



Malaysian Communications and Multimedia Commission

Guidelines on Substantial Lessening of Competition (Postal Services Industry)

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Foreword

These Guidelines have been prepared by the Malaysian Communications and Multimedia Commission ("**Commission**") in accordance with section 39 of the Postal Services Act 2012 ("**PSA 2012**"). Section 39 of the PSA 2012 gives the Commission the power to publish guidelines which clarify the meaning of 'substantially lessening of competition'.

These Guidelines outline the Commission's general approach to the meaning of 'substantially lessening of competition' for the purpose of administering the PSA 2012. It addresses the factors that the Commission may take into account when assessing whether a licensee's conduct has the purpose of or has, or may have, the effect of substantially lessening competition in a market or determining whether to take regulatory and/or enforcement action(s) under sections 38 and 44 of the PSA 2012. Nevertheless, these factors are not exhaustive.

These Guidelines do not bind or limit the Commission's powers and functions regarding competition matters in the postal services industry in any way. These Guidelines should not be relied on as a substitute for the PSA 2012, or any regulations made under the PSA 2012, or as a substitute for legal advice.

These Guidelines may be revised by the Commission from time to time.

Abbreviation and Glossary

Commission	Malaysian Communications and Multimedia Commission
Complainant	Means anyone who makes a complaint regarding an anti-competitive conduct
kg	Kilograms
Licensee	Means a company incorporated under the Companies Act 1965 [Act 125] that has been granted a licence under the PSA 2012 to provide postal services
NUSL	Non-Universal Service Licence
PMB	Pos Malaysia Berhad
Postal Article	Means a letter, a package, a parcel, a wrapper or a container that can be collected, transmitted and delivered through the postal network of a licensee
PSA 2012	Postal Services Act 2012
Respondent	Means the person alleged to have engaged in the anti-competitive conduct
USL	Universal Service Licence

Glossary of Figures

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1 Background

Introduction

- 1.1 The Commission is responsible for promoting competition and prohibiting anti-competitive conducts in the postal market. The General Competition Practices are contained in Part IX of the PSA 2012.
- 1.2 The rationale for the inclusion of the competition provisions under the PSA 2012 is to ensure that anti-competitive conducts do not undermine the national policy objectives, particularly to regulate the postal market for the long-term benefit of the end-users.¹
- 1.3 These Guidelines outline the Commission's general approach to assess the conduct of licensees for the purposes of sections 38 and 44 of the PSA 2012.
- 1.4 Section 38 of the PSA 2012 prohibits a licensee from engaging in conduct which has the purpose of substantially lessening competition in the postal market. Under section 44 of the PSA 2012, the Commission has the power to direct a licensee in a dominant position in the postal market to cease conduct in that postal market which has, or may have, the effect of substantially lessening competition.
- 1.5 These Guidelines provide a framework within which the conduct of a licensee will be assessed by the Commission. Section 39 of the PSA 2012 gives the Commission the power to publish guidelines which clarify the meaning of 'substantially lessening of competition'. Subsection 39(2) of the PSA 2012 states that "*the guidelines may include reference to:*
 - (a) *the need to balance between the promotion of competition and the provision of quality services throughout Malaysia;*
 - (b) *the postal market;*
 - (c) *global trends in the postal market;*
 - (d) *the impact of the conduct of the licensee on the number of competitors in the postal market and their market shares;*
 - (e) *the impact of the conduct of the licensee on barriers to entry into the postal market;*

¹ <https://www.mcmc.gov.my/en/sectors/postal-courier/policies>

- (f) *the impact of the conduct of the licensee on the range of services in the postal market;*
- (g) *the impact of the conduct of the licensee on the costs and profit structures in the postal market; and*
- (h) *any other matters which the Commission is satisfied are relevant.”*

1.6 These Guidelines set out the Commission’s approach in assessing substantial lessening of competition and the factors that may be taken into account when making a decision on regulatory and/or enforcement action in relation to breaches of section 38 of the PSA 2012 or to make a direction in accordance with section 44 of the PSA 2012. These Guidelines also outline the Commission’s investigation and decision-making process.

1.7 These Guidelines do not provide an exhaustive list of all the factors that may be taken into account by the Commission when investigating the conduct of a licensee or an exhaustive list of all the types of conduct that may raise competition concerns under the PSA 2012. These Guidelines also do not include the Commission’s approach in determining the relevant markets. Reference can be made to the Guidelines on Dominant Position (Postal Services Industry) issued by the Commission to understand the framework adopted in defining the relevant boundaries in the postal market.

2 Licence and Regulations under the PSA 2012

- 2.1 These Guidelines are applicable to a “**Licensee**” which means a company incorporated under the Companies Act 1965 [Act 125] that has been granted a licence under the PSA 2012 to provide postal services. A “licence” means a Universal Service Licence (“**USL**”) or Non-Universal Service Licence (“**NUSL**”) granted under section 13(2) of the PSA 2012.
- 2.2 The USL has been granted to Pos Malaysia Berhad (“**PMB**”) and is valid for a period of twenty (20) years from 1 October 2016 to 30 September 2036.
- 2.3 For NUSL, there are three (3) licence categories as shown in **Table 1** below. The NUSL² is valid for a period of three (3) years. The NUSL’s primary area of focus is to provide postal services, which includes courier services, for the delivery of postal articles.³

Table 1: Category of licence for the NUSL

Category	Services
A	(i) International inbound and outbound courier service; and (ii) Domestic courier service in Malaysia
B	(i) International inbound courier service; and (ii) Domestic courier service in Malaysia
C	Intra-state domestic courier service in Malaysia

- 2.4 Subsection 12(1) of the PSA 2012 provides that the licensing requirement under the PSA 2012 shall not apply to the categories specified in the First Schedule of the PSA 2012. In particular, postal articles exceeding 2kg in weight per postal article are not licensable under the PSA 2012.
- 2.5 In assessing whether a Licensee is engaging in any conduct which has the purpose of or has, or may have, the effect of substantially lessening competition, the Commission will have regard to any postal regulations, notices and guidelines that are enforceable against and/or imposed on Licensees from time to time.

² <https://www.mcmc.gov.my/skmmgovmy/media/General/pdf2/List-of-Non-Universal-Service-Licensees.pdf>

³ Regulation 2 of the Postal Services (Licensing) Regulations 2015 defines ‘*courier service*’ as ‘postal services provided in an expedited manner with track and trace service’
<https://www.mcmc.gov.my/en/legal/acts/postal-services-act-2012-act-741/postal-services-licensing-regulations-2015>

3 Substantial Lessening of Competition Framework in the Postal Services Industry

- 3.1 All Licensees under the PSA 2012 will be subjected to the competition provisions as provided for under the PSA 2012 (Part IX – General Competition Practices).
- 3.2 The key prohibitions under Part IX of the PSA 2012 on general competition practices are as follows:
- (a) Prohibition on anti-competitive conduct under section 38;
 - (b) Prohibition on entering into collusive agreements namely rate fixing, market sharing or boycott of another competitor under section 40; and
 - (c) Prohibition on tying or linking arrangements under section 41.

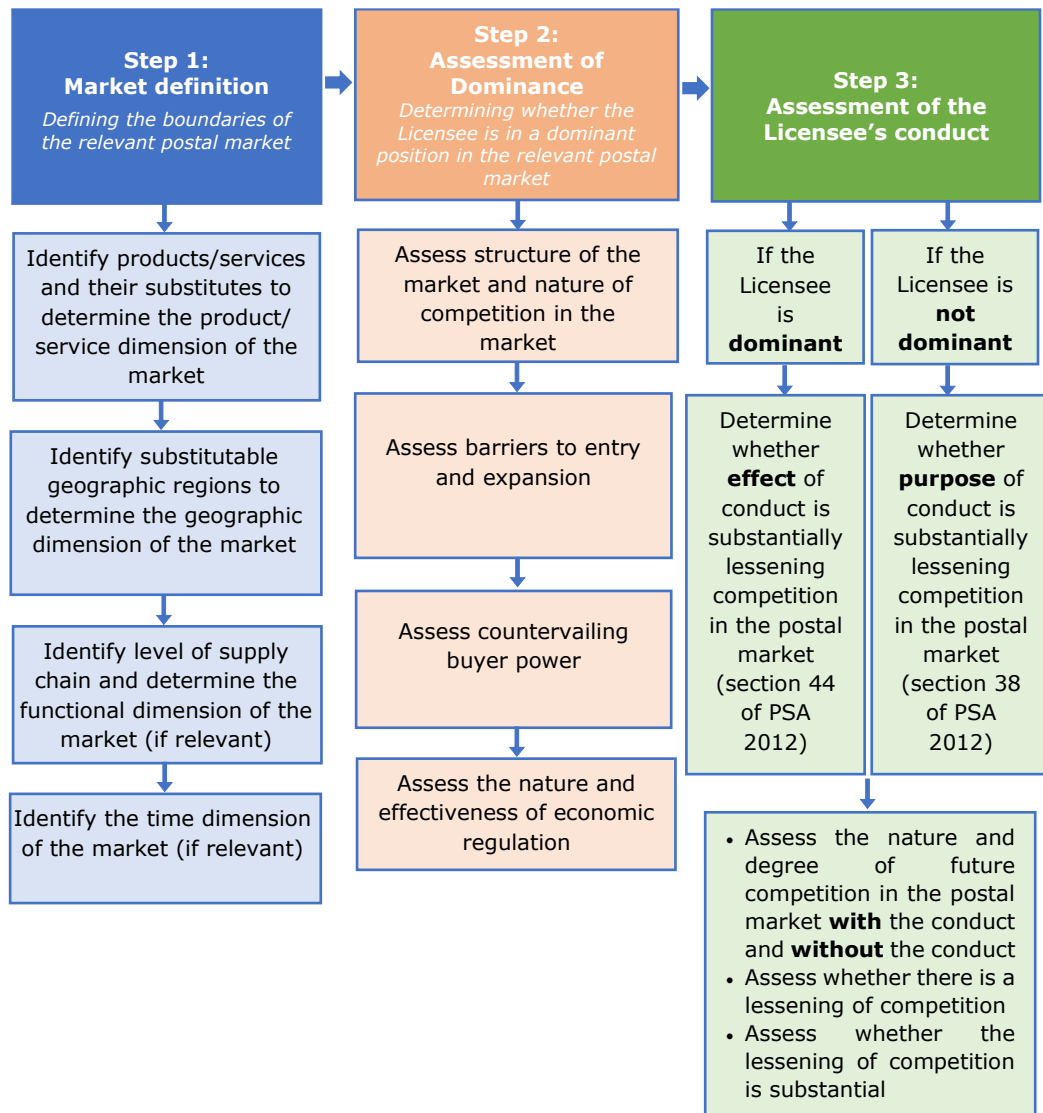
Under Section 47 of the PSA 2012, any person who commits an offence under Part IX of the Act shall, upon conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years, or to both.

- 3.3 Section 39 of the PSA 2012 gives the Commission the power to publish guidelines which clarify the meaning of 'substantially lessening of competition'.
- 3.4 These Guidelines provide a broad overview of the Commission's analytical framework on assessment of substantially lessening of competition. However, it is not an exhaustive list of all types of conducts that may raise competition concerns under the PSA 2012.

4 The Commission’s Framework for Assessing Substantial Lessening of Competition

- 4.1 Determining whether a Licensee is engaging in a conduct which has the purpose of or has, or may have, the effect of substantially lessening competition in a postal market involves a three-step process.
- 4.2 **Figure 1** below sets out the Commission’s approach in assessing whether a Licensee is engaging in an anti-competitive conduct in the postal market.

Figure 1: The Commission’s Approach to the Assessment of Anti-Competitive Conduct



- 4.3 For the purposes of section 44 of the PSA 2012, the Licensee must be in a dominant position in the postal market before the Commission decides to issue a direction to cease a conduct in that postal market, which has, or may have, the effect of substantially lessening competition. A determination of dominance can be made in accordance with section 42 of the PSA 2012 at any time when the Commission is investigating a conduct as set out in the Commission's Guidelines on Dominant Position (Postal Services Industry).

Step 1: Market definition

- 4.4 When assessing the conduct of a Licensee for the purpose of sections 38 and 44 of the PSA 2012, the Commission will define the relevant postal market in which the conduct has occurred. This is carried out in accordance with the framework of market definition set out in section 5 of the Guidelines on Dominant Position (Postal Services Industry).

Step 2: Assessment of Dominance

- 4.5 The Commission will then undertake the assessment of dominance to ascertain if the Licensee engaging in the conduct is in a dominant position. This is carried out in accordance with the framework for assessment of dominant position set out in section 6 of the Guidelines on Dominant Position (Postal Services Industry).
- 4.6 The Commission may determine that a Licensee is in a dominant position in the postal market under section 42 of the PSA 2012. A Licensee in a dominant position in the postal market must not abuse its dominant position in a manner that would result in substantially lessening competition in the postal market.
- 4.7 Following the assessment of the conduct, if a Licensee in a dominant position engages in a conduct which has, or may have, the effect of substantially lessening competition in the postal market, the Commission may direct the Licensee to cease the conduct and to implement appropriate remedies in accordance with section 44 of the PSA 2012.

Step 3: Assessment of a Licensee's conduct

Conduct

- 4.8 The Commission's ability to exercise its powers in Part IX - General Competition Practices under the PSA 2012 is dependent on whether a Licensee is engaging in an activity that constitutes as 'conduct' under sections 38 and 44 of the PSA 2012.

- 4.9 'Conduct' is not defined in the PSA 2012. The word 'conduct' is defined by the Oxford English Dictionary to include "the way in which a person behaves" and "management or direction". At its broadest, 'conduct' could encompass any commercial or other activities that are undertaken by a Licensee in the relevant postal market. This could include, for example:
- (a) entering into or giving effect to a contract with another party;
 - (b) decisions on rates setting;
 - (c) decisions on the marketing of products or services;
 - (d) decisions to supply or not supply products or services;
 - (e) decisions on the quality of products or services offered; and
 - (f) a merger or acquisition.
- 4.10 With regard to sections 38 and 44 of the PSA 2012, the Commission is primarily concerned with 'conduct' which has the purpose of substantially lessening competition or has, or may have, an effect of substantially lessening competition in the postal market. For example, this could, amongst other things, include activities such as predatory pricing, foreclosure strategies, and mergers or acquisitions.
- 4.11 Accordingly, the Commission considers 'conduct' to include any action taken by a Licensee that has the potential to have negative effect on competition in the postal market.

'Purpose' and 'effect'

- 4.12 The Commission's approach to assessing a Licensee's conduct will differ depending on whether the Commission is assessing the conduct under sections 38 or 44 of the PSA 2012.
- 4.13 Section 38 of the PSA 2012 prohibits a Licensee from engaging in conduct which has the **purpose** of substantially lessening competition in the postal market.
- 4.14 Section 44 of the PSA 2012 gives the Commission the power to direct a Licensee in a dominant position to cease conduct which has, or may have, the **effect** of substantially lessening competition in the postal market and to implement the appropriate remedies.
- 4.15 The distinction between purpose and effect is important.

- 4.16 The '**purpose**' of conduct is the end sought to be accomplished by that conduct.⁴ In assessing the 'purpose' of a Licensee's conduct, the Commission will have regard to direct evidence of purpose, or it may infer a purpose from a range of factors, including but not limited to:
- (a) the nature of the conduct;
 - (b) the circumstances of the conduct, including the decision making process that led up to the conduct and its commercial context; and
 - (c) the actual or likely effect of the conduct.
- 4.17 It is possible for conduct to have more than one purpose. The Commission will consider a Licensee to have engaged in conduct with a particular purpose if that purpose is or was a substantial purpose of the conduct. This means that the particular purpose should be one of the purposes of the conduct and has been material to the decision to engage in the conduct in question.
- 4.18 The '**effect**' of conduct is the result or outcome of that conduct. In assessing the 'effect' of a Licensee's conduct, the Commission will examine the results of the conduct or the likely results of the conduct.

What is 'Substantially Lessening of Competition'?

- 4.19 Competition is a process of rivalry between firms. The level of competition in a market is the level of this rivalry. Substantially lessening of competition is a core concept in carrying out the assessment under the PSA 2012.
- 4.20 In a competitive market, firms are constrained in their commercial activities by the presence of existing or potential competitors, or by their consumers. Therefore, a 'lessening' of competition in a market involves a reduction of the competitive constraints in that market.
- 4.21 Making a determination on whether competition is lessened by particular conduct is a question of fact and a matter of degree. A 'lessening' of competition may be equated with an increase in market power for one or more Licensees in a market. For example, a lessening of competition will usually occur if the number of competitors in the market is reduced. A 'lessening' of competition can also occur if a Licensee engages in conduct which maintains its market power. For example, conduct that prevents market entry or creates a barrier to entry may also equate to a lessening of competition.

⁴ *News Ltd & Ors v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45 at [18], pg.6

- 4.22 Not all conducts that lessen competition is prohibited by the PSA 2012. It is only when that conduct *substantially* lessens competition in the postal market that the Commission will take action. In assessing whether a lessening of competition is 'substantial', the Commission takes the view that a lessening of competition will be 'substantial' if the reduction in competitive constraints in the postal market (or the resulting increase in market power) is considerable or big.⁵
- 4.23 For instance, conduct that results in a reduction of (or has the purpose of reducing) the number of suppliers in the postal market does not, of itself, constitute a substantial lessening of competition. Whether conduct which results in a reduction in the number of suppliers in the postal market has the purpose or effect of *substantially* lessening competition will depend on whether and to what extent that reduction results in a reduction or weakening of the competitive constraints on the remaining suppliers in the postal market or reduces the incentives on the remaining suppliers to compete. For example, conduct which attempts to eliminate a minor market participant might only have a trivial effect on competition, but conduct which attempts to reduce competition from a major participant could have a dramatic effect on competition in the postal market.

The 'With and Without' Test and Competitive Factors

- 4.24 In assessing whether conduct has the **purpose** or has, or may have, the **effect** of substantially lessening competition in the postal market under sections 38 and 44 of the PSA 2012, the Commission will use the 'with or without' test (also known as the counterfactual test). The test considers:
- (a) what competition in the postal market would look like '**with**' the conduct taking place; and
 - (b) what competition in the postal market would look like '**without**' the conduct taking place.
- 4.25 If the level of competition in the postal market 'with' the conduct is substantially lower than the level of competition 'without' the conduct, the conduct will be considered by the Commission to 'substantially lessen competition' in the postal market.
- 4.26 Assessing the level of competition in the postal market in the future 'with' the conduct against the future 'without' the conduct involves an assessment of the following factors:

⁵ *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62; FLR 37; 2 TPR 315; 44 ALR 557; ATPR 40-318 at [444].

- (a) the structure of and nature of **existing competition** in the postal market;
- (b) **potential competition**, including barriers to entry or expansion and the height of those barriers; and
- (c) other sources of competitive constraint, including the existence or strength of **countervailing buyer power**.

4.27 When assessing the level of competition in the postal market 'with' the conduct, the Commission will usually apply the prevailing conditions of competition or, in other words, the 'status quo'. However, the Commission may use a counterfactual different from the prevailing conditions of competition where there is compelling evidence that the status quo will not continue regardless of the conduct. For example, if there is compelling evidence that a major competitor will exit the postal market for reasons unrelated to the conduct, then the Commission may apply a counterfactual (i.e. the future 'without' the conduct) in which that competitor has exited the postal market.

Existing competition

4.28 In Malaysia, the postal services industry, which includes courier services, has become competitive due to the rise of e-commerce activities. The competition for last-mile delivery is intense with approximately one hundred and five (105) Licensees⁶ as of August 2024.⁷

4.29 When analysing the nature and degree of actual competition in the postal market, the Commission will consider:

- (a) the number of existing competitors in the postal market;
- (b) the relative market shares of each of the participants in the postal market;
- (c) the behaviour of participants in the postal market, including pricing and other competitive behaviour; and
- (d) any other competitive dynamics in the postal market.

⁶ As of August 2024, there are one hundred and four (104) Non-Universal Service Licences (NUSL) and one (1) Universal Service License (USL) granted by the Commission.

⁷<https://www.mcmc.gov.my/skmmgovmy/media/General/pdf2/List-of-Non-Universal-Service-Licensees.pdf>

- 4.30 The Commission's approach to assessing 'market share' and 'competitive dynamics' in the context of sections 38 and 44 of the PSA 2012 will be similar to its approach to assessing these factors set out in section 6 of the Guidelines on Dominant Position (Postal Services Industry).
- 4.31 In general, the greater the number of competitors in the postal market in the future with the conduct, the more competitive that postal market is likely to be and the less likely it is that there will be a substantial lessening of competition as a result of the conduct.

Potential competition

- 4.32 In assessing the level of competition in the postal market in the future 'with' the conduct against the future 'without' the conduct, the Commission will also consider the extent to which potential competition may act as a competitive constraint in the postal market. This is dependent on the ease with which potential entrants or existing Licensees can enter into or expand operations in the postal market.
- 4.33 A Licensee is likely to be constrained by potential competition if entry or expansion is likely, timely and of a sufficient scale and scope. An assessment of whether entry or expansion is likely to constrain a Licensee requires consideration of the barriers to entry or expansion in the postal market. The factors that the Commission will consider when assessing the nature and extent of any barriers to entry or expansion in the market is set out in section 6 of the Guidelines on Dominant Position (Postal Services Industry).
- 4.34 In general, the harder it is for potential entrants or existing Licensees to enter or expand operations in the postal market, the less competitive the postal market is likely to be and the more likely it is that there will be a substantial lessening of competition as a result of a conduct.

Countervailing buyer power

- 4.35 Countervailing buyer power is the ability of consumers to constrain the independence of a Licensee, particularly its ability to set prices or terms of supply. The factors that the Commission will consider in assessing the level of countervailing buyer power is set out in section 6 of the Commission Guidelines on Dominant Position (Postal Services Industry).
- 4.36 In general, the greater the degree of countervailing buyer power there is in the postal market with the conduct, the less likely it is that conduct will be considered to have the purpose or effect of substantially lessening competition.

5 Examples of conducts that may substantially lessen competition

- 5.1 The Commission will assess anti-competitive complaints in the postal market for conduct that has the **purpose** of substantially lessening competition or has, or may have, an adverse **effect** on competition. While there is a broad range of conduct that may achieve such a result, there are some particular types of conduct that are more likely to concern the Commission.
- 5.2 Examples of conducts that the Commission considers to be more likely to have an adverse impact on competition in the postal market include:
- (a) **Predatory pricing.** This refers to a pricing strategy of setting low or below cost prices to eliminate a competitor or to deter a potential competitor from entering the market.
 - (b) **Foreclosure strategies.** There are a number of strategies that may be employed by a Licensee to foreclose, limit or deter competition in a market and these strategies may include exclusive dealing that makes it difficult or impossible for its competitors in the market to compete.
 - (c) **Mergers or acquisitions.** A merger refers to the combining of two or more firms. An acquisition refers to the acquisition of assets or shares.
- 5.3 The Commission's approach to assessing the purpose or effect of these conducts, are described in further detail below. The examples provided are hypothetical and serve as a general guide only.
- 5.4 When assessing the purpose or effect of conduct under sections 38 and 44 of the PSA 2012, the Commission will identify the relevant postal market in which competition may be affected. The relevant markets will be defined as shown in **Figure 1** above.
- 5.5 It should be noted that engaging in the above types of conduct will not necessarily result in a substantial lessening of competition *per se*. However, the conduct is more likely to be of concern to the Commission and result in an investigation if the Commission has grounds to believe that such conduct has the requisite purpose or effect. The examples of conduct identified by the Commission above is not intended to be an exhaustive list of all types of conduct that may have the purpose or effect of substantially lessening competition in the postal market.
- 5.6 In addition to sections 38 and 44 of the PSA 2012, sections 40 and 41 of the PSA 2012 prohibit specific types of conduct namely, prohibition on entering into collusive agreements and prohibition on tying or linking arrangements, respectively. In many cases there may be an overlap between these provisions

and, where this occurs, the Commission may choose to take action under either the specific prohibitions in sections 40 and 41 of the PSA 2012 (as applicable), or to apply the more general provisions under sections 38 and 44 of the PSA 2012 (as applicable).

Predatory pricing

- 5.7 Predatory pricing conduct involves a dominant Licensee lowering the price of its products or services below cost to drive a competitor or competitors out of the market, or to prevent a potential competitor or competitors from entering the market.
- 5.8 While 'predatory pricing' can result in short term benefits to consumers from the low pricing, consumers may lose out in the longer term if, once the competitor or competitors exit the market, the Licensee engaging in the predatory pricing raises prices above the competitive price. **A predatory pricing 'strategy' is more likely to remove or eliminate competition where the Licensee engaging in the conduct is in a dominant position in the market.**
- 5.9 Not all low or below cost pricing is 'predatory' and likely to substantially lessen competition. For example, a Licensee may be able to offer a price lower than that of its competitors because it has a more efficient operation or a lower cost base. Further, a Licensee may offer a low price as part of a short term 'promotion' or to respond to the competitive activities of its rivals.
- 5.10 In assessing whether a Licensee is engaging in predatory pricing conduct that has the purpose or effect of substantially lessening competition in a relevant market, the Commission will consider the following factors:
- (a) whether the Licensee is pricing its products or services below cost. The Commission may consider any relevant measure of cost, including average variable cost or average total cost;
 - (b) the duration and continuity of the conduct. In general, the longer the conduct continues, the more likely it is that the low pricing will influence competitors' decisions to exit or enter a market;
 - (c) whether the conduct has resulted in the exit of a competitor or competitors from the market; and
 - (d) whether a hypothetical competitor as efficient as the Licensee engaging in the conduct can realistically supply the products or services at the price being supplied by the Licensee.

5.11 The Commission may require a range of quantitative and qualitative information from a complainant and the Licensee that is the subject of the complaint when assessing whether pricing conduct is likely to raise competition concerns. Some examples of information that the Commission may require include:

- (a) data relating to current and historical pricing and profit margins for both the complainant and the Licensee;
- (b) data relating to current and historical costs of supply of the products or services in question, for both the complainant and the Licensee;
- (c) documentation to support any allegation by the complainant that their business has or will be harmed by the conduct; and
- (d) information on the length of time that the pricing conduct has been occurring, what effect the pricing conduct is having on investment decisions of the complainant (and others in the industry) and any other information that the Commission may consider to be relevant.

Example 1 – Predatory Pricing

Licensee A is a courier service provider and is in a dominant position with a market share of more than 50% in the parcel market. Its competitor, Licensee B has a market share of less than 20%.

Licensee A has been slowly losing its market share to Licensee B who is offering comparable or better prices than Licensee A.

Licensee A decides to undertake an aggressive pricing campaign to win back its market share. Licensee A drops its retail price below its average variable cost to strengthen its position in the parcel market. Licensee B follows suit; however, it is not long before Licensee B is forced to put all its promotion activities on hold because of the losses it has incurred from the 'price war'.

In this example, Licensee A's conduct may be considered to have the purpose or effect of substantially lessening competition in the parcel market, as Licensee A has used its dominant position to engage in predatory pricing.

Example 2 – Predatory Pricing

Licensee C is a courier service provider and has a market share of about 10% in the parcel market. Licensee C decides to undertake an aggressive pricing campaign by dropping its retail price below its average variable cost to gain market share.

Its competitor, Licensee D has a market share of about 25%. The continuous promotion campaigns by Licensee C had caused detrimental effects to Licensee D, who has been losing parcel volume and revenue. As a result, Licensee D is struggling to remain in the market because of the 'price war'.

In this example, Licensee C's conduct may **not** be considered to have the effect of substantially lessening competition in the parcel market, as Licensee C is **not in a dominant position** and is not leveraging its market power to engage in predatory pricing.

Foreclosure strategies

5.12 There are a number of strategies that may be employed by a Licensee to foreclose, limit or deter competition in a market. Conduct that is likely to be of particular concern to the Commission, includes:

- (a) exclusive dealing; and
- (b) strategies employed by a vertically integrated Licensee that controls an essential or key input to the downstream market to make it difficult or impossible for its competitors in the downstream market to compete.

(a) Exclusive dealing

5.13 In general, exclusive dealing is a conduct which requires or otherwise induces consumers or suppliers to deal solely or primarily with a single Licensee to foreclose the market to competitors. It typically involves an arrangement between a consumer and a supplier under which the consumer will acquire all or a substantial portion of a product or service from the supplier. It can also, amongst other things, involve an arrangement where a dominant operator provides discounts or rebates, or other incentives, which encourage or induce a consumer to acquire all or a substantial proportion of the consumer's requirements from a single supplier.

5.14 Exclusive dealing arrangement may raise competition concerns in circumstances where, as a result of the exclusive dealing, a substantial proportion of the market is foreclosed to competitors. In addition, as a result of exclusive dealing, consumers may incur a higher fee or experience delay in delivery of the goods or services purchased.

5.15 When assessing whether an exclusive dealing arrangement has the purpose or effect of substantially lessening competition in the postal market, the Commission will consider the following factors:

- (a) The position of the parties to the exclusive dealing arrangement in the market. An exclusive dealing arrangement is more likely to raise concerns if one of the parties to the arrangement is in a dominant position in relation to the acquisition or supply of products or services;
- (b) The nature and scope of the exclusive dealing conduct, e.g. the constraints imposed by the 'exclusive dealing' (i.e. the exclusive dealing prevents the consumer or supplier from acquiring or supplying in part or in whole), the proportion of the market affected and the duration of the conduct;
- (c) The position of other participants in the market, e.g. the market position (including market shares) of the parties' competitors, consumers and suppliers (where relevant); and
- (d) Whether the exclusive dealing has had an effect on pricing, quality, market entry or market structure.

5.16 In general, the more restrictive the exclusive dealing conduct is and the greater the proportion of the market affected by the exclusive dealing conduct, the more likely it is that the conduct will be considered by the Commission to have the purpose or effect of substantially lessening competition in the postal market.

Example – Exclusive dealing

ABC Sdn Bhd is a dominant e-commerce platform that has collaboration with multiple sellers within and outside the country. ABC Sdn Bhd had entered into a long-term agreement to appoint Licensee A to become the sole service delivery provider for goods transacted on this online platform. Consumers who purchase goods through this online platform have no other choice but to use the delivery services offered by Licensee A. Licensee A, appoints Licensee B who is equally as efficient as Licensee A and has a good reputation for its quality of service, to support delivery services where it does not have coverage. Licensee B is only able to deliver goods that have been assigned by Licensee A.

Licensee B has sufficient infrastructure and resources to handle larger volume and approached ABC Sdn Bhd to expand its delivery services to a wider geographic area. However, Licensee B is restricted due to Licensee A's exclusive arrangement with ABC Sdn Bhd.

In this example, both Licensee A and ABC Sdn Bhd may have the purpose or effect of substantially lessening competition in the market as it restricts or limits the ability of other equally efficient competitors to compete with Licensee A. Although ABC Sdn Bhd does not fall under the PSA 2012, the Commission may work together with the

relevant regulatory body to address this matter if the conduct affects the postal market.

(b) Strategies employed by vertically integrated Licensees

- 5.17 There are a number of strategies that may be employed by a dominant vertically integrated Licensee that controls an essential or key input to the downstream market to make it difficult or impossible for its competitors in the downstream market to compete.
- 5.18 These strategies can include (but are not limited to):
- (a) a vertically integrated Licensee imposing unreasonable supply terms on its consumers who compete with the supplier in the downstream market or terms of supply that increase the cost of competing in the downstream market;
 - (b) a vertically integrated Licensee treating its own downstream business more favourably than its competitors; and
 - (c) a vertically integrated Licensee requiring its competitors in the downstream market to supply commercially sensitive information that is then used to compete against its consumers in the downstream market.
- 5.19 In assessing whether the conduct of a vertically integrated Licensee has the purpose or effect of substantially lessening competition in a relevant postal market, the Commission will consider (amongst other things):
- (a) the position of the Licensee in the market – in general, the stronger the dominant position of the Licensee in the market, the higher the likelihood that conduct protecting that position may lead to anti-competitive foreclosure;
 - (b) nature and extent of existing competition in the market, including the position of the Licensee’s competitors in the market;
 - (c) the nature and extent of the conduct and the proportion of the market affected;
 - (d) the significance of the input to competition in the downstream market;
 - (e) whether the vertically integrated Licensee would itself be able to compete in the downstream market if it was subject to the conduct in question;
 - (f) the position of the vertically integrated Licensee in the market; and

- (g) evidence of any actual foreclosure, for example evidence of a decline in the market positions of the Licensee's competitors in the downstream market or evidence that competitors have exited the market.

5.20 The Commission may seek a range of qualitative and quantitative information from the Licensees when assessing whether foreclosure strategies may have the purpose or effect of substantially lessening competition, including:

- (a) data showing market share trends over the period of the conduct and prior to the conduct;
- (b) internal documents relating to the conduct, including strategy papers and internal correspondence;
- (c) pricing data, including trend data;
- (d) information about the conduct in question, including the nature of the conduct and its scope; and
- (e) copies of any contracts or other documents evidencing the arrangement in question.

Example 1 – Foreclosure strategies

XYZ Sdn Bhd is an e-commerce platform and holds a dominant position. XYZ Sdn Bhd treats its own in-house delivery partner, Licensee C in a more favourable manner as compared to other delivery partners that are equally efficient. For example, merchants who select Licensee C as their preferred delivery partner are granted certain advantages such as opportunity to participate in sales events, eligible for free shipping offers, etc. XYZ Sdn Bhd also require merchants that wish to enjoy those advantages to enter into an exclusive agreement to allocate their parcel delivery services solely to Licensee C.

In this example, the conduct of XYZ Sdn Bhd that had restricted other service delivery providers from competing on a level playing field has benefited Licensee C. In addition, XYZ Sdn Bhd had leveraged on its position to entice merchants to enter into exclusive agreements. This has resulted in foreclosure of other service delivery providers. Both XYZ Sdn Bhd and Licensee C's conduct may be construed to have the purpose or effect of substantially lessening competition. Although XYZ Sdn Bhd does not fall under the PSA 2012, the Commission may work together with the relevant regulatory body to address this matter as the conduct affects the postal market.

Example 2 – Foreclosure strategies

Licensee A has dominant position in the postal market. Licensee A became aware of the increasing competition in the postal market and decided to implement a Zonal Pricing Scheme. In zones where a particular service is not provided by its competitors, Licensee A charges higher prices that are significantly above cost and in zones that are competitive, it charges prices below cost that are lower than its competitors.

In this example, Licensee A's conduct of cross subsidisation is a form of a foreclosure strategy and may have the purpose or effect of substantially lessening competition in the postal market.

Mergers or acquisitions

- 5.21 The Commission regard mergers and acquisitions to be a 'conduct' and is therefore subject to sections 38 and 44 of the PSA 2012.
- 5.22 Mergers or acquisitions can take the following forms:
- (a) a **horizontal** merger or acquisition, which involves the merger of two firms, or the acquisition by one firm of another, at the same function level of the supply chain;
 - (b) a **vertical** merger or acquisition, which involves firms at different functional levels of the market; and
 - (c) a **conglomerate** merger or acquisition, which is a merger or acquisition which is neither a horizontal nor a vertical merger.
- 5.23 Not all mergers or acquisitions will raise competition concerns. The Commission recognises that mergers or acquisitions are common corporate transactions and are beneficial to an efficiently functioning economy. However, a merger or acquisition may raise competition concerns if it lessens competition by reducing or weakening the competitive constraints in a market or reducing the incentives for competitive rivalry.
- 5.24 Accordingly, the Commission will closely monitor mergers or acquisitions where:
- (a) the merger or acquisition results in a Licensee obtaining a dominant position in a market; or
 - (b) where one of the parties to the merger or acquisition is already in a dominant position.

5.25 In assessing whether a merger or acquisition has the purpose or effect of substantially lessening competition in a relevant market, the Commission will consider the following factors:

- (a) **The degree of concentration in the market with and without the merger or acquisition taking place.** A merger or acquisition that leads to a significant increase in market concentration is more likely to substantially lessen competition (although concentration is not in itself determinative). The Commission will consider the extent to which competitors remaining in the market post-merger will constrain the level of competition in the market.
- (b) **The extent of barriers to entry into the market.** The Commission's perspective on barriers to entry is discussed in the Guidelines on Dominant Position (Postal Services Industry). Where a merger or acquisition brings about an increase in market concentration, low barriers to entry may nevertheless result in the merger or acquisition having no substantial effect on competition in the market, as new entrants can constrain the behaviour of the merged firm.
- (c) **The level of dynamic competition in the market.** A merger or acquisition that leads to an increase in market concentration may not necessarily have an anti-competitive effect in a dynamic market, where future competition may be fuelled by growth and innovation
- (d) **The effect of the merger or acquisition on the relevant firm's ability to raise prices.** A lowering of competitive constraints on the relevant firm after the merger or acquisition, conveyed through its ability to raise prices above the competitive level, may indicate that the merger or acquisition has the effect of substantially lessening competition in the market.
- (e) **The degree of countervailing buyer power.** An explanation of countervailing buyer power is provided in the Commission's Guidelines on Dominant Position (Postal Services Industry). Countervailing buyer power may function as a competitive constraint on a licence post-merger, even where the merger or acquisition brings about greater concentration in the market.
- (f) **The existence and degree of any efficiencies brought about by the merger or acquisition.** In its analysis, the Commission will consider the potential beneficial effects that a merger or acquisition may have on competition. For example, mergers and acquisitions may provide efficiencies through economies of scale and the pooling of research and development. In particular, the efficiencies resulting from the merger of

two smaller players in the market may actually increase competition, by providing a more powerful constraint on larger or dominant players in the market.

- 5.26 The Commission may require a range of quantitative and qualitative information from parties to a merger or acquisition when assessing whether a merger or acquisition is likely to raise competition concerns. Some examples of information that the Commission may require include:
- (a) recent sales figures (by volume and by value) of each competitor in the market, so as to allow the Commission to calculate market shares;
 - (b) information relating to the size of investment required for a potential competitor to enter the market;
 - (c) economic data relating to price elasticity in the market, so as to determine the effect of a possible price increase on demand and therefore to assess the ability of the merged firm to raise prices above the competitive level;
 - (d) data relating to current pricing and profit margins of the parties, and projected prices and profit margins after the merger or acquisition; and
 - (e) data relating to the market's size, growth prospects and level of innovation, to assess the level of dynamic competition in the market.

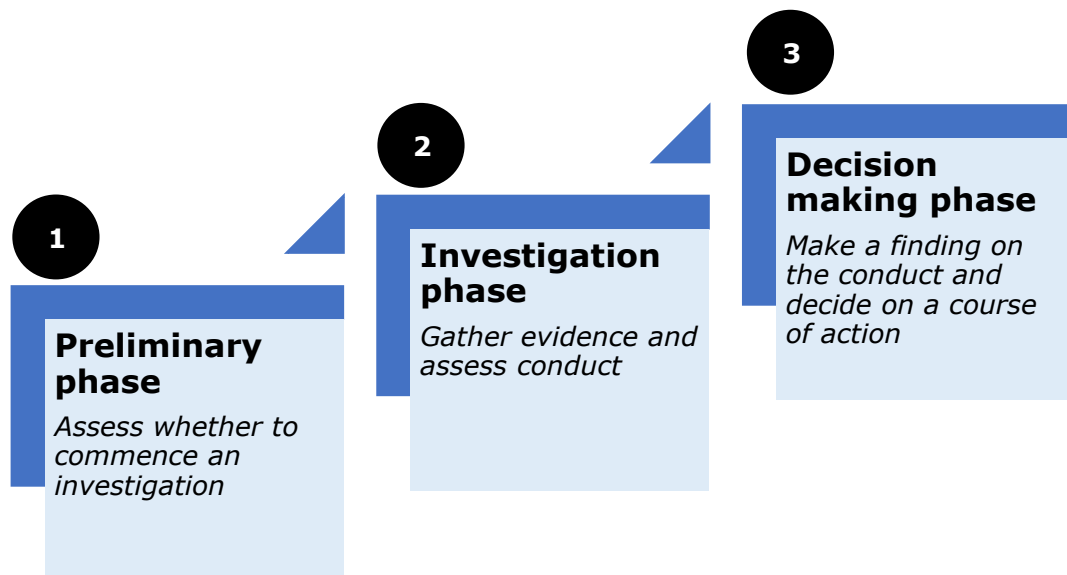
6 Authorisations

- 6.1 The Commission may, pursuant to section 45 of the PSA 2012, authorise a conduct which may have the purpose or the effect of substantially lessening competition in a postal market, if it is satisfied that the conduct is in the national interest.
- 6.2 This would usually require the Commission to be satisfied that the national interest in the conduct outweighs the detriment effect to competition caused by such conduct. Prior to authorisation of the conduct, the Commission may also require the Licensee to submit an undertaking regarding its conduct in any matter relevant to the authorisation.
- 6.3 These Guidelines, however, do not set out the process for seeking authorisation or the factors that the Commission will take into account when considering whether to authorise conduct under section 45 of the PSA 2012.

7 The Commission's Investigation Process

- 7.1 The Commission can commence an investigation into the conduct of a Licensee if it has grounds to believe that a Licensee has engaged in an anti-competitive conduct. This information can be received in one of three (3) ways: through a direct complaint made to the Commission, through information contained in media reports or other public channels, or through information obtained by the Commission in the course of administering its information gathering powers.
- 7.2 The Commission's investigation process for investigating allegations of anti-competitive conduct under Part IX - General Competition Practices of the PSA 2012 consists of three (3) phases, as outlined in the **Figure 2** below.

Figure 2: The Commission's Investigation Process



Phase 1: Preliminary

- 7.3 The preliminary phase involves the Commission making an assessment as to whether to commence an investigation into the conduct of a Licensee.
- 7.4 The preliminary phase will consist of the following steps:
- (a) **Communication with the Complainant.** The Commission may seek further information or clarification from anyone who makes a complaint regarding an anti-competitive conduct ("**Complainant**"), where the information initially provided is incomplete or unclear. Information provided by a complainant will generally be vital to the Commission's

investigation and therefore the Commission expects full co-operation from the Complainant. If the Complainant fails to cooperate fully with the Commission during an investigation, the Commission may consider the complaint to be vexatious or frivolous and decline to investigate the complaint further.

- (b) **Communication with the Respondent.** Following the communication with the complainant, the Commission may proceed to seek a response from the person alleged to have engaged in the anti-competitive conduct (“**Respondent**”).
- (c) **Preliminary assessment.** Section 71 of the PSA 2012 empowers the Commission to direct a person to provide any information if the Commission has reasonable grounds to believe that the person has any information/evidence relevant to the performance of the Commission’s powers and functions under the PSA 2012. The Commission will conduct a preliminary review of all of the information it has received from the Complainant and Respondent. The Commission will assess the information to determine whether there are grounds to believe the conduct has the purpose or effect of substantially lessening competition in the postal market. If the Commission determines that there are no grounds to believe that the conduct has the purpose or effect of substantially lessening competition, it will not take any further action. The Commission may notify the Complainant and Respondent on this matter.

7.5 This phase may take up to thirty (30) days or more depending on the information requested from both the complainant and respondent.

Phase 2: Investigation

7.6 The Commission will commence Phase 2 investigation, if it has grounds to believe that the conduct has the purpose or effect of substantially lessening competition. The investigation phase involves examining all of the evidence in order to determine whether an anti-competitive conduct has contravened the General Competition Practices of the PSA 2012. This phase consists of the following steps:

- (a) **Notification to the Respondent.** The Commission will inform the respondent that the matter is proceeding to an investigation.
- (b) **Call for submissions from the Complainant and Respondent.** Before the Commission makes any finding that is adverse to a Complainant or the Respondent, the Commission shall give the

Complainant or Respondent an opportunity to make submissions about the matter to which the investigation relates.

- (c) **Further information gathering.** The Commission has powers under subsection 71(1) of the PSA 2012 to gather information from any person who has information or documents relevant to the investigation. The Commission may therefore contact competitors, suppliers or consumers to seek information, including information relating to issues such as market definition, the level of competition in the market and assessment of dominance. Where the Commission wishes to gather information from a person, it will provide a notice, as required under subsection 71(2) of the PSA 2012. The person will then be given a reasonable time to comply. The person providing the information must ensure that the information is true, accurate, complete and not misleading. The Commission can choose to consult third parties at any time if required for the purposes of gathering additional information or verifying information provided by the complainant or the Licensee under investigation.
- (d) **Consideration of evidence.** After the Commission has obtained all of the evidence it requires, it will consider this evidence in order to determine whether the Respondent has engaged in anti-competitive conduct or otherwise contravened the PSA 2012.

7.7 This phase may take up to one hundred eighty (180) days or more as the Commission will need to carry out the investigation process.

Phase 3: Decision-Making

- 7.8 The decision-making phase involves the Commission making a decision in relation to a particular finding and course of action that needs to be imposed.
- 7.9 If the Commission decides that the Respondent has engaged in anti-competitive conduct, it may do one or more of the followings:
 - (a) if the Respondent is in a dominant position, direct the respondent to cease the conduct under section 44 of the PSA 2012; and/or
 - (b) implement any other remedies that the Commission is authorised to seek under the PSA 2012.
- 7.10 The Commission may issue a press release announcing its findings at the conclusion of its investigation.

7.11 This phase may take up to thirty (30) days or more depending on the Commission's decision and the course of action that needs to be imposed.

8 Making a complaint

- 8.1 Anyone wishing to lodge an anti-competitive complaint to the Commission in relation to a conduct of another Licensee under the PSA 2012 may do so using the Anti-Competitive Complaint Form (Postal Market) available at the Commission's website at the following link:

<https://www.mcmc.gov.my/en/resources/eform/anti-competitive-complaint-form-postal-market>

- 8.2 Alternatively, you may also write to the Commission at:

Address: Malaysian Communications and Multimedia Commission
MCMC HQ, Tower 1, Jalan Impact, Cyber 6, 63000
Cyberjaya, Selangor Darul Ehsan, Malaysia

Email: acc@mcmc.gov.my

Attention: Head Competition Department, Market Regulation Division

Tel: +603-8688 8000

Facsimile: +603 8688 1000

- 8.3 The Commission requires that all complaints be made in writing and be accompanied by information, evidence and documents to assist the Commission in making an assessment as to whether to commence an investigation. The Commission also requires that all complaints are signed by an authorised senior officer of the Complainant to ensure that the complaint is not vexatious or frivolous. Providing false or misleading information to the Commission is prohibited and may be subjected to regulatory actions under subsection 71(5) of the PSA 2012.

- 8.4 The Complainant is required to provide a designated contact person and contact details for the Commission to contact, which include the following information:

Name : _____
Designation : _____
Office Tel. : _____
Hand phone : _____
Email address : _____
Date : _____

- 8.5 For additional guidance please contact the Head of Competition Department, Market Regulation Division as per the contact details provided in paragraph 8.2 above.