



Malaysian Communications and Multimedia Commission

Guideline on Substantial Lessening of Competition

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Foreword

This Guideline has been prepared by the Malaysian Communications and Multimedia Commission (the **Commission**) in accordance with section 134 of the *Communications and Multimedia Act 1998* (the **CMA**). Section 134 gives the Commission the power to publish guidelines which clarify the meaning of “substantial lessening of competition”.

This Guideline replaces the Guideline on Substantial Lessening of Competition¹ published by the Commission in 2000.

This Guideline outlines the Commission’s general approach to the meaning of “substantial lessening of competition” for the purposes of administering the CMA. It is not an exhaustive summary of all of the factors that the Commission may take into account when assessing whether a licensee’s conduct has the purpose or has, or may have, the effect of substantially lessening competition in a market, or determining whether to take enforcement action under sections 133 and 139 of the CMA. This Guideline does not bind or limit the Commission in any way.

This Guideline is intended as a guide only and should not be relied on as a substitute for the CMA or any regulations made under that Act, or as a substitute for legal advice.

This Guideline may be revised by the Commission from time to time.

¹ RG/SLC/1/00(1).

1 Introduction

- 1.1 This Guideline outlines the Commission's general approach to assessing the conduct of licensees for the purposes of sections 133 and 139 of the CMA.
- 1.2 Section 133 of the *Communications and Multimedia Act 1998* (the **CMA**) prohibits a licensee from engaging in conduct which has the purpose of substantially lessening competition in a communications market. Where the Commission considers that the conduct of a licensee is in breach of section 133, it may seek interim or interlocutory injunctions under section 142 or seek the imposition of a fine under section 143 of the CMA.
- 1.3 Under section 139(1) of the CMA, the Commission has the power to direct a licensee in a dominant position to cease conduct which has, or may have, the effect of substantially lessening competition.
- 1.4 This Guideline provides a framework within which the conduct of a licensee will be assessed by the Commission. Section 134 of the CMA permits the Commission to publish guidelines to clarify the meaning of "substantial lessening of competition." Section 134(2) states that the guideline may include:²
 - (a) the relevant economic market;
 - (b) global trends in the relevant market,
 - (c) the impact of the conduct on the number of competitors in a market and their market shares;
 - (d) the impact of the conduct on barriers to entry into the market;
 - (e) the impact of the conduct on the range of services in the market;
 - (f) the impact of the conduct on the cost and profit structures in the market; and
 - (g) any other matters which the Commission is satisfied are relevant.
- 1.5 Accordingly, this Guideline sets out the Commission's interpretation of the substantial lessening of competition test and the factors that may be taken into account by the Commission when making a decision to bring enforcement action in relation to breaches of section 133 or to make a direction in accordance with section 139(1) of the CMA. This Guideline also outlines the Commission's investigation and decision making process.
- 1.6 This Guideline does not provide an exhaustive list of all of the factors that may be taken into account by the Commission when investigating the conduct of a licensee or an exhaustive list of all of the types of conduct that may raise competition concerns under the CMA. This guideline also

² Section 134(2), CMA.

does not include the relevant markets or global trends in the relevant markets. These features are covered in the Market Definition Analysis.³

- 1.7 In developing this Guideline, the Commission has had regard to the factors set out in section 134(2) of the CMA, international best practice and the guidelines issued by overseas competition regulators.

Objects of the CMA

- 1.8 In assessing whether conduct has the purpose or effect of substantially lessening competition in a market for the purposes of sections 133 and 139, the Commission will have regard to the objects of the CMA.

- 1.9 In particular, under section 139(2) of the CMA, the Commission may only issue a direction to a licensee to cease conduct under section 139(1) if the Commission is satisfied that the direction is consistent with the objects of, and any relevant instruments made under, the CMA.

- 1.10 The objects of the CMA are contained in section 3 which provides that:

"(1) The objects of this Act are -

(a) to promote national policy objectives for the communications and multimedia industry;

(b) to establish a licensing and regulatory framework in support of national policy objectives for the communications and multimedia industry;

(c) to establish the powers and functions of the Malaysian Communications and Multimedia Commission; and

(d) to establish powers and procedures for the administration of this Act.

(2) The national policy objectives for the communications and multimedia industry are -

(a) to establish Malaysia as a major global centre and hub for communications and multimedia information and content services;

(b) to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;

(c) to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;

(d) to regulate for the long-term benefit of the end user;

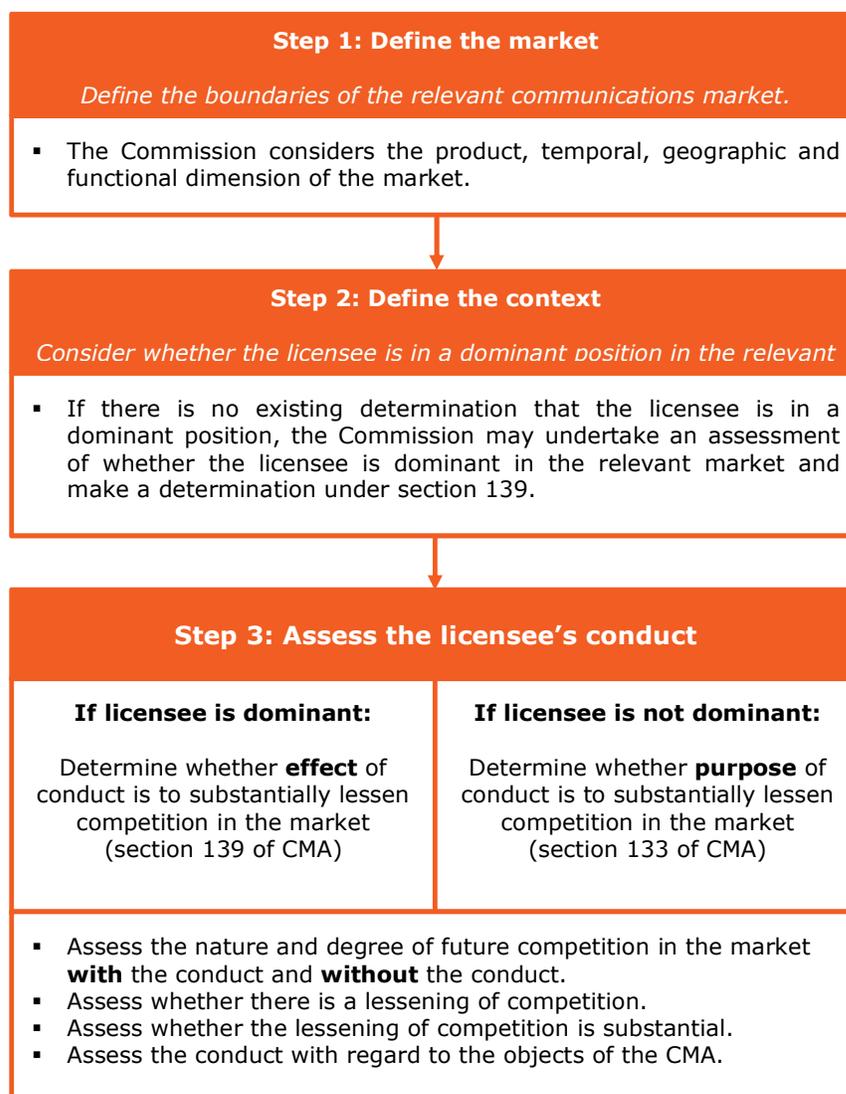
³ MCMC, Market Definition Analysis (2014).

- (e) *to promote a high level of consumer confidence in service delivery from the industry;*
- (f) *to ensure an equitable provision of affordable services over ubiquitous national infrastructure;*
- (g) *to create a robust applications environment for end users;*
- (h) *to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;*
- (i) *to promote the development of capabilities and skills within Malaysia's convergence industries; and*
- (j) *to ensure information security and network reliability and integrity".*

2 The Commission's framework for assessing a 'substantial lessening of competition'

2.1 Determining whether a licensee is engaging in conduct which has the purpose or has, or may have, the effect of 'substantially lessening competition' in a communications market involves a three-step process.

Figure 1: The Commission's approach to substantial lessening of competition



2.2 When assessing the conduct of a licensee for the purposes of sections 133 and 139 of the CMA, the Commission will use the relevant markets set out in the Market Definition Analysis,⁴ unless a change in circumstance justifies a review of that definition for the purposes of applying the 'substantially lessening competition' test or unless the Commission determines that the

⁴ MCMC, Market Definition Analysis (2014).

market and competitive dynamics should give rise to a different market definition.

- 2.3 Where the Commission determines that a review of the relevant market definition is required for the purposes of applying the 'substantially lessening competition' test, the Commission will define the relevant communications market in accordance with the framework for defining communications markets set out in the Guideline on Dominant Position.⁵
- 2.4 For the purposes of section 139 only, the licensee must be in a dominant position in a communications market before the Commission may issue a direction to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition. A determination of dominance can be made at any time and will be made in accordance with the Commission's Guideline on Dominant Position.⁶

Conduct

- 2.5 The Commission's ability to exercise its powers under Chapter 2 of Part VI is dependent on whether an activity constitutes 'conduct' under sections 133 and 139 of the CMA.
- 2.6 'Conduct' is not defined in the CMA. 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 market. This could include, for example:
- (a) entering into or giving effect to a contract with another party;
 - (b) decisions on price 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.
- 2.7 With regard to sections 133 and 139 of the CMA, the Commission is primarily concerned with 'conduct' that has, or may have, a negative effect on competition in a communications market. For example, this could include (among other things) activities like predatory pricing, refusals to supply or supplying bundled products or services.
- 2.8 Accordingly, the Commission considers 'conduct' to include any action taken by a licensee that has the potential to have a negative effect on competition in a communications market.

⁵ MCMC, *Guideline on Dominant Position* (2014).

⁶ See: MCMC, *Guideline on Dominant Position* (2014).

'Purpose' and 'effect'

- 2.9 The Commission's approach to assessing a licensee's conduct will differ depending on whether the Commission is assessing the conduct under section 133 or section 139 of the CMA.
- 2.10 Section 133 prohibits a licensee from engaging in conduct which has the **purpose** of substantially lessening competition in a communications market. Accordingly, section 133 requires an assessment of the 'purpose' of the conduct in question.
- 2.11 By contrast, section 139 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.
- 2.12 The distinction between purpose and effect is important.
- 2.13 The 'purpose' of conduct is the end sought to be accomplished by that conduct.⁷ 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:
- (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.
- 2.14 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 have been material to the decision to engage in the conduct in question.
- 2.15 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.

⁷ *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45.

3 Substantially lessening competition

What is 'substantially lessening competition'?

- 3.1 'Substantially lessening competition' is a core concept in the CMA.
- 3.2 Competition is a process of rivalry between firms. The level of competition in a market is the level of this rivalry.
- 3.3 In a competitive market, firms are constrained in their commercial activities by the presence of existing or potential competitors, or by their customers. Therefore, a 'lessening' of competition in a market involves a reduction of the competitive constraints in that market.
- 3.4 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 participants 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 firm 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.
- 3.5 Not all conduct that lessens competition is prohibited by the CMA. It is only when that conduct *substantially* lessens competition in a communications 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 communications market (or the resulting increase in market power) is considerable or big.⁸
- 3.6 For instance, conduct that results in a reduction of (or has the purpose of reducing) the number of suppliers in a market does not, of itself, constitute a substantial lessening of competition. Whether conduct which results in a reduction in the number of suppliers in a communications 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 communications market or reduces the incentives for 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 market.

⁸ *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62; FLR 437; 2 TPR 315; 44 ALR 557; ATPR 40-318 at [444].

The 'With and Without' Test and Competitive Factors

- 3.7 In assessing whether conduct has the purpose or has, or may have, the effect of substantially lessening competition in a communications market under sections 133 and 139 of the CMA, the Commission will use the 'with or without' test (also known as the counterfactual test). The test considers:
- (a) what competition in the market would look like **with** the conduct taking place; and
 - (b) what competition in the market would look like **without** the conduct taking place.
- 3.8 If the level of competition in the market with the conduct is substantially lower than the level of competition in the market without the conduct, the conduct will be considered by the Commission to 'substantially lessen competition' in the market.
- 3.9 Assessing the 'level of competition' in a market in the future with the conduct against the future without the conduct involves an assessment of the following factors:
- (a) the structure of and nature of **existing competition** in the 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 power** of buyers.
- 3.10 When assessing the level of competition in the 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 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 market.

Existing competition

- 3.11 When analysing the nature and degree of actual competition in a communications market, the Commission will consider:
- (a) the number of existing competitors in the market;
 - (b) the relative market shares of each of the participants in the market;
 - (c) the behaviour of participants in the market, including pricing and other competitive behaviour; and

(d) any other competitive dynamics in the market.

3.12 The Commission's approach to assessing market share and competitive dynamics in the context of sections 133 and 139 of the CMA will be similar to its approach to assessing these factors set out in the Guideline on Dominant Position.⁹ In general terms, the greater the number of competitors in a market in the future with the conduct, the more competitive that 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

3.13 In assessing the 'level of competition' in a 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 market. This is dependent on the ease with which potential entrants or existing competitors can enter into or expand operations in a market.

3.14 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 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 the Guideline on Dominant Position.¹⁰

3.15 In general terms, the harder it is for potential entrants or existing competitors to enter into or expand operations in a market, the less competitive that market is likely to be and the more likely it is that there will be a substantial lessening of competition as a result of conduct.

Countervailing buyer power

3.16 Countervailing buyer power is the ability of customers to constrain the independence of a licensee, particularly its ability to set prices or terms of supply.

3.17 The Commission will consider the following factors in assessing the level of countervailing buyer power:

(a) The number, size and importance of customers in the market. Where there is a high degree of concentration amongst buyers compared to suppliers, buyers are more likely to be in a position to constrain the activities of suppliers.

(b) The extent to which the customer has the ability to bypass the supplier by acquiring the products or services from another supplier, 'sponsoring' market entry or vertically integrating to bypass the supplier.

⁹ MCMC, *Guideline on Dominant Position* (2014).

¹⁰ MCMC, *Guideline on Dominant Position* (2014).

- 3.18 In general, the greater the degree of countervailing power there is in the market with the conduct, the less likely it is that conduct will be considered to have the purpose or effect of substantially lessening competition.

Example

Licensee A enters into a long term exclusive contract with a supplier. Licensee A has only one competitor, Licensee B. If the supplier is the *only* supplier of an essential input into the market in which Licensee A and Licensee B compete, the 'with and without' test would apply as follows:

- in the future *with* the exclusive contract, Licensee B is unable to acquire the essential input from the supplier. If Licensee B has no other option but to acquire the input from the supplier, Licensee B will be excluded from competing in the market in which Licensee A competes;
- in the future *without* the exclusive contract, Licensee B may be able to negotiate a supply arrangement with the supplier and, assuming that commercial terms can be agreed, Licensee B will continue to compete with Licensee A.

In this simple example, the level of competition in the market with the exclusive contract may be substantially lower than the level of competition in the market *without* the exclusive contract.

However, the conclusion might be different if, for example, barriers to entry into the supply of the input are very low or the input is not essential for Licensee B to compete in the market. If barriers to entry into the input market are low, Licensee B could bypass the supplier of the essential input by, for example, vertically integrating into the market for the supply of the input.

4 Examples of conduct that may 'substantially lessen competition'

- 4.1 The Commission will closely monitor communications markets for conduct that 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.
- 4.2 Examples of conduct that the Commission considers to be more likely to have an adverse impact on competition in a communications market include:
- (a) **Predatory pricing.** This refers to a pricing strategy of setting low prices (sometimes below cost) to eliminate a competitor or to deter a potential competitor from entering the market.
 - (b) **Refusal to supply.** A 'refusal to supply' refers to an actual refusal to supply products or services, such as in response to a request from an actual or potential competitor, or a constructive refusal to supply a product or service, such as agreeing to supply but only on uncompetitive or uncommercial terms or conditions.
 - (c) **Margin squeeze.** This refers to a situation where a vertically integrated firm that controls an essential input to the downstream market supplies that input at a price that makes it difficult or impossible for its competitors in the downstream market to compete because the firm does not charge its own downstream operation the same high price.
 - (d) **Bundling.** This concept refers to the practice of supplying a product or service only on the condition that the consumer also acquire or not acquire a different product or service from that supplier or from another supplier.
 - (e) **Other foreclosure strategies.** There are a number of strategies that may be employed by a licensee to foreclose, limit or deter competition in a market. These strategies may include exclusive dealing or a situation where a vertically integrated firm that controls an essential input to the downstream market supplies that input on non-price terms and conditions that make it difficult or impossible for its competitors in the downstream market to compete.
 - (f) **Mergers or acquisitions.** A 'merger' refers to the combining of two or more firms. An acquisition refers to the acquisition of assets or shares.
- 4.3 Each of these types of conduct, and the Commission's approach to assessing the effect of this conduct, is described in further detail below.

The examples provided below are hypothetical and are provided as a general guide only.

- 4.4 When assessing the purpose or effect of conduct under sections 133 and 139 of the CMA, the Commission will identify the relevant market in which competition may be affected. As noted in paragraph 2.2 above, the Commission will use the relevant markets set out in the Market Definition Analysis, unless a change in circumstance justifies a review of that definition for the purposes of applying the 'substantially lessening competition' test or unless the Commission determines that the market and competitive dynamics should give rise to a different market definition.
- 4.5 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, these forms of conduct are 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 types of conduct identified by the Commission above is not intended to be an exhaustive list of all of the types of conduct that may have the purpose or effect of substantially lessening competition in a communications market.
- 4.6 Section 135 ('Prohibition on entering into collusive agreements') and section 136 ('Prohibition on tying or linking arrangements') of the CMA prohibit specific types of conduct. These provisions operate in addition to the operation of sections 133 and 139. In many cases there may be overlap between these provisions and, where this occurs, the Commission may choose to take action under either the specific prohibitions in sections 135 and 136 (as applicable), or to apply the more general provisions under sections 133 and 139 (as applicable).

Predatory pricing

- 4.7 Predatory pricing conduct involves a (usually dominant) firm lowering the price of its products or services (usually below cost) to drive a competitor or competitors out of the market, or to prevent a potential competitor or competitors from entering the market.
- 4.8 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 firm 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 firm engaging in the conduct is in a dominant position in the market.
- 4.9 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.

- 4.10 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.

Example – Predatory Pricing

Licensee A is a large supplier of ADSL services to residential and business customers. Licensee A has a market share of more than 50%. It has three competitors for the supply of ADSL, each with a share of less than 20%.

Licensee A has been slowly losing market share to its competitors. Licensee B announces its intention to invest significantly in ULLS and its own DSLAM infrastructure which will result in Licensee B offering comparable, if not better, ADSL speeds than Licensee A.

Licensee A decides to undertake an aggressive pricing campaign to win back market share in response to this announcement. It drops its retail price below its average variable cost. Its competitors follow suit, however it is not long before Licensee B is forced to announce that it has put its investment plans on hold as a result 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 a relevant market.

- 4.11 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 product or service 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.

Refusals to supply

- 4.12 A refusal to supply covers a broad range of conduct and includes both actual refusals to supply (i.e. where a licensee declines a request to supply products or services) and constructive refusals to supply (i.e. where a licensee agrees to supply, but only on unreasonable or uncommercial terms or conditions).
- 4.13 Not all refusals to supply are anti-competitive. For example, a refusal to supply for legitimate reasons, such as poor credit risk or a breach of contract, will generally not be considered by the Commission to be anti-competitive.
- 4.14 A refusal to supply, or conduct which amounts to a constructive refusal to supply, may be considered to have the purpose or effect of substantially lessening competition in a market by the Commission if:
 - (a) the conduct relates to a product or service that is necessary to be able to compete effectively in a downstream market; and
 - (b) the conduct is likely to lead to the elimination or prevention of effective competition in that downstream market.

Example 1 – Refusal to Supply

Licensee A is a vertically integrated supplier of fixed telephony and broadband services. Licensee A owns all of the basic infrastructure, including poles, ducts, manholes, fibre optic and copper cables, in a particular geographic region.

Licensee B approaches Licensee A and requests that it supply it with access to its ducts and manholes to allow Licensee B to lay fibre optic cable to supply large multi-dwelling units in the area served by those ducts and manholes. Licensee A refuses to allow Licensee B access on the basis that there is insufficient capacity.

In this example, the refusal to supply may have the purpose or effect of substantially lessening competition if, looked at objectively, it would be commercially sensible for Licensee A to have supplied Licensee B (i.e. there is in fact sufficient capacity to allow Licensee B access) and Licensee B would be prevented from supplying services to a significant proportion of

the market.

Example 2 – Constructive Refusal to Supply

Licensee A is a supplier of mobile telephony and broadband services. Licensee B approaches Licensee A to become an MVNO on Licensee A's network. Licensee A agrees to allow Licensee B to become an MVNO on its network, but makes it a condition of supply that Licensee B provides it with certain detailed information about its customers before it will allow the customer to be connected to the network. This information is not necessary for Licensee A to supply the service to the MVNO and is information that is not readily available to the MVNO in the form required by Licensee A (if at all).

In this example, while Licensee A has not refused to supply Licensee B in the conventional sense, requiring that Licensee B provide certain information which is not readily available may amount to a constructive refusal to supply. This may have the effect of substantially lessening competition if, as a result, Licensee B is unable to compete in the downstream market. However, in this example, the Commission would also consider whether Licensee B could approach another supplier of mobile telephony and broadband services, Licensee C, to become an MVNO and whether Licensee C would also impose the same conditions of supply.

- 4.15 The Commission may require a range of information from a complainant and the licensee that is the subject of the complaint when assessing whether a refusal to supply is likely to raise competition concerns. Some examples of information that the Commission may require include:
- (a) information about the products or services which are the subject of the request for supply;
 - (b) information about the reasons which have been given by the licensee for refusing to supply the products or services to the complainant;
 - (c) information about other options available to the complainant to compete in the market and the conduct of other suppliers in the market; and
 - (d) documentation to support any allegation by the complainant that their business has or will be harmed by the conduct.

Margin squeeze

- 4.16 Margin squeeze refers to a situation where a vertically integrated firm that controls an essential input to a downstream market sets the price for that input at a level which results in an insufficient margin between the price at which it supplies the input to wholesale customers and the price at which it supplies the finished product in a downstream market for an efficient

operator. The low margin can prevent wholesale customers from effectively competing with the vertically integrated firm in the downstream market. A margin squeeze is also known as a "price squeeze".

- 4.17 A margin squeeze typically occurs when the vertically integrated firm makes the wholesale inputs to a product available to competitors at an artificially-inflated price. This price may be inflated either by reference to the price that the firm charges its own downstream unit, or by reference to the costs of producing the input. This type of margin squeeze behaviour may also constitute a constructive refusal to supply (i.e. a supply on unreasonable terms and conditions).
- 4.18 A margin squeeze may also occur where a firm makes wholesale inputs available to competitors at a competitive, non-discriminatory price, but sells the finished product in the downstream market at a price that is artificially lowered (e.g. below cost). This conduct may also prevent competitors from effectively competing in the downstream market. This second manifestation of margin squeeze behaviour has parallels with predatory pricing.
- 4.19 A firm may also engage in a combination of the two behaviours outlined above, offering the wholesale input at a higher price to competitors while simultaneously lowering the price of the downstream product.

Example – Margin Squeeze

Licensee A is the owner of physical fibre network infrastructure, while also providing fibre broadband access to end users in downstream markets. Licensee A also provides a wholesale bitstream access service to Licensee B, which uses this as an essential input to providing downstream fibre broadband access products that compete with those of Licensee A.

The price of Licensee A's wholesale access product is only very slightly lower than the price at which Licensee A sells its fibre broadband access product to end users. This prevents Licensee B from effectively competing in the downstream market. Even if Licensee B operates efficiently, once it adds the cost of transforming Licensee A's wholesale access service into a finished product, Licensee B's downstream product is not price-competitive with that provided by Licensee A. In this instance, Licensee A's conduct may have the purpose or effect of substantially lessening competition.

- 4.20 A small difference (low margin) between a firm's wholesale input price and its downstream product price will not necessarily constitute an anti-competitive margin squeeze. In some instances, the low margin may reflect the fact the value added to transform the input into a final product is minor. For example, a firm may supply a 'white-label' wholesale product to a competitor that requires little input or investment from the competitor. A low margin may also be a reflection of competitive efficiencies held by the vertically-integrated firm, which allow it to transform the input into a final product at low cost. This may result in the

firm's price for the downstream product being not significantly higher than the wholesale input price.

- 4.21 However, the Commission will consider that a margin squeeze is likely to be anti-competitive where the price at which a firm makes wholesale inputs available to competitors, or the price at which the firm sells downstream products, cannot reasonably be justified on the basis of cost and do not allow an efficient competitor to effectively compete in the downstream market.
- 4.22 An imputation test may be used by the Commission to assess whether or not a licensee is engaging in a margin squeeze. An imputation test is designed to determine whether the margin between the price for a wholesale input and the retail price of a downstream service is sufficient to cover the retail costs of a vertically integrated firm. In particular, an imputation test compares:
- (a) the price charged by a vertically integrated licensee for a particular retail service it supplies, and by other retail service providers who wish to supply the same retail service using the vertically integrated licensee's network; and
 - (b) the wholesale price charged by the vertically integrated licensee for access to its network, plus the additional costs incurred by the licensee, in transforming the essential input into the retail service.
- 4.23 Where the retail price is less than the sum of the wholesale access price and additional costs, the imputed margin is negative, which may indicate potential anti-competitive behaviour.
- 4.24 While imputation testing can be a useful tool for assessing whether a firm is engaging in margin squeeze, the Commission recognises that the test has some limitations, particularly where the relevant products or services are supplied as part of a bundle. This is because the relevant market definition may not coincide with the bundled package.
- 4.25 Where the Commission receives a complaint that a licensee is engaging in margin squeeze in relation to a bundled product or service, the Commission may adjust the imputation test to take into account the relevant market by, for example, removing the price or cost information relating to non-relevant services, weighting the price or cost information to reflect the proportion of bundled supply in the market or imputing the retail price of services when supplied unbundled.
- 4.26 In addition to undertaking an imputation test, the Commission will also take into account other factors when assessing whether a licensee is engaging in anti-competitive margin squeeze, including:
- (a) whether there are any regulatory or commercial reasons for the licensee pricing in that manner;

- (b) whether the price at which the relevant firm supplies wholesale inputs to competitors is justifiable by reference to differences in the product or service supplied to its competitors compared to the product or service supplied to its downstream business;
- (c) whether the pricing has had or is likely to have an appreciable effect on existing competitors or new or potential entrants to the market;
- (d) whether any reductions in the licensee's retail price is of a significant duration or targeted towards particular customers; and
- (e) if the product or service that is the subject of complaint is supplied as a bundle, the factors outlined in paragraph 4.29 below.

4.27 Accordingly, in assessing whether a vertically integrated licensee's pricing behaviour is likely to amount to an anti-competitive price squeeze, the Commission may require the following information from the licensee in question and other market participants:

- (a) information about the product or service in question;
- (b) pricing data for the wholesale input and the downstream product or service;
- (c) pricing data for the supply of the input by the licensee to its downstream entity;
- (d) data relating to the cost of producing and/or supplying the wholesale input and the cost of producing or supplying the downstream product or service;
- (e) the results of any imputation testing undertaken internally by the licensee; and
- (f) information about the licensee's reasons for engaging in the conduct.

Bundling

4.28 'Bundling' generally refers to the situation where two or more products or services are sold as a single package.

4.29 While bundling can often be pro-competitive, conditional selling in this manner may be considered anti-competitive if the supplier is in a dominant position and the 'bundling' conduct forecloses (or otherwise limits) competition (or potential competition) in relation to another component of the bundle in which the supplier is not dominant. Bundling conduct may limit competition if the supplier, for example:

- (a) sets the price of the bundle at a level which strongly encourages customers to purchase the bundle of services rather than individual services from competitors; or

- (b) only supplies the products or services in relation to which it is in a dominant position within the bundled package (that is, it does not supply the products or services in relation to which it is in a dominant position separately from the bundle), and therefore 'captures' sales of the other services in the bundle for which it faces competition.

Example - Bundling

Licensee A is a Pay TV operator. Customers acquiring its sports channel package are also required to acquire its base channel package, which includes lifestyle channels and news channels. Licensee A does not supply customers with its sports channel package separately from the bundle. Licensee A is dominant in the supply of sports channels.

In this example, if the bundle of the sports channel content with other content has the effect of preventing other suppliers of other types of channels (such as IPTV providers) from competing in relation to this content, then the bundling conduct may have the effect of substantially lessening competition.

- 4.30 When assessing whether bundling has the purpose or effect of substantially lessening competition, the Commission may require the following information from market participants:
- (a) information about the bundled products and services and the terms and conditions of supply;
 - (b) information about competitors, including the number and nature of competitors in relation to the supply of the bundled products;
 - (c) information about barriers to entry in relation to the supply of the bundled products;
 - (d) pricing and cost data for the bundled products; and
 - (e) any information about the effect of the conduct on decisions by customers to acquire the products or services, or on the ability of competitors to compete with the licensee in any market.

Other foreclosure strategies

- 4.31 As noted above, there are a number of other 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 firm 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.

Exclusive dealing

- 4.32 In general terms, exclusive dealing is conduct which requires or otherwise induces customers or suppliers to deal solely or primarily with a single firm. It typically involves an arrangement between a customer and a supplier under which the customer will purchase all or a substantial portion of a product or service from the supplier. It can also involve an arrangement which provides volume discounts or rebates, or other volume-based incentives, which encourage or induce a customer to acquire all or a substantial proportion of the customer's requirements from a single supplier.
- 4.33 Exclusive dealing practices are common and are generally unlikely to raise competition concerns. However, exclusive dealing arrangements may raise competition concerns in circumstances where, as a result of the exclusive dealing, a substantial proportion of the market is foreclosed to competitors.
- 4.34 When assessing whether an exclusive dealing arrangement has the purpose or likely effect of substantially lessening competition in a communications market, the Commission will consider the following factors:
- (a) The position of the parties to the exclusive dealing arrangements 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. does the exclusive dealing prevent the customer 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, customers and suppliers (where relevant).
 - (d) Whether the exclusive dealing has had an effect on pricing, quality, market entry or market structure.
- 4.35 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 a communications market.

Example – exclusive dealing

Licensee A is a Pay TV operator. Licensee A enters into an exclusive licence for the acquisition of broadcast rights with the largest producer of local content, including locally-produced movies.

This is exclusive dealing and may have the purpose or effect of substantially lessening competition in a market if, as a result of the exclusive licence, IPTV suppliers or suppliers of video-on-demand services are unable to access local content (or are restricted in their ability to access local content) and this restricts or limits their ability to compete with the Pay TV operator.

Strategies employed by vertically integrated firms

- 4.36 There are a number of strategies that may be employed by a vertically integrated firm 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.
- 4.37 These strategies can include (but are not limited to):
- (a) a vertically integrated supplier imposing unreasonable supply terms on its customers 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 supplier treating its own downstream business more favourably than its competitors; and
 - (c) a vertically integrated supplier requiring its competitors in the downstream market to supply commercially sensitive information that is then used to compete against its customers in the downstream market.
- 4.38 In assessing whether the conduct of a vertically integrated licensee has the purpose or effect of substantially lessening competition in a relevant 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) the 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 - in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its

duration and the more regularly it has occurred, the greater the foreclosure effect is likely to be;

- (d) the significance of the input to competition in the downstream market;
- (e) whether the vertically integrated supplier 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 supplier 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.

Example – Foreclosure strategies

Licensee A owns a high speed broadband network and supplies wholesale access to access seekers. Licensee A also competes in the downstream retail market for the supply of high speed broadband services to business, Government and retail markets.

Licensee A decides to prioritise its own retail customers in relation to installation and faults. This results in installation lead times, and fault rectification timeframes, for its own retail customers that are significantly faster than for its wholesale customers.

The conduct leads to a significant reduction in the market shares of Licensee A's competitors in the downstream market as retail customers become frustrated with their inability to offer the same level of service as Licensee A.

In this example, Licensee A's conduct may have the purpose or effect of substantially lessening competition in a market.

4.39 The Commission may seek a range of qualitative and quantitative information from market participants when assessing whether exclusive dealing conduct or other 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.

Mergers or acquisitions

- 4.40 The Commission regards mergers and acquisitions to be 'conduct' and therefore subject to sections 133 and 139 of the CMA.
- 4.41 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 functional 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 or vertical merger.
- 4.42 Not all mergers or acquisitions will raise competition concerns. 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.
- 4.43 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.
- 4.44 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 Guideline on Dominant Position. 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 Guideline on Dominant Position. Countervailing buyer power may function as a competitive constraint on a licensee 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.

4.45 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

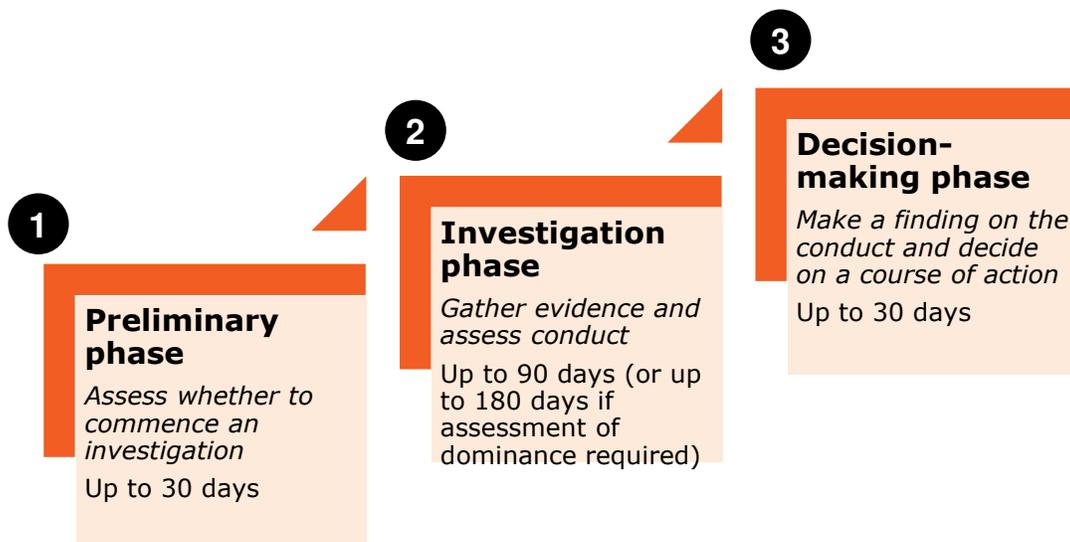
- (e) data relating to the market's size, growth prospects and level of innovation, to assess the level of dynamic competition in the market.

5 Authorisations

- 5.1 The Commission may authorise conduct under section 140 of the CMA which may have the purpose or the effect of substantially lessening competition in a communications market, if it is satisfied that the conduct is in the national interest.
- 5.2 This would usually require the Commission to be satisfied that the national interest in the conduct outweighs the detriment to competition caused by that conduct.
- 5.3 This Guideline does 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 140.

6 The Commission's investigation process

6.1 The Commission's investigation process for investigating allegations of anti-competitive conduct under Chapter 2, Part VI of the CMA consists of three phases, as outlined in the diagram below.



The Preliminary Phase

6.2 The preliminary phase involves the Commission making an assessment as to whether to commence an investigation into the conduct of a licensee.

6.3 The preliminary phase will consist of the following steps:

- (a) **Commencement of investigation.** The Commission can commence an investigation into the conduct of a licensee if it has grounds to believe that a licensee has engaged in anti-competitive conduct. This information can be received in one of three 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.
- (b) **Communication with complainant.** The Commission may seek further information or clarification from the 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 complainants. If a complainant fails to co-operate 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.

- (c) **Communication with respondent.** The Commission may seek a response from the person alleged to have engaged in the anti-competitive conduct (the respondent). The Commission has the discretion to make inquiries of the respondent under section 69(4) of the CMA.
- (d) **Preliminary assessment.** The Commission will conduct a preliminary review of all of the information it has received in the stages above. The Commission will assess the information to determine whether there are grounds to believe that a civil or criminal offence has been committed under the CMA. If this is the case, the Commission is obliged by section 68 of the CMA to conduct an investigation into the matter.
- (e) **Notification to complainant and respondent, if no further action is required.** If the Commission determines that there are no grounds to believe that a civil or criminal offence has been committed, it will not take any further action. The Commission will notify the complainant and respondent if this is the case, as required by section 69(5) of the CMA.

The Investigation Phase

- 6.4 The **investigation phase** involves examining all of the evidence in order to determine whether anti-competitive conduct, in contravention of Chapter 2, Part VI of the CMA, has occurred. This phase consists of the following steps:
- (a) **Notification to respondent.** The Commission will inform the respondent that the matter is proceeding to an investigation, as required under section 70(1) of the CMA.
 - (b) **Call for submissions from complainant and respondent.** According to section 70(5) of the CMA, the Commission cannot make a finding that is adverse to a complainant or a respondent unless it has given 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 section 73(1) of the CMA to gather information from any person who has information or documents relevant to the investigation. The Commission may therefore contact competitors, suppliers or customers to seek information, including information relating to issues such as market definition, the level of competition in the market and questions of dominance. Where the Commission wishes to gather information from a person, it will provide a notice, as required under section 73(2) of the CMA. The person will then be given a reasonable time to comply, as per section 73(3) of the CMA. The person providing the information must ensure that the information is true, accurate, complete and not misleading.

- (d) **Public inquiry into assessment of dominance.** Where the investigation requires the determination of a licensee's dominant position, the Commission may conduct a public inquiry into assessment of dominance. However, the Commission is not required to undertake a public inquiry before making a determination that a licensee is in a dominant position.
- (e) **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 CMA.

The Decision-Making Phase

- 6.5 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.
- 6.6 If the Commission decides that the respondent has engaged in anti-competitive conduct, it may do one or more of the following:
 - (a) if the respondent is in a dominant position, direct the respondent to cease the conduct;
 - (b) seek an interim or interlocutory injunction against any conduct prohibited under the CMA;
 - (c) prepare a report for the Minister, which sets out the respondent's conduct, any findings made and the evidence or material on which these findings were based, as allowed under section 71 of the CMA; and/or
 - (d) implement any other remedies that the Commission is authorised to seek under the CMA.
- 6.7 The Commission may issue a press-release announcing its findings at the conclusion of its investigation. However, the Commission can choose to make an investigation public at any time if required for the purposes of gathering additional information or verifying information provided by the complainant or the licensee under investigation.

Making a Complaint

- 6.8 Anyone wishing to make a complaint to the Commission in relation to conduct of a licensee under the CMA should write to the Commission at:

Address: Malaysian Communications and Multimedia Commission, Off Persiaran Multimedia, 63000 Cyberjaya, Selangor Darul Ehsan

Fax: +60 3 86 88 10 00

- 6.9 The Commission requires that all complaints be made in writing and be accompanied by information and documents to assist the Commission with making an assessment as to whether to commence an investigation. The Commission also requires that all complaints be accompanied by a signed undertaking by a senior officer of the complainant that the complaint is not vexatious or frivolous.
- 6.10 If you require further guidance on how to make a complaint, including guidance on the type of information or documentary evidence that should be submitted to the Commission with the complaint, please contact the Commission at:

Address: Malaysian Communications and Multimedia Commission, Off Persiaran Multimedia, 63000 Cyberjaya, Selangor Darul Ehsan

Telephone: +60 3 86 88 80 00

Fax: +60 3 86 88 10 00