

MALAYSIAN COMMUNICATIONS AND MULTIMEDIA COMMISSION

**PROCESS FOR ASSESSING ALLEGATIONS OF ANTI-COMPETITIVE CONDUCT :
AN INFORMATION PAPER**

IP/Competition/1/00(1)

Process For Assessing Allegations of Anti-Competitive Conduct :
An Information Paper

TABLE OF CONTENTS

1. Purpose	1
2. Introduction	1
3. Process for Assessing Alleged Anti-Competitive Conduct	2
4. Indicative Timeframes	6
5. Information Requirements	6
6. Contact with the Commission	7
Attachment : Process Flow and Indicative Timeframes	9

**PROCESS FOR ASSESSING ALLEGATIONS OF ANTI-COMPETITIVE
CONDUCT: AN INFORMATION PAPER**

1. Purpose

This Information Paper explains the process which the Commission shall adopt in determining whether a licensee is engaging in anti-competitive conduct in contravention of Chapter 2, Part VI of the Communications and Multimedia Act 1998 ("the Act").

2. Introduction

2.1 Consistent with the provisions in Chapter 2, Part VI, the Commission's objectives are:

- First, to secure compliance with the provisions of Chapter 2; and
- Second, to prevent or deter anti-competitive conduct in communications markets.

2.2 Chapter 2, Part VI of the Act also contains a number of prohibitions against anti-competitive conduct. In summary, they include the following provisions:

- Section 133 prohibits a licensee from engaging in any conduct which has the purpose of substantially lessening competition in a communications market. The meaning of 'substantial lessening of competition' is clarified in the Commission's *Guideline on Substantially Lessening of Competition* - RG/SLC/1/00(1).
- Section 135 prohibits understandings, agreements or arrangements which provide for rate fixing, market sharing, and certain boycotts.
- Section 136 prohibits tying or linking arrangements. Specifically, section 136 prohibits a licensee from making it a condition for the provision or supply of a product or service in a communications market that the person acquiring such product or service in the communications market is also required to acquire or not to acquire any other product or service either from the licensee or another person.

2.3 Section 143 provides that a person who contravenes any prohibition under Chapter 2 commits an offence. Furthermore, the Commission may seek an

interim or interlocutory injunction against any conduct prohibited in Chapter 2 under section 142(1).

- 2.4 The Commission may determine that a licensee is in a dominant position in a communications market¹ and as provided by section 139(1), direct a licensee to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market. The meaning of 'dominant position' is clarified in the Commission's *Guideline on Dominant Position in a Communications Market – RG/DP/1/00(1)*.

3. Process for assessing alleged anti-competitive conduct

The process which the Commission will go through when assessing allegations of anti-competitive conduct can be divided into three phases:

- 3.1 First, a **preliminary phase** in which information provided (or readily available) to the Commission is assessed with a view to determining whether on the information available, there is, prima facie, anti-competitive conduct in a communications market.
- The preliminary phase may commence with an allegation or complaint made to the Commission, or information may be provided to the Commission which suggests possible anti-competitive conduct. It may also commence in response to information obtained by the Commission in the process of administering information gathering provisions, or information obtained via media reports suggesting that a licensee is acting in an anti-competitive manner.
 - A preliminary assessment of the information received from the complainant will be made. Where the information received is incomplete, the Commission may seek clarification or further information from the complainant. In many instances, no further action will be taken by the Commission particularly where the information provided does not suggest possible anti-competitive conduct.

¹ Section 137

- In making its assessment, the Commission may seek response or comments from the person alleged to have purportedly engaged in anti-competitive conduct. This may be conducted for the purpose of deciding whether the Commission has power to investigate the matter to which the complaint relates or whether the Commission should, in its discretion investigate the matter further².
- During the preliminary phase, the Commission will seek to establish whether or not there are grounds to believe that a civil or criminal offence under the relevant section or its subsidiary legislation was, is or will be committed. If so, the Commission must commence an investigation into the relevant matter(s)³.
- If the Commission decides not to take any further action, the Commission will notify the complainant and the respondent⁴.

3.2 Second, an **investigative phase** in which the Commission will launch an investigation of the matter with a view to determining whether, on the evidence available, there is anti-competitive conduct in a communications market. Depending on the matter being investigated, the Commission may also seek to establish whether a licensee is in a dominant position in a communications market.

- The Commission will observe principles of natural justice in carrying out its investigations. At the commencement of a formal investigation of a matter, the Commission will inform the relevant licensee (the respondent) that the matter is to be investigated⁵. While the Act states that it is not necessary for the respondent to be given an opportunity to appear before the Commission⁶, section 70(5) provides that the Commission shall not, as a result of the investigation, make a finding that is adverse to a complainant or a respondent unless it has given the relevant party an opportunity to make submissions about the matter to which the investigation relates within a time period of at least 30 days. Following section 70(6), the Commission will consider the submissions made before making its decisions.

² Section 69(4)

³ Section 68

⁴ Section 69(5)

⁵ Section 70(1)

⁶ Section 70(4)

- During the course of its investigation, the Commission may exercise its information-gathering powers⁷. It must be noted that as per Section 73(1), the power may be exercised in respect of **any person** who has any information or any document that is relevant to the performance of the Commission's powers and functions, or who is capable of giving any evidence which the Commission has reason to believe is relevant to the performance of the Commission's powers and functions. As an example, the matter being investigated may require the Commission to undertake market inquiries. In doing so, the Commission may make inquiries with competitors, suppliers and customers to ascertain the scope of the relevant market, to assess the level of competition in that market, and to determine whether a licensee is in a dominant position in that market.
- In exercising its powers, the Commission may issue written notices requiring any such information, documents (or copies thereof) or evidence to be submitted to the Commission⁸. Reasonable time will be given to comply with any directions made⁹. Section 73(4) further states that the person providing information to the Commission is responsible for ensuring that the information provided is true, accurate and complete.
- The Commission may conduct a public inquiry in the assessment of dominant position, either in response to a written request from a person or on its own initiative. However, the Commission shall only conduct an inquiry if it is satisfied that the matter is of significant interest to either the public or to current or prospective licensees under the Act.
- In carrying out its investigations, the Commission will generally, in the first instance, seek information from the relevant sources on a voluntary basis. The Commission's expectation is that information provided on a voluntary basis will generally be sufficient for the Commission's purposes and it will usually not be necessary for the Commission to exercise its information-gathering powers under Chapter 5, Part V.

⁷ Chapter 5, Part V

⁸ Section 73(2)

⁹ Section 73(3)

- However, it is to be noted that should the Commission decide to exercise its information gathering powers under Chapter 5, Part V, the Commission is required by section 79 to maintain a record of all information, evidence or documents received pursuant to the directions given under section 73(2) and the record shall be made available to the public.
- In addition, the Commission reserves the right to publish information received in the course of exercising its powers and functions under this Chapter if it is satisfied that the publication is consistent with the objects of this Act¹⁰. However, section 80(2) provides that the Commission shall consider the commercial interest of the parties to whom the information relates before publishing the information.
- After concluding an investigation, the Commission may prepare and give to the Minister a report which covers the conduct of the investigation, any findings made, and the evidence and other material on which those findings were based¹¹.
- At the end of its investigations, the Commission will seek to form a view on:
 - whether there is conduct which substantially lessens competition in a communications market;
 - whether there is a contravention of the Act; and
 - where appropriate, whether a licensee is in a dominant position in a communications market.

3.3 Third, a **decision making phase** in which the Commission will seek to determine what courses of action, if any, the Commission should take in light of the findings made during the investigative phase. Possible courses of action open to the Commission include:

- Instruct the respondent to cease the relevant conduct or, where appropriate, to implement remedial measures;

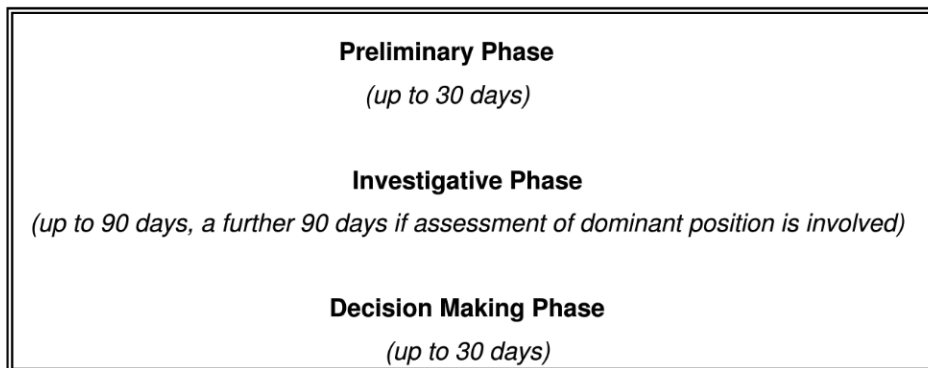
¹⁰ Section 80(1)

¹¹ Section 71

- Where the relevant licensee is found by the Commission to be in a dominant position in a communications market, the Commission may so determine and issue a direction to that licensee under section 139(1);
- Taking enforcement action for a contravention of a prohibition under Chapter 2, Part VI. This may involve the Commission seeking an interim or interlocutory injunction against any conduct prohibited in that Chapter, or obtaining the permission of the Public Prosecutor to commence prosecution proceedings for offences under the Act. The Sessions Court has jurisdiction to try any offence under the Act¹².

4. Indicative timeframes

The following diagram briefly sets out indicative timeframes which the Commission expects will apply to the process set out above. This is further elaborated in the **Attachment** to this document. The Commission will review these timeframes at an appropriate time in light of the Commission's experience in applying the processes set out in this paper.



5. Information requirements

- 5.1 The Commission considers that complainants and/or informants who allege anti-competitive conduct have an important role to play in providing information and assistance. While acknowledging that the Commission is

¹² Section 261

obliged to and shall investigate potentially anti-competitive conduct without assistance if necessary, the Commission will expect complainants or informants to provide all possible assistance to ensure a rapid response.

- 5.2 Therefore, when assessing complaints or allegations of anti-competitive conduct, the Commission will generally expect the complainant or informant to substantiate any allegations made, and demonstrate why the complainant or informant believes that a licensee has engaged in anti-competitive conduct.
- 5.3 The conduct alleged to have taken place should be clearly defined. The complainant should be specific, providing relevant details including dates, identities and location of the parties involved. As far as possible, the allegation should be substantiated by appropriate evidence, including copies of relevant documents.
- 5.4 Apart from the above, the Commission suggests that the complainant or informant address the following when formulating the complaint or allegation, providing information which the Commission might require to undertake a preliminary assessment of the complaint or allegation:
- Who are the respondent's competitors;
 - Who are the respondent's customers and suppliers?
 - Market share information either of the respondents or respondent's main competitors;
 - Has the complainant taken any measures to address the matter?

6. Contact with the Commission

- 6.1 Complaints of anti-competitive conduct may be brought to the attention of the Commission by a letter in writing addressed to:

The Chairman
Suruhanjaya Komunikasi dan Multimedia Malaysia
Level 11, Menara Dato' Onn
Putra World Trade Centre
45 Jalan Tun Ismail
50480 Kuala Lumpur

- 6.2 The Commission aims to give a written acknowledgement of any written complaints received by the Commission within two (2) weeks of receipt of the complaint.

29 February 2000

ATTACHMENT : PROCESS FLOW AND INDICATIVE TIMEFRAMES

Substantial Lessening of Competition

