ISSUES RELATING TO REGULATORY ENFORCEMENT IN THE COMMUNICATIONS SECTOR IN MALAYSIA

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Abstract

This paper seeks to examine and present a review of the correlation between the institutional structure of the regulatory body, in this case the Malaysian Communications and Multimedia Commission (MCMC), and the exercise of its enforcement powers provided under the Communications and Multimedia Act 1998 ('CMA 1998'), in the face of the convergence of telecommunication, broadcasting and multimedia industries in Malaysia. The focus of this paper is to highlight the various enforcement mechanisms envisaged under the CMA 1998 and the corresponding effectiveness in view of the institutional setting therein. Central to the instant study is the possibility and viability of civil enforcement of the various provisions enumerated under the CMA 1998, apart from the conventional state-criminal prosecution on any potential infringements.

Abstrak

Kertas projek ini bertujuan untuk menyelidik dan mempersembahkan satu tinjauan terhadap hubungan di antara struktur institusi sesebuah badan regulatori, dalam kes ini Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM), dan perlaksanaan kuasa penguatkuasaan yang diperuntukkan di bawah Akta Komunikasi dan Multimedia 1998 ('AKM 1998'), di dalam menghadapi pencantuman industri-industri telekomunikasi, penyiaran dan multimedia di Malaysia. Fokus kertas projek ini adalah untuk memberi sorotan terhadap mekanisma-mekanisma penguatkuasaan yang dibayangkan di bawah AKM 1998, dan kebekesanan mekanisma tersebut berlandaskan kepada latar belakang institusi baru ini. Tumpuan kertas projek ini ialah kemungkinan dan kesesuaian penguatkuasaan secara sivil ke atas pelbagai peruntukkan yang tercatit di bawah AKM 1998, selain daripada penguatkuasaan dalam bentuk jenayah yang lazimnya dijalankan oleh badan-badan penguatkuasaan ke atas sebarang kesalahan.

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Chapter 1: Background

The provision of telecommunication services in Malaysia, like any other form of public utilities, was historically a direct matter under the purview of the state since the colonial era, and later the federal government upon attainment of independence of the country. Myriad factors may have contributed to this historical development. The scale of investment and technology required as well as public interest seems to account predominantly for the state direct provision of the services concerned[1].

Nevertheless, industrialization and the resultant rapid economic development experienced by the country in the last two decades has evident trend of escalating demand for better quality of the service provision as well as accessibility to the public utilities, which has now became basic necessity of the modern society. This has, by and large, posted an eminent challenge on the state's ability and capacity to cope with the increasing expectation of the public on the service delivery of public utilities. This scenario does not come by surprise as witnessed in other developing countries, and that of other developed nations[2].

Alongside with the economic development, fundamental structural revolution to the telecommunication market was only introduced, mainly attributed to the launched of the *Multimedia Super Corridor (MSC)* project in 1997, one of the main thrust for the accomplishment of a developed nation status as envisioned under the *Vision 2020* aspiration. In deed, prior to 1997, deregulation of the telecommunication industry in Malaysia has started with the proliferation of the concept of liberalization of state-owned public utilities in the 80s', as advocated in other jurisdictions. The *Jabatan Telekom*

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[1] See for example Legal and Institutional Aspects of Regulation – Online Module 6, ITU-infoDev ICT Regulation Toolkit, Chapter 2 at pp.4-7. Available online at www.ictregulationtoolkit.org as of May 2008. The chapter provides a summary background on the gradual transition of the Telecommunications industry from the state-owned monopoly environment to the free-competition environment.

[2] See Note [1] above

Malaysia (JTM) was formed as an agency tasked with the provision of telecommunication services in the country, saw the first step in liberalizing the telecommunication market[3].

Dissolution of the *JTM*, the natural monopoly in the telecommunication market in the country, which ensued much later into a corporate entity, *Telekom Malaysia Bhd (Telekom)* inherited statutorily the incumbent *JTM* legal status. It has nevertheless allowed the initial liberalization of the telecommunication market by introducing the element of market competition to substitute the sole monopolistic model[4]. At that stage, telecommunication services were characterized by purely voice services, be it fixed line voice services or the limited provision of cellular voice services[5]. *Telekom* evolved as the dominant player in the market, largely due to the well-built incumbent legacy network it inherited[6].

Subsequently, technological advancement in the global communications industry, both the hardware peripheral as well as the supporting software development introduced new advanced services to the customer that were once not imaginable. The new wave of multimedia content delivery over the communication network has changed the way of modern life in all aspects thinkable, greatly manifested first in the form of electronic commerce, then propagated to other perspective of personal and daily life, such as education, leisure and community network[7]. Against this backdrop, from being viewed purely as the enabler for the delivery of advance multimedia content and services,

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[3] For detail elaboration on the evolution of the liberalization of the telecommunication market in Malaysia, see note [10] below.
[4] See MCMC (2007). Industry Report 2007 (Volume 2): A Comparative of Telecommunications Trends, pp. 5 – 10.
[5] See MCMC (2004). Communication and Multimedia: Market and Financial Review 3rd Quarter 2004, pp. 6-7.
[6] Telekom was reported as the main industry contributor to the Bursa Malaysia in terms of its market capitalization and contribution. See MCMC (2004). Market Performance: C & M Bulletin 2004 pp. 7 -8.
[7] See note [4] at pp. 10 – 15. The report evaluated the recent technological advancement and provides general information on the new trend of service delivery worldwide.

telecommunication industry proved in itself it has much economic value yet to be unleashed with the convergence of the multimedia and the network industry[8].

It was premised on this very background, which was also coherent with the government policy under the *MSC* project that new regulatory regime was introduced in response to the converged communication and multimedia industry[9]. This was crystallized by streamlining the function of the then *JTM*, in the telecommunication sector, and the Ministry of Information (MOI), which was in charge of the broadcasting sector, under the Malaysian Communications and Multimedia Commission ('the MCMC') established under the Malaysian Communications and Multimedia Commission Act 1998 ('CMCA 1998'). Parallel to the development was the corresponding consolidation of the Telecommunications Act 1950 and the Broadcasting Act 1988 into the Communications and Multimedia Act 1998 ('CMA 1998')[10]. Detail of the new regulatory regime established will be discussed in the next section.

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[8] See MCMC (2007). Chapter 7: Steps into the Future – An Outlook, Industry Performance Report 2006, pp. 138 -140.
[9] See the Minister's address to the Dewan Rakyat during the 2nd and 3rd reading of the Communications and Multimedia Bill 1998 on 20 Julai 1998 (Hansard at page 45)
[10] See Angeline Lee (2001). Convergence in Telecom, Broadcasting and IT: A Comparative Analysis of Regulatory Approaches in Malaysia, Hong Kong and Singapore. *Singapore Journal of International & Comparative Law (2001) 5 pp 674 – 695.*

Chapter 2: The New Regulatory Framework

2.1 *'Regulatory Framework'* defines

The author contends that it may well serve the purpose in our current pursuit to first endeavor a brief discussion on the various forms of *Regulatory Framework*, which has lucidly colored the modern system of governmental administration. Literatures by political scientists on this topic are never lacking. In fact, central to these literatures is the argument on the most suitable regulatory regime for the effective governmental administration in a given social-political-economy setting. By and large, it seems that the concept of *regulation* is generally said to represent certain form of state intervention to influence the industry, market or community behavior to achieve specific public goals[11].

It is crucial to appreciate that the key to this loose definition of *regulation* is that the industry, market or community concern is presumed to be autonomous upon its initial inception. In another word, the autonomous system is subjected to the function of the free market forces, or commonly referred to as the 'invisible hand' in economy term. State intervention in the form of regulation is therefore mostly perceived only desirable to achieve specific public goals, the benefits of which should, as far as possible outweighs the costs of compliance. While this presumption may be true to certain extent, it does not, some argues, reflect a thorough representation of the concept of *regulation*[12].

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[11] See I. Bartle & P. Vass (2005). Self-Regulation and the Regulatory State: A Survey of Policy and Practice. *Centre for the Study of Regulated Industries, The University of Bath 2005.* J. Braithwaite (2006). Responsive Regulation and Developing Economies. *World Development Vol.34, No.5, pp.884 – 898, 2006.* Better Regulation Task Force (2001). Economic Regulation, July 2001. Commission of the European Communities (2001). European Governance: A White Paper, Brussels, 25 July 2001. R. Mayntz (2001). From Government to Governance: Political Steering in Modern Societies.

[12] See Final Report: Study on Co-Regulation Measures in the Media Sector, conducted by the Hans-Bredow-Institut for Media Research at the University of Hamburg, a study undertaken for the European Commission, Directorate Information Society and Media, Unit A1, Audiovisual and Media Policies. The draft published on 13 Jan 2006.

Indeed, one may find that this form of state intervention varies in a spectrum dependant on the degree and level of state intervention. Conversely, it is also suggested that the spectrum of *regulation* resemble the different level of participation between both the regulator and the subject of *regulation* i.e. the regulated. Based on this basic idea literatures has flourished into various models of *regulatory framework*. While researches into this area has been abundant, with the necessary diversity in the findings, mostly attributed to their respective model of applicability, to summarize the same has not been an easy job in any event.

To throw light in this aspect, common features of most classes of *regulatory framework* researched may be conveniently categorized into four categories[13], namely (i) *Statutory Regulation*, (ii) *Co-Regulation*, (iii) *Self-Regulation*, and (iv) *No Regulation*. Each of the above-named categories has their own attributes and characteristics, and necessarily connotes their respective advantages and shortcomings. Application of any form of the *regulatory framework* would depend on the maturity of the particular market or industry under consideration[14].

Ultimately, one need to realize that variant based on the categories of basic frameworks listed above are always possible for any framework concern is in its very own nature representing a mean to achieve specific end-result envisaged. Therefore, discussion on the *regulatory framework* would inescapably entails scrutiny of the efficiency and effectiveness of the framework in achieving the objectives set, measured against the

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[13] See Better Regulation Task Force (2000). Alternatives to State Regulation. July 2000.
[14] See Better Regulation Task Force (2005). Better Regulation for Civil Society: Making Life Easier for Those Who Helps Others. Published online on November 2005, available at www.brtf.gov.uk

segment of market by which it operates and the given social-political-economy setting at that given point in time[15].

Be that as it may, bearing in mind the caution elaborated in the preceding paragraph, attributes and characteristics of each of the categories may be discussed for the purpose of our instant investigation. *Statutory Regulation* connotes the direct and complete state control over the subject matter. In this regard, the important functions of policy making, supervision, enforcement and adjudication are all within the state direct purview. *Statutory Regulation* has always been referred to as the 'traditional' or the 'command-and-control' regime for the unidirectional policing of the regulated. This single channel system is at time being criticized for its rigid command structure, however, there are research that tends to support its application in certain market condition, i.e. market with little competition, and in instances to achieve long-term objectives for the public benefit.

Co-Regulation on the other hand is a semblance of the 'relaxed' *Statutory Regulation* and an 'extension' of the *Self-Regulation*. As its name 'Co' suggests, *Co-Regulation* normally operates on the basis of participation of the regulated, in varying degree in either the policy formation, supervision, enforcement and adjudication process. In its most common form, the policy making process is reserved exclusively to the state whereas the execution, monitoring and enforcement is entrusted to the *Co-Regulatory* body with certain oversight mechanism by the state installed as backstop. Also, the *Co-Regulatory* body will normally derives its legal recognition from specific principal statutory instruments enacted by the Parliament that spell out its powers, functions, obligations and composition. The most important feature of *Co-Regulatory* body is perhaps its ability to prosecute either in the civil or the criminal nature for non-compliance of sanctions on the regulated.

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[15] See C.C. Novion (2003). Best Practices on Regulatory Impact Analysis in OECD Countries presented at the conference *Regulatory Governance Initiative in South East Europe, Bulgaria, 23*

Whereas, *Self-Regulation*[16] has been commonly used to denote two broad scenarios: the *Regulated Self-Regulation* and the *Pure Self-Regulation.* In the formal, the regulatory body receives legal recognition in the form of statutory provision for its existence. In most instances, the regulatory body has a legal entity with specific powers, functions and objectives to be delivered that has legal backing. However, it distinguishes from *Co-Regulation* in the sense of the legal binding effect of sanctions issued on the regulated. Typical form of sanctions, so to speak, is through voluntary industry code, voluntary agreement, best practices, general guidelines, and other form of non-binding instruments. This characteristic holds true for most of the *Co-Regulatory* body with the exception to professional body such as the legal, medical, engineering and accountancy where the concept of high professional ethics warrant formal binding effect on sanction preferred on non-compliance[17].

In the latter, *Pure Self-Regulation* does not, in most cases, receive formal or legal recognition of its purpose and functions, as mostly it existed as a form of special interest group, watchdog or pressure group. This latter form of *Self-Regulation* is considered by many the true mechanisms in an autonomous market with self-functioning and self-corrective measures[18]. Despite the dual facets of *Self-Regulation*, and the inherent nature of non-binding sanctioning power, in practice, it is observed that the perceived threats of more severe form of government intervention, through more direct means of enforcement

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Jan 2003.

[16] See D. Brereton (2002). The Role of Self-Regulation in Improving Corporate Social Performance: The Case of the Mining Industry. Presented to the Australian Institute of Criminology Conference on *Current Issues in Regulation: Enforcement and Compliance, Melbourne, September 2002.*

[17] Other variant of co-regulatory framework is seen in S. Turnbull (2007). The Imperative and Benefits of Introducing Outcome based Privatized Co-Regulation. *International of Self-Governance.* Available online at www.linkedin.com

[18] See evaluation in M. Sidel (2008). The Promise and Limits of Collective Action for Nonprofit Self-Regulation: Evidence from Asia. *University of Iowa Legal Studies Research Paper Number 08-06.*

often motivate compliance even though there is no *ex ante* legal backstop of enforcement[19].

As alluded to in the foregoing paragraph, the demarcation between the *Co-Regulation* and the *Self-Regulation* category may not, at time be so straightforward as discussed above. The gray area between the two is sometime called the *Quasi-Regulation*. What can be discerned with based on literatures is this: *Quasi-Regulation* represents an intermediate regime between the two ends of *Co-Regulation* and *Self-Regulation*. It distinguishes from one another based on the characteristic it resembles that may tilts between the two end of the scale. Yet again, the choice of the attributes that characterize the regime has to be suited to the market conditions and the objectives it envisaged to achieve[20].

Indeed, the collusion, or rather fusion between the *Co-Regulation* and *Self-Regulation* as crystallizes in the form of *Quasi-Regulation* is indispensable in practice. The rationale for this, some suggest, is that in order to enjoy the fullest benefits associate with the moving away from the *Command-and-Control* regulatory regime, fuzziness of the same is invariable. Benefits, primarily in the form of effective knowledge and expertise sharing, flexibility and adaptability, lower regulatory and regulatory compliance costs, and better market function to avoid market failure, entails the suitable adaptation of the regime as it evolves in response to the changing market conditions.

This reasoning that captures the element of adaptation and evolution of the *regulatory regime* also finds it support in researches that advocate the concept of the *cycle of*

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[19] See N. Lundblad & A. Kiefer (2002). The Economy Efficiency of Self-Regulation: Two Case Studies. Presented at 17th BILETA Annual Conference April 2002 at Free University, Amsterdam.
[20] See OFCOM (2004). OFCOM Statement on Criteria for Promoting Effective Co and Self-regulation. And OFCOM (2008). OFCOM Consultation on Initial Assessment of When to Adopt Co. and Self-regulation. Both available at www.ofcom.gov.uk

regulatory evolution[21]. Main thrust to this concept rested on the argument that *regulatory* in itself is not a static process contrary to common believe. As the market evolves with time and the conditions vary, the corresponding *regulatory regime* ought to be revised to respond to changes, lest it shall risk outliving progress. According to this school of thought, the single dimensional analysis of the categories of *Regulatory Framework* as above first indicated, may be deceiving into believe that *regulation* is static.

While there may necessary be time frame for operation of a particular category of the regime, it concedes that for any given market, it will inescapably experiences the transient transition from the one extreme end of *Statutory Regulation* to the other end of *Self-Regulation*, or *vice versa*. The inherent weaknesses underpin each of this evolution stages has been accounted for such eventuality: for when effectiveness and efficiency has reached the stage where it proves a disservice to the aim it intends to achieve, and market failure occurs, direct state intervention ensues and the cycle perpetuates[22]. Diversion from the *cycle*, has not find any concrete support in literatures, while some segment maintained that healthy competition may sounds a potential solution to the perpetuity of the *cycle* and an *en route* to the ultimate solution to remain in the balance or preferred state of *Quasi-Regulation*.

The author contends that the basic concept of *Regulatory Framework* elaborately discussed above suffices for the purpose of the instant study on the *regulatory framework* of the telecommunication industry in Malaysia, which will be discussed in the next section.

2.2 Framework under the *Telecommunications Act 1950 and Broadcasting Act 1988* (the 'old framework')

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[21] Some of the problems as highlighted by S.H. Zheng (2003). A Discourse on the Legal Framework of China's Public Utility Enterprises. *Singapore Journal of International & Comparative Law (2003) 7 pp. 86 – 101.*

[22] See M. Klein & N. Roger (1994). Back to the Future: The Potential in Infrastructure Privatisation. Public Policy for the Private Sector, The World Bank FDP Note No.30. 2-4

Before embarking further discussion on the new regulatory regime, it is only appropriate to gauge some basic understanding on the old regulatory regime provided under the repealed *Telecommunications Act 1950* and the *Broadcasting Act 1988* for better appreciation of the fundamental changes brought about by the new legislation. Under the old telecommunication regime, the framework consists of three main components, namely (i) the Government through the exercise of the powers by the Minister, (ii) the Director General of the Telecommunication and (iii) the potential service providers.

Part II, IIA and V of the repealed *Telecommunications Act 1950*[23] jointly provide the institutional set-up of the framework, in terms of the power and function of the Minister, the Director General of Telecommunications and the separate financial structure upon which the Director General functions. The remaining Part III, IV, and VI provide the sanction, penalties and enforcement of the repealed Act. To appreciate the nature of the *regulatory regime* under the said Act, Part II is particularly apposite where it states:

> *3.* *(1)* ***The Government shall have the exclusive privilege of establishing, maintaining and working telecommunications in Malaysia.***
>
> *...*
>
> *(3)* ***The Minister may grant a license*** *on such conditions and in consideration of such payments as he thinks fit to* ***any person to establish, maintain or work a telecommunications*** *on any part of Malaysia...(emphasis added)*

[23] Part II stipulates the 'Privileges and Powers of the Government' in respect to the 'exclusive privilege' of the government in relation to any matters related to provision of telecommunications services, including the grant of license and the institutional setting and powers of the Minister and Director General thereof. Part IIA provides the establishment and operation of the Telecommunication Fund, whereas Part V provides for the 'exclusive privilege' of the government in regard to radiocommunication services.

Further, it is compulsory under the regime that the Minister is to appoint the Director General of Telecommunications[24]. The duties and functions of the Director General are provided as:

> *3B (1) It shall be the duty and function of the Director General –*
>
> ***(a) to exercise regulatory functions in respect of the conduct of telecommunication services in Malaysia including the establishment of standards and their enforcement;***
> *(b) to **regulate** the use of the radio frequency spectrum;*
> *(c) to **regulate** the national use of the geostationary-satellite orbit…*
> *(d) to represent the Government in respect of international telecommunication matters which are on a government-to-government basis and to do all things necessary for this purpose;*
> *(e) to **promote** the provision of international transit services by persons providing telecommunication services in Malaysia;*
> ***(f) to promote the interests of consumers, purchasers and other users of the telecommunication services or telecommunication apparatus in Malaysia (including in particular, those who are disabled) in respect of the prices charged for, and the quality and variety of, services provided and apparatus supplied;***
> ***(g) to encourage major users of telecommunication services whose places of business are outside Malaysia to establish places of business in Malaysia;***
> ***(h) to promote research into and the development and use of new techniques by persons engaged in commercial activities connected with telecommunications in Malaysia;***
> ***(i) to enable such persons to establish and maintain a leading position in the field of telecommunications.***
>
> *(Emphasis added)*

In addition thereto, it is also provided that the Director General is to comply with the following policy objectives:

> *3B (2) In discharging the duties imposed on him by subsection (1), the Director General shall have regard to –*
>
> ***(a) efficiency and economy;***
> ***(b) satisfying all reasonable demands for telecommunication services;***
> ***(c) fostering the development and expansion of the telecommunication service of the world in collaboration with other countries and international organizations concerned with world telecommunications;***

[24] Section 3A Telecommunications Act 1950

(d) *the promotion of measures for the safety of life through telecommunications;*
(e) *the provision of domestic and overseas telecommunication services at rate consistent with efficient service;*
(f) *the promotion of research in telecommunications, in particular, the peaceful uses of telecommunication technology including that relating to the geostationary-satellite orbit; and*
(g) *collaboration with educational institutions for the promotion of technical education in the field of telecommunications.*

(Emphasis added)

In scrutinizing Part II of the Act, one need to remember that the repealed Act in its original form reserved the powers in any dealing with Telecommunications to the government, and impliedly the Minister, as it said, *exclusively*. This is entirely unsurprising given the specific historical setting, considering the fact that any other form of public utilities, e.g. electricity, water, postal service etc. are all perceived as critical infrastructure of the state, more so under emergency and war state. In addition to that, the central controlled and planned economy system inherited since the colonial era has its pivotal role to play in this legacy development.

The residuary power of the Minister to grant a license for the operation of telecommunications and the appointment of the Director General came by way of amendment decades after the coming into force of the original Act. This later enactment symbolizes, knowingly or unknowingly, the preparatory steps toward further liberalization of the telecommunications industry. The arrangement of the repealed Act reflects the relatively simple or rather the monopolistic market condition at that time, for obvious reason that is coherent with the attitude of the government of the day as alluded to earlier.

It may be seem at fleeting glimpse that the repealed Act had very much akin to that of *Statutory Regulation*, in view of the substantial reservation of powers vested in the Minister. Based on this, it seems that while the Minister *may* allow the provision of

telecommunications service to a valid licensee appointed under the Act, this residuary power is not comparable to the exclusivity enjoys by the government. More so, while the licensee may *'establish, maintain or work a telecommunications'*, in retaining the exclusivity, the government has the final say in terms and conditions of the provision, that would definitely ensure better, if not full compliance and delivery of any policy envisaged by the government.

This is done, as evident, fortified in respect of the duties and functions delegated to the Director General. In fact, it can be considered that subsection 2 to section 3B has unequivocally postulated the policy objectives of the government, delegated for its execution upon the Director General. Hence, the overriding principle of the whole regime hinges on the establishment of an *efficient and cost economical regulatory system in paving the way in fostering the development and expansion of telecommunications services on the one hand, and promoting the interest of the customers on the other.* Nonetheless, it is observed that while customer interest has been categorically named as one of the many policy objectives, it has not fully attained what is perceived as the modern idea of *customer right to access* for the interest recognized then is limited to the basic rate control.

Though under the repealed regime the Director General has been tasked with the delegated functions previously exercisable directly by the Minister, the ultimate control still remained with the Minister. This is illustrative, particularly so in the following aspects: (i) power to make regulations in all matters of telecommunications[25]; (ii) decision on the grant or revocation of license, and the specific terms and conditions[26]; (iii) the determination of the maximum amount of the annual development expenditure by the Minister and the

[25] See s.7 of the repealed Act.
[26] S.3 and 8 of the repealed Act.

Minister of Finance from the *Telecommunication Fund* for the Director General[27]; and (iv) the Minister's duty to report to the Parliament[28].

It is also noted that enforcement of the repealed Act has been largely entrusted on the Director General[29]. Contravention of the sanctions prescribed entails pecuniary penalty in the form of fines in most cases, with the more severe offence being treated as criminal in nature where imprisonment sentence may be imposed upon conviction at the criminal court[30]. The offences sanctioned under the repealed Act essentially dealt with physical mischief in the form of fraud or damage caused to the telecommunications system, including the content or messages being transmitted, apart from the offence of unlicensed service provision[31].

On the other hand, the *Broadcasting Act 1988* has remained in a rather crude form where apart from reserving the exclusivity of any form of broadcast activities and its associate contents to the government, *regulatory framework* is typically within the Minister direct control[32]. Enforcement, predominantly on the licensing aspect and the use of broadcast and reception related apparatus, was carried out by authorized officers appointed by the Minister[33]. Liability of offences under the Act is strict and incurred financial sanction in most cases, with imprisonment sentence reserved as alternative for more severe infringement[34].

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[27] S. 9D, 9E of the repealed Act.
[28] S. 9L of the repealed Act.
[29] See Part IV, V and VI on the enforcement of the various provisions under the repealed Act.
[30] The criminal nature of the offence is evident from the manner in which investigation is to be carried out. The extensive powers to conduct search with or without warrant, examination of witnesses and the admissibility of the evidence thereof, and the prosecution of the offender witnessed the assimilation of the procedure practiced by the police under criminal investigation.
[31] see Part IV of the repealed Act which provides for the penalties for offences stipulated therein which run from s.21 until s.33 of the Act.
[32] Part II, III and IV of the Act stipulated the powers of the Minister in relation to the license to broadcast and matters related thereto.
[33] See Part V of the Act.
[34] See s. 18 of the Act which provides the penalty under the Act.

2.3 Framework under the *Malaysian Communications and Multimedia Commission Act 1998 and the Communications and Multimedia Act 1998* (the 'new framework')

Under the new regulatory regime, the platform consists of an enriched number of actors, evidenced the seemingly more complex communications market, in line with the international trend[35]. As explained, towards the end of the 20th century, technology advancement has brought about the convergence in the technical aspect of the telecommunications and broadcasting, and served an irresistible impetus for the subsequent convergence in the advance service provisions, which entails the necessary market combination and structural fusion. This has allowed the once separate industry, and its stakeholders to interplay within this new common platform.

In response to this wave of convergence within the two industries, the CMA and CMCA 1998 jointly provide a seemingly flexible regime, both in terms of the *regulatory structure* and *regulatory instruments* that is adaptable to the highly dynamic market conditions. Underpinning this flexibility is the concept of 'technology neutrality', whereby instead of market segmentation based on technology, that proved too fast to be obsolete, rather the new platform gravitates toward the 'activities-oriented' segregation and regulation. Hence, from the once horizontal-technology-based regime, the new *regulatory regime* introduces the vertical-activities layer-based regime that is better accommodative to rapid technology advancement[36].

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[35] The international trend of moving towards a 'converged regulatory mechanism' should also be read with the parallel and prevailing deregulation of the state-own monopoly industry. In gist, the process of deregulation has its historical justification, which was predominantly based on the quest for better distributive and allocative efficiency in terms of the investment and provision of quality, and equitable telecommunications services to the larger masses of the society. See Chapter 1, 'The New Paradigm for Network Utilities', Reforming Infrastructure: Privatization, Regulation and Competition, World Bank Policy Research Report 2004 (co-publication with Oxford University Press) available online at www.worldbank.org as of May 2008.

[36] More detail on convergence of the technology and industry, as well as the corresponding regulatory and institutional impacts, see US experience outlined by P. Larouche (2003). Dealing with Convergence at the International Level. *Singapore Law Review (2003) 23 Sing LR 85 -114.*

In fact, in view of the emergence of this complex network of stakeholders' interconnection and the daunting *regulatory* challenge foreseeable, the new piece of legislation demonstrates great wisdom in that, while arguably it had been enshrined and adopted in the repealed *old regime*, it spelt out the clear policy objectives as common aspiration for all stakeholders concerned under the CMA 1998. This general, yet clear policy objectives is crucial in two respects, firstly it promotes and assures regulatory certainty, particularly so in new service areas that requires huge investment in both the advance infrastructure upgrade and innovation of advance services. Secondly, it provides a yardstick for the measurement of the *Regulatory Impact Analysis* for any regulation introduced by the regulator.

These objectives are termed *'the 10 National Policy Objectives for the Communications and Multimedia Industry'* which are as follows:

(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 the long-term benefit of the end user;*

(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.*

On top of the 10 National Policy Objectives is the crucial statutory assurance on prohibition of *Internet* censorship[37]. These policy objectives, when read together, indicate a new developmental aspect of the country that presupposes necessary economic and social transformation that is partly contributory to the master plan both under the *MSC project* and the nation's long term vision. Indeed, it may be observed that the CMA 1998 regime encompasses the whole spectrum of economic regulation, technical regulation, consumer protection, and social regulation towards achieving the policy objectives. The policy objectives therefore serve as the regulatory umbrella where the separate subsection of regulations develops its context. Subsequently, this form of 'objective-oriented' model canvasses a pyramid of *regulatory objectives* that evolves and obligated on all stakeholders concerned as envisaged under the CMA and CMCA 1998[38].

First and foremost, the Minister while still retains the power in relation to policy setting and certain other crucial subject matters of politically sensitive in nature, including licensing and spectrum assignment *per se*, in exercising the ministerial powers and functions are

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[37] See s.3(3) CMA 1998.

[38] Indeed, the various aspects of regulation e.g. termed under the label of economic, technical, consumer, and social regulation under the new regime, could best translate the very essence of common regulatory objectives endorsed universally as crucial to facilitate the transition process from the state-own monopoly to free-competition market environment, which in turn requires the adept balancing between healthy market competition and consumer welfare, with the state retaining the backstop function to prevent market failure.

statute-bound to ensure compliance with the policy objective[39]. The MCMC on the other hand, had more stringent yet concise duties and functions, which represent detail translation based on the basic policy objectives, to comply and execute as stipulated under the new regime. Amongst these functions are:

(a) to advise the Minister on all matters concerning the national policy objectives for communications and multimedia activities;

(b) to implement and enforce the provisions of the communications and multimedia laws;

(c) to regulate all matters relating to communications and multimedia activities not provided for in the communications and multimedia law;

(d) to consider and recommend reforms to the communications and multimedia laws;

(e) to supervise and monitor communications and multimedia activities;

(f) to encourage and promote the development of the communications and multimedia industry including in the area of research and training;

(g) to encourage and promote self-regulation in the communications and multimedia industry;

(h) to promote and maintain the integrity of all persons licensed or otherwise authorized under the communications and multimedia laws;

(i) to render assistance in any form to, and to promote cooperation and coordination amongst, persons engaged in communications and multimedia activities; and

(j) to carry out any function under any written law as may be prescribed by the Minister by notification published in the Gazatte.

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[39] The Minister decision on all matters is required to be consistent with the objectives of the Act, for example as provided under s.7(2) CMA 1998 which provides that the Ministerial Direction shall be

Industry forums in the form of *Access Forum, Technical and Standard Forum, Content Forum* and *Consumer Forum* on the other hand, has been established under the new regime as provided under the CMA 1998. These statute-based forums share the common objective to promote self-regulation within the ambit of their respective narrow applications. Industrial codes based on voluntary adoption have been developed and registered with the MCMC[40]. It is within this well-defined institutional structure and the corresponding *pyramid of policy objectives* that the new regime operates, which may be conveniently summarized in the following diagrams:

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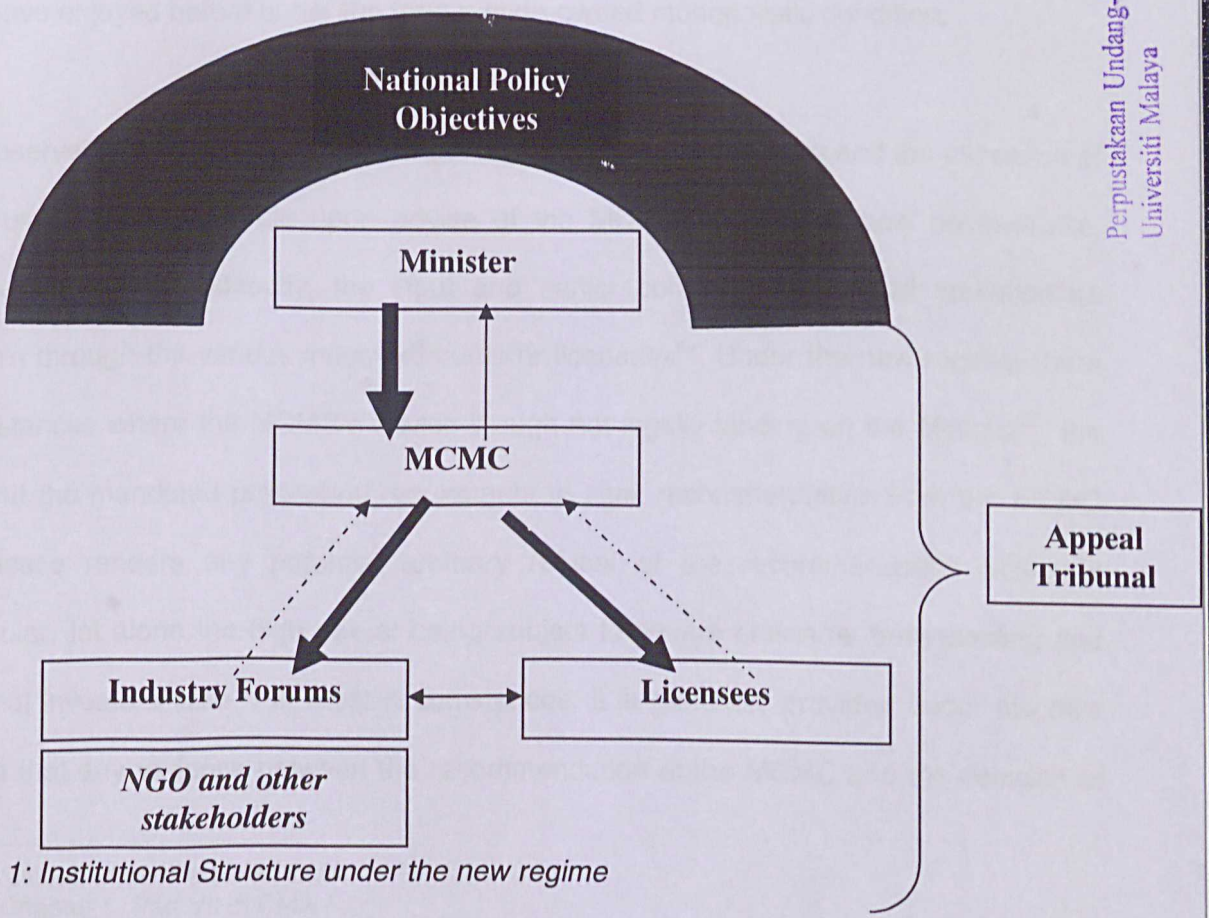

Figure 1: Institutional Structure under the new regime

consistent with the objects of the Act.

[40] Similar institutional set-up is evident in advance countries. See European Commission (2004). Self-regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis. *Programme in Comparative Media Law and Policy, Oxford University Centre for Socio-Legal Studies, 30 April 2004.*

Based on the foregoing new institutional structure articulated in *Figure 1*, it is evident that the new *regulatory regime* introduced under the CMA and CMCA 1998 envisaged a balance semblance of different *regulatory* models at work. As illustrated earlier, apart from the various industrial forums that operate on the premise of *self-regulation*, the Minister's residual power in matters pertaining to the grant of specific license[41] and spectrum allocation and any conditions pertaining thereto[42], two of the most crucial aspects of telecommunication and broadcasting provision which signify in a subtle manner the ability of the State to determine the level of market competition, registered the direct state interventionist approach. This direct state intervention is not however absolute as what they have enjoyed before under the former state-owned monopolistic condition.

It is observed that even in these two most crucial aspects of licensing and the allocation of spectrum, the Minister acts upon advise of the MCMC[43], which in turn necessitates, despite sometimes indirectly, the input and earlier consultation from all stakeholders concern through the various industry forums or licensees[44]. Under the new regime, there are instances where the MCMC's advice though not legally binding on the Minister[45], the fact that the mandated procedural requirement to seek recommendation from the MCMC in practice renders any potential arbitrary refusal of the recommendation politically unpopular, let alone the high risk of being subject to severe criticisms from existing and potential investors alike[46]. In most circumstances, it is generally provided under the new regime that any variance between the recommendation of the MCMC and the decision of

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[41] As provided under Part IV of CMA
[42] See Chapter 1, Part VII of CMA
[43] See s.29, and s.172 of CMA.
[44] This is done through instruments such as Public Inquiry, Public Consultation or the various industry dialogues as has been consistently held annually from 2000-2006.
[45] For example, the Minister is not mandated by law to consult any licensees or the Commission for the issuance of Ministerial Determination, as provided under s.10 of CMA.
[46] See Explanatory Statement No.21 and 22 of the Communications and Multimedia Bill 1998 (D.R. 15/98) presented for the first reading in the Dewan Rakyat on 13 July 1998.

the Minister shall be notified to the parties concerned in writing, detailing the reasons for such decision and the avenues[47], in certain contexts, of review[48] or appeal against such decision[49].

On the other hand, as a general observation, suffice here to say that the new regime envisaged the MCMC to function under the *Co-regulatory* model even though the MCMC is tasked, amongst others, to promote *self-regulation* of the industry. In this sense, the MCMC has predominantly engaged the participatory mode from all stakeholders concern in the *regulatory process*. It is notable that under this new regime, the task of policy setting and review is reserved to the Ministry whereas the MCMC is interested solely on the implementation and enforcement which translates the policy identified into actual roll-out[50]. This form of functional delineation or separation between the Ministry and the MCMC resonates in coherent with the international best practice of ministerial accountability[51], in term of policy direction, to the electorates through the Parliament. Whereas the MCMC, the non-elected administrative arm is deemed most appropriate to restraint its functions to the implementation and enforcement under the modern governmental machinery that ascribed with the doctrine of separation of powers, and the accountability thereof[52]. The interplay between these different *regulatory* models is best illustrated in the figure below:

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[47] e.g. s. 30(6) and (7) of CMA.
[48] Review by the Appeal Tribunal as provided under s.18 of CMA.
[49] See Explanatory Statement No. 45 and 46 which explained the relationship between the self-regulatory Industrial Forum and the role of the Minister envisaged under such model.
[50] See A. Henten, R. Samarajiwa, W. H. Melody (2003). Designing Next Generation Telecom Regulation: ICT Convergence or Multisector Utility? Report on The World Dialogue on Regulation for Network Economies (WDR) 2002, Chapter 2 and 8.
[51] See W. Min (1999). Telecommunications Regulations: Institutional Structures and Responsibilities. Working Party on Telecommunication and Information Services Policies, Directorate for Science, Technology and Industry, OECD, 11-21.
[52] See Better Regulation Task Force (2003). Independent Regulator, October 2003. Available online at www.brtf.gov.uk

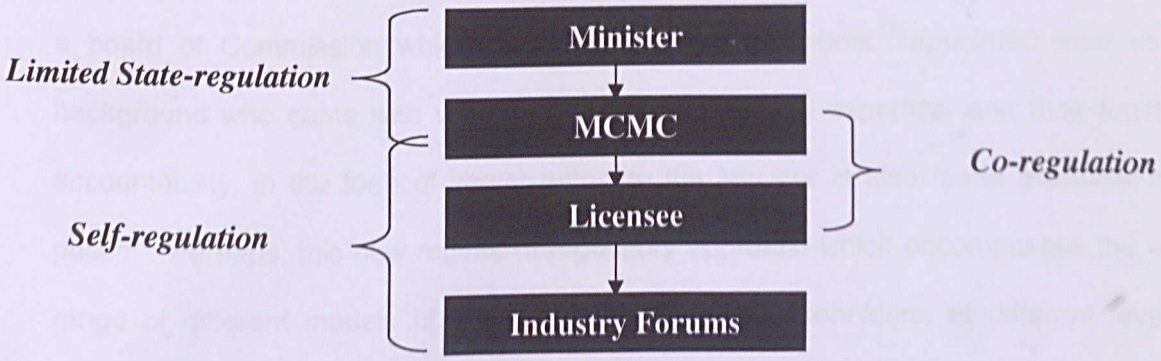

Figure 2: Interplay of regulatory models on different levels of stakeholders' participation

Conversely, view from this perspective of retention of residual Minister powers and functions, albeit limited in scope but far-reaching in its impact, it may seems that the *autonomous* or the 'independence' of the regulator, i.e. the MCMC from any potential political pressure or other interested stakeholders[53], which is referred sometimes as 'regulatory capture', may not be totally insulated as advocated by some academicians[54]. It may further appears that under the new regime the MCMC still needs to obtain approval from the Minister concern in regard to the yearly budget, both for the operational and developmental purposes. As such, financial autonomous dictates that the MCMC still subject to the direct purview of the Minister in this narrow sense.

The issue of independence[55] of the MCMC however necessarily calls for the scrutiny of other forms of safeguard prescribed under the new regime, the majority of which is procedural in nature, which dictates the openness and transparency of the decision making process which engaged, in most cases, stakeholders public consultation and

[53] See A. Estache, A. Goicoechea & M. Manacorda. (2006). Telecommunications Performance, Reforms and Governance. World Bank Policy Research Paper 3822. 11-17.
[54] See T. Bakovic, B. Tenenbaum & F. Woolf. (2003). Regulation by Contract: A New Way to Privatize Electricity Distribution. World Bank Working Paper No.14, Chapter 2, 31-39.
[55] See A. Estache. (1997). Designing Regulatory Institutions for Infrastructure – Lessons from Argentina. Public Policy for the Private Sector, The World Bank FDP Note No.114. 1-4

inquiry[56]. Apart from that, theoretically the decision-making unit of the MCMC comprises of a board of Commission which made up of board members[57] appointed from various background who came with vast industry experience and expertise, and their functional accountability, in the form of yearly report to the Minister is also made available to the public[58]. Perhaps, this new regime of *regulatory* approach which encompasses the whole range of different models of *regulation* for different stakeholders, at different levels of policy selection and decision making process as illustrated in *Figure 2* above, manifests the wisdom of the drafter in view of the prevailing political, economic and social context peculiar to the local situation, with the ultimate aim of gravitates towards *self-regulation* once the market attains its equilibrium in the long run[59].

To summarize, the main attributes of the institutional structure prescribed under the new regime could be summed up in the following diagram:

Attributes	Remarks
1. Establishment of the regulator and its mandate	
By detailed legislation?	Yes
Does legislation specify regulator's responsibilities in detail?	Yes – CMA and CMCA 1998
Does it balance discretionary powers with predictability?	Yes – clear procedural requirements are mandated
Does it clearly define roles of different institutions?	Yes – Minister, MCMC, licensees and Industry Forums
2. Type of governing body of the regulator	
Sector specific?	Yes – converged industry of communications and broadcasting
Collegial board?	Yes – the board of

[56] As provided under Chapter 3, Part V which stipulates the powers of the Commission to conduct Inquiry and the procedures governing exercise of the same.
[57] See Part II CMCA which provides for the establishment of the board of commissioners.
[58] See s.19 CMCA.
[59] The new regime is very similar to the Australian model. See evaluation on the Australian model in Senate Environment, Communications, Information Technology and the Arts References Committee, *The Australian Telecommunications Network, August 2004.* And Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in Broadband Services, August 2004*

	Commissioners
Separated from political and business interest?	Yes
3. Autonomous of decision making by the regulator	
Can decision be appealed?	Yes – the industry specific Appeal Tribunal
4. Enforcement powers of the regulator	
Clearly defined powers?	Yes
Information gathering powers?	Yes
Power to impose fines and sanctions?	Yes
Arbitration and disputes resolution?	Yes
Award, enforce and revoke license?	Yes – exercisable through recommendation to the Minister
5. Staffing and recruitment	
Who appoint the Commissioners?	Minister
Tenure of the Commissioners?	2 years (renewable up to 5 terms)
Dismissal rules and procedures?	Yes
Staff recruitment and compensation rules?	Yes
6. Financial autonomy	
Funding sources?	Annual budget from MCMC fund subject to Minister approval
Full control of own funding?	Partial – subject to Minister approval
Account subject to external auditing?	Yes
7. Transparency of decision making process	
Publish draft decision for comment?	No
Publish decision with justification?	Yes – mandated
Issue Annual Report?	Yes
Hold public consultation?	Yes

Figure 3: Summary Attributes of the Institutional Structure under the new regime

Interaction between these various entities as shown in *Figure 1* is fueled by the various types of *regulatory instruments* or *enforcement decrees* afforded under the new regime. Underlining this new institutional set up as depicted in *Figure 1* is the clear demarcation of the delegated authority and exclusive powers of the State over this industry formerly exercised through the Minister to the *Co-Regulatory* body e.g. the MCMC. It would patently appear from close scrutiny of the powers and functions of the MCMC and the Minister as provided under the CMA and CMCA 1998 that there is clear functional distinction between the two entities. Under the new regime, the Minister retains his control on the overall industry policy whereas the MCMC focuses predominantly on the execution and implementation of the policy identified and adopted by the Ministry. In this sense, the MCMC is at the frontline of the administration dealing with the regulated industry and the stakeholders. It is premised on these dual functional separations that the various *Regulatory Instruments* operate.

Again, to recapitulate, the rationale for the functional separation between the Minister, which represents the State, and the MCMC does not derive from thin air. Rather, this separation underpins the successful transition from the *state-own monopoly* industry to the competition based market environment to eradicate the service delivery failure under the former planned economy structure. The 'trade-off' in this new institutional structure is crucial as a form of 'carrot', as some theory may suggest, that is required to induce private investment and industry participation. Under this model, the State, through the Minister, is perceived best to reserve to the role of overall policy maneuvering and leave the execution and implementation to the regulator.

Indeed, research on the benefits and advantages of this form of liberalized institutional setting is abundant based on similar experience in privatizing the industry in the more

advanced countries. In short, the core reason underlying this new institutional arrangement is to introduce the check and balance mechanism between the various entities with the participation from the regulated to ensure regulatory certainty, the foremost consideration for private investment. Yet at the same time, the ultimate backstop mechanism to prevent market failure is still locked in the hand of the Minister, to be exercised sparingly as the last resort.

In light of the fundamental spirit upon which the new institutional structure rests, the *limited state-regulation* as between the Minister and the MCMC is maintained by the new instrument in the form of Direction, whereby the Minister may direct the MCMC to undertake certain act to give effect to the specific subject matter in accordance to the policy objectives entrenched under the new regime. This form of 'indirect order' sees the manifestation of the 'self-restraint' on the part of the Minister to interfere with the execution and administrative function entrusted on the regulator. On the other hand, the Minister decides policy matters expressly reserved to him under the CMA and CMCA 1998 through the instrument of Determination. It is observed that this instrument is prevalent in specific subject matters that carry substantial public and political interest, such as the rates regulation, licensing and spectrum assignment. Also, Declaration may be issued exclusively in regard to the matter pertaining to license conditions and any exemption thereof, while Regulations could be made by the Minister either on specific matters or procedures allowed under the Act or for any other matters to ensure compliance with the policy objectives from the regulated.

Conversely, depends on the specific subject matters susceptible to regulation, which will be deliberated in detail herein below, broadly, the relationship between the MCMC and the regulated is mainly governed by the Commission Direction and Determination. These two forms of instruments represent the chief instruments for securing compliance to the policy

objectives in the liberalized telecommunications and broadcasting industries. In the former, contrary to the Ministerial Direction, which only binds the MCMC, the Commission Direction, seeks direct compliance from the regulated on any provisions in the Act. In the latter, as will be apparent in the subsequent discussion, Commission Determination operates within very narrow scope on very limited subjects, predominantly on matters pertaining to determination of competition and access interconnection arrangement.

This is unsurprising as the nature of Determination deals essentially with policy consideration, which ought to be chiefly reserved for the Minister. Thus, the involvement of the Commission in this niche area is exceptional rather than norm. The justification for these 'exceptional delegation' perhaps is due to the highly technical issues involved whereby the Commission is better equipped with the expertise to deliberate on the same. Towards this end, being an exceptional function delegated to the Commission, it is evident that procedural safeguard in the form of Public Inquiry is envisaged prior to the issuance of any Commission Determination to assess whether the issuance of such Determination is warranted. The benchmark to institute a Public Inquiry is high: the Commission may hold a Public Inquiry only if it satisfied that the matter is of significant interest to either the public or to current or prospective licensees.

Apart from those above captioned main *regulatory instruments*, specific guidelines, papers, registered voluntary industry codes, mandatory standard and registered undertaking furnished by the stakeholder complement the compliance tools mentioned in the foregoing portion. Whereas the process of public inquiry, consultation and other information gathering exercise initiated by the Commission in accordance with the relevant provisions under the Act may, in appropriate instances, serve as an early indication of the *regulatory* contemplation, which may in turn prepare or cushion the industry's expectation for any impending *regulatory* changes or forthcoming amendments. Under the new regime, the

Commission is empowered to initiate Investigation on the compliance status of the regulated in accordance to Chapter 4 Part V of CMA. Thus far, this provision has never been invoked by the MCMC but the underutilized section may prove invaluable in terms of forcing compliance from the regulated as this Investigation may serve as deterring regulatory threat, in the form of negative publicity on corporate governance apart from potential civil and criminal penalty for potential transgressions.

It is important to note that all these form of *regulatory instrument* carry with the penal sanctions in the form of fines, and in certain instance, imprisonment for any willful non-compliance. In specific exceptional instruments such as *registered voluntary industry code* and *mandatory standard*, civil penalties in the form of fines may be imposed by the Commission. In order to appreciate the practical environment upon which each of these *regulatory instruments* operate, and be able to gauge the efficiency of their function upon the specific subject matters under regulation, each of these subject matters will be discussed under separate headings as below, with reference to the table of *regulatory instruments* as listed out in Appendix 1:

3.1 Economic Regulation

As detailed in Appendix 1, Economic Regulation encompasses three main components, namely licensing, competition practice and network access. It is apparent that matters relating to licensing are primarily under the direct purview of the Minister. The Minister may issue Determination, Declaration and Regulation to control the eligibility or exemptions of the applicants, the license conditions or any special and additional conditions, and the detail procedures governing the application, rejection and notification processes. The direct involvement of the Minister is inherited since the repealed Act. Indeed, naturally due to the peculiar fact that licensing plays the utmost critical role that correlates with the policy

of the government as to the extent of deregulation envisaged and thus the level of competition to be allowed in the market place, in direct intervention of the Minister is inevitable. Contravention in the form of unlicensed activities, or non-compliance to the ministerial instruments dictates penal sanction of fine and imprisonment.

On the other hand, as has been said earlier, matters related to general competition practice, in particular the assessment of the market condition and the determination of dominant market position of the regulated and any anti-competitive behavior are monitored and enforced by the Commission. To this end, since presumably the Commission is better equipped with the expertise, and thus able to respond promptly to any alleged anti-competitive conduct in the market, the operational aspect of the monitoring and enforcement is entrusted to the Commission. It is noted that anti-competitive conducts too entail similar penal sanction in the form of monetary penalty and imprisonment. Daily fine is further imposed for the continuing breaches of the prohibition. Furthermore, the Commission or any person affected by the contravention may, with the leave of the Commission, seeks civil redress from the court to enforce any provisions in this regard, while in the meantime, interlocutory or interim relief such as injunction may be applied against the prohibited conduct. In this sense, breaches of any prohibitions against anti-competition offences allow private enforcement in the civil court apart from any *ex post* sanction imposed or initiated by the Commission.

Likewise, issues pertaining to network interconnection and access, which is the corner stone in promoting a level-playing field for the service-based competition among the licensees, requires highly technical understanding on the network environment and the corresponding access regime as well as the various methods of determining the access charges and fees. As such, the Commission is in charge of overseeing the access mechanism. Compare with the regulation imposed on anti-competition practice, access

and interconnection sees more participation envisaged from the regulated industry. Under this head of regulation, the obligation is shifted to the Access Forum to devise the Access code, which stipulates the agreed terms, and conditions, procedures and rate methodologies binding on all access seekers and grantors. Refusal to grant access to network facilities or services listed in the access list is rendered with similar penal sanction in the form of fine and imprisonment.

3.2 Technical Regulation

Technical Regulation too covers three main components, namely Spectrum Assignment, Numbering and Electronic Addressing and Technical Standards. As with Licensing activities discussed above, spectrum, due to its inherent scarcity and its usage which may entails certain form of national security and public interest, and is further subject to international coordination and regulation, is under the direct control of the Minister. Albeit all the factors justifying the Minister's direct interference as alluded to above, the huge economy value derives from spectrum trading and auction for commercial rollout, perhaps resembles the most convincing reason for the state control. To this end, illegal usage of spectrum bands is subject to criminal sanction of similar fine and imprisonment terms. The Minister, as in Licensing, may utilize the instrument of Determination, Declaration and Regulation to control the usage of spectrum and to make rules and procedures for the assignment or exemption thereof.

On the other hand, the other two components, i.e. Numbering and Electronic Addressing and Technical Standards clearly allow the delegation by the Commission of any or all functions pertaining thereto to qualified experts. This is more apparent for the development of Technical Standards whereby the Technical Standard Forum is greatly leveraged for the development of uniform standards under the Technical Code. Penal sanction is only

imposed on technical offences that tend to compromise public safety, for instance due to illegal radiation, or emission; or network apparatus that hinder network interoperability.

3.3 Consumer Protection

Consumer Protection records the most prevalent, yet unsurprising ministerial intervention, particularly in relation to provision of services at remote or the so called 'underserved' areas envisioned by the Universal Service Provision (USP) scheme and equitable access safeguard in the form of Rate Regulation and Required Application Service. On the other hand control on Quality of Service (QoS) is entrusted in the hand of the Commission, leveraging on the industry self-regulation mechanism entrenched in the Consumer Code devised by the Consumer Forum. Central to Consumer Protection is the requirement for the regulated to develop and put in place customer complaint handling procedures and disputes resolution mechanism.

3.4 Social Regulation

Social Regulation basically inherits the control over the broadcasting sector previously provided under the repealed Act but worded in more technology neutral term to tailor for the converged industry whereby it is the broadcast's content that is subject to regulation, irrespective of the mode of transmission. The Licensing aspect, naturally, subject to the Minister direct control. Illegal service provider is thus subject to penal sanction. The Content Regulation is again functions in accordance to the Content Code developed by the Content Forum, while criminal sanction may also be imposed by the Commission for offensive content, which is expressly prohibited under this section.

3.5 Express Prohibitions and General Offences

It is observed that quite apart from the various *regulatory instruments*, which by and large laid down the policy objectives, requirements and procedures in regard to each specific area under regulation, as discussed in the foregoing, there are other form of sanctions provided under the CMA 1998, they are termed as 'Additional Offences' under the Act. These offences generally resemble the strict liability offences laid down in the repealed Act, which are still relevant today. Whereas there are also new, express prohibitions being introduced under the new Act. These new express prohibitions are mostly akin to strict liability offences and are catered within the very niche application of specific subject matter of regulation. More detail of this group of offences will be discussed in the subsequent discussion.

Chapter 4: Criminal Sanctions and the Possibility of Civil Enforcement

As has been elaborately discussed in the foregoing chapter, to reiterate, broadly speaking, criminal sanctions are levied against any transgressions for the following categories of offences: (i) non-compliance of any *regulatory instrument* be it issued either by the Minister or the Commission. This may includes subsidiary legislation in the form of Ministerial Regulations, as well as contravention of the voluntary industrial code, i.e. the Access Code, Technical Code, Content Code and Consumer Code. Even though non-conformance to these latter codes is not an offence *per se*, nevertheless, since compliance to these codes has been mandated as standard license condition, criminal penalties may still be invoked as breaching the license condition; (ii) contravention of specific prohibition expressly provided under the CMA 1998 which is peculiar to each subject matter. For instance, the express prohibition against anti-competitive conducts, collusive agreements, tying or linking arrangements, illegal service providers, offensive content etc. and (iii) contravention of the specific offences categorically labeled as 'Additional Offences' enumerated under Chapter 2 Part X of the Act.

Against this backdrop, it appears that under the new regime, except in limited instances, criminal sanction is the default or primary option available against transgressions of any provisions under the CMA 1998. The tradition of criminal enforcement has its long origin rooted as seen in the repealed Act. However, then the scope of the offence was less complicated and centered primarily on some form of malicious damaging or tempering with the physical transmission network. Whereas under the new regime, new form of unprecedented offences has been introduced, which canvasses the whole spectrum of activities, which governs the economic, social, technical, and consumer aspects of the converged regulation. Under this peculiar circumstances, while ascribing non-compliance incidents with penal sanction may pose greater deterring effect, and in turn, arguably,

better able to secure adherence from the regulated, it is doubtful whether criminal sanction alone is sufficient and represents the most expedient way to ensure effective compliance from the regulated. Of more crucial is whether criminal sanction is suitable for all types of offences prescribed under the CMA 1998 and thus should be invoked indifferently across the board.

Based on the statistic published by the Enforcement Department of the Commission[60], generally, it is evident that there is a steady upward trend in the volume of cases investigated for the period between 2005 and 2008[61]. However, the volume of cases investigated does not seem to correlate, or reflect the severity of offences being breached. Close scrutiny of the statistic reveals that a huge proportion, in fact virtually all the cases investigated which involved the licensees comprise of the offence of non-compliance to license condition[62] or failure to file the necessary audited account or contribution to the USP fund. All these breaches are essentially administrative in nature and do not seem to have any significant implication on the performance of the market. For instance, non-compliance to license condition is a generic term that denotes administrative offences that may vary within the spectrum of severity. It may includes the less significant or isolated offence of non-compliance to the various registered voluntary industry codes, such as the consumer code, or any written guidelines or subsidiary legislation issued by the Commission, to the more severe offence that connotes public interest such as breach of an undertaking in terms of network roll-out plan or committed investment in return for the grant of license or assignment of spectrum; or merger of dominant market players which may substantially lessening competition without prior notification and approval from the Commission.

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[60] The statistic is available online at the Commission's official website at www.skmm.gov.my
[61] A total of 155 cases investigated in 2005, 129 cases in 2006, 352 cases in 2007, and 343 cases in 2008 (as of 30 September 2008).
[62] 30 cases in 2005, 34 cases in 2006, 81 cases in 2007 and 161 cases in 2008.

In the absence of any detail information on the specific provision being breached by the licensees, the only useful recourse is to refer to the statistic of cases being prosecuted in court during the same period, assuming that offences of graver in nature that implicate far-reaching public concern would have necessary been prosecuted in court. Study on the statistic however indicates nothing of peculiar interest. In fact, it appears that very insignificant number of cases of this nature being charged in court[63]. Indeed, it is obvious that out of the total limited number of cases ultimately being charged in court, majority of the case fall under the category of 'Additional Offences' which has historically been prosecuted under the repealed Act[64].

These findings perhaps could be explained in view of the alternative enforcement remedies of civil fine in the form of compound, exercisable by the Commission[65] as well as the other compliance tools, in particular the Commission Direction, which has thus far exhibited satisfactory compliance without the need for further criminal prosecution in court[66]. The availability of these two forms of alternative enforcement tools has witnessed significant reduction in cases being prosecuted in court. In fact, it is believed that due to

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[63] No cases of this nature being charged in 2005 and 2006, 7 cases in 2007 whereby 5 cases were later being withdrawn upon payment of compound between RM8,000 – RM10,000 by the offender. 2 other cases still pending hearing. 2 cases being charged in 2008, whereby one of the case was due to failure to contribute to the USP fund. Both cases pending hearing.

[64] Offences such as fraudulent or improper use of the service, counterfeit equipment, non-standard equipment, damage or tempering with the transmission system, and that of illegal or unlicensed service provider.

[65] S.243 CMA 1998 reading together with s.2 of the Communications and Multimedia (Compounding of Offences) Regulations 2001 renders all offences under the CMA and its associates subsidiary legislation susceptible to compound by the Chairman with the written approval of the Deputy Public Prosecutor (DPP). This alternative bar any further criminal prosecution upon payment of the compound – per s.243(3). Based on the statistic of cases being compounded from 2005-2008, it appears that the number of cases being compounded is proportionate to the increasing volume of cases being investigated. Also, it is noticed that there is a steady trend of increase in the amount of the compound for specific type of offences, such as non-standard equipment, breach of license condition, failure to summit accounting report, and unlicensed service provision.

[66] For example so far the Commission has issued 2 Direction on particular licensees in 2006 (Direction No.1 of 2006) and 2007 (Direction No.1 of 2007) respectively to seek compliance and

the harsh and penal effect of criminal prosecution, and the long delay of criminal proceedings in court[67], the Commission has exhibited the preference for these two alternative enforcement tools, the former is employed since the nature of the offence breached could hardly constitute 'criminality' in the strict sense, whereas the latter could be invoked to secure direct compliance from the offending licensees for conduct which entails more serious implications. As such, with the introduction of these civil fines mechanism and the operation of Commission Direction, the Commission retains more discretion and flexibility to decide the most efficacious way of enforcement depending on the nature of the provisions being breached and the blameworthiness of the perpetrator.

Apart from that, it is obvious that civil enforcement mechanism is also introduced under the new regime, but its application is limited only to the enforcement of any provisions pertaining to prohibition of anti-competitive conducts[68]. The Commission or individual affected by the contravention may initiate the civil action. In the case of individual bringing the action, further control on this civil enforcement mechanism is subject to leave to be granted by the Commission prior to the initiation of the civil proceeding in court. However, pending the same, the Commission or the individual may apply to the court for interim injunction against the prohibited conduct. Thus far, there is no reported case that have invoked this provision and as such the effectiveness of this mechanism is yet to be tested.

Despite the foregoing, it appears that the enforcement mechanism provided under the new regime assimilates very closely to the 'Pyramid of Enforcement Theory', which has been greatly deployed in the regulatory environment in Australia, particularly so in area of

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ordered to decease the alleged anti-competition practice. A new case was investigated in 2008 pertaining to the same offence and still pending decision of the Commission.

[67] See for instance there are reported cases shown under the statistic published by the Commission whereby prosecution in court has been initiated since 2006 but are still pending disposal in court as of 2008.

[68] See s.142(2) CMA 1998

securities law enforcement and anti-trust regulation. Under this theory, criminal prosecution in court situated at the apex of the pyramid of enforcement and only to be deployed sparingly as remedy of last resort. Other alternative enforcement decrees, which are largely administrative in nature, such as warning, and letter to show cause, to start with the least penal in nature, initiation of public investigation and inquiry to civil fines and public reprimand and suspension of license, regulator's direction, civil enforcement and revocation of license, and ultimately criminal prosecution in court. While overseas research has shown promising enforcement efficacy based on this model, it is still unclear of its local application as no significant development has been observed thus far. As such, its efficacy in the local context, especially in cases of public concern, has yet to be proven.

Conclusion

The new regulatory regime introduced under the CMA and CMCA 1998 has seen the functional separation between the Minister and the regulator. While the Minister retains his exclusive discretion and control over policy matters, the regulator is entrusted with the execution and enforcement of the various regulations envisaged for the achievement of the goals spelt out under the policy objectives. To this end, the CMA and CMCA clearly paint the functions and the corresponding powers of the different entity set-up under the new institutional structure. Underlining this new institutional structure is the various *regulatory instruments* and the procedures for invocation of each of them respectively. Central to these various forms of *regulatory instruments* is the new enforcement mechanism put in place to secure compliance of those *regulatory instruments*. Based on our discussion, it appears that even though penal sanction in the form of fine and imprisonment represents the default option against such breaches, alternative enforcement tools, in the form of civil fines and Commission Direction managed to ensure speedy and cost effective compliance as compare to criminal sanction. Though the deterring effect of criminal prosecution could not be discounted in cases of most severe in nature, whereby transgressions of such cases may render significant or devastating repercussion on the market or public, alternative enforcement tools of less penal in nature, such as warning, letter to show cause or seeking explanation, initiation of public investigation or inquiry, public reprimand, civil fines, suspension or the ultimate revocation of license and civil enforcement may well achieve the desirable compliance. These less penal enforcement are particularly useful in regard to economic offences such as engaging in anti-competitive conduct, or offences committed by body corporate, whereby financial and negative publicity on corporate governance may, in appropriate cases, deemed sufficient regulatory threat to secure compliance. While based on the enforcement statistic published by the Commission, this alternative enforcement mechanism seems to function

satisfactorily, however, due to the lack of enforcement of cases of significant public interest, the new regulatory regime, and the corresponding effectiveness of the enforcement mechanism is yet to be tested, particularly in the area of civil enforcement.

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APPENDIX 1: SUMMARY OF *REGULATARY INSTRUMENTS* AND THEIR APPLICATIONS

SUBJECT MATTER	ISSUES	SECTION	REGULATORY INSTRUMENTS
Economic Regulation	**Licensing**	s.27	Ministerial Regulation – eligibility of applicants
		s.30, s.126, s.127	Ministerial Declaration – special / additional license conditions
		s.33	Ministerial Declaration – modification / variation / revocation of license
		s.36	Ministerial Approval – Transfer / change of ownership of license issued
		s.37	Ministerial Declaration – suspension and cancellation of license
		s.128	Ministerial Determination – definition of network boundary
		s.130	Ministerial Determination – nominated facilities provider
	General Competition Practices	s.134	Commission Guideline – meaning of 'substantial lessening of competition'
		s.137	Commission Determination – dominant market position
		s.138	Commission Guideline – meaning of 'dominant position'
		s.139	Commission Direction – licensee in dominant position to cease conduct having effect of substantially lessening competition
		s.140	Commission authorization of conduct in return of undertaking to be furnished by licensee
	Access to Services	s.146	Commission Determination – facilities and services under Access List – with recommendation from Access Forum
		s.153	Commission Request – Access Code
		s.155	Industry Access Undertaking
Technical Regulation	**Spectrum Assignment**	s.158	Ministerial Regulation – spectrum assignment
		s.159	Ministerial Determination – frequency bands for assignment
		s.162	Ministerial rules – Third party transfer of spectrum
		s.163	Ministerial Direction – compliance with third party transfer rules

		s.174	Ministerial Determination – preferential rights of persons or classes of persons
		s.176	Minister Determination – spectrum reassignment
		s.178	Ministerial Direction – compulsory acquisition of assignment
	Numbering and electronic addressing	s.179	Commission Delegation – control, planning, and administration
	Technical standard	s.184	Commission Designation – Technical Standard Forum
Consumer Protection	**Quality of Service**	s.189	Commission Designation – Consumer Forum
	Required applications services	s.192	Ministerial Determination – list of required applications services
		s.193	Ministerial Direction – to provide required applications services
	Rate Regulation	s.199	Ministerial Determination – rates setting
		s.200	Ministerial Determination – persons or areas for special rates
		s.201	Ministerial Rules – rules regarding rates
	Universal Service Provision	s.202	Ministerial Direction – to MCMC to determine USP system
		s.203	Commission Determination – definition of 'underserved areas' and 'underserved groups within the community'
		s.204	Ministerial Regulation – contribution by licensees to USP fund
Social Regulation	**Licensing**	s.206	Ministerial Declaration – special / additional license conditions on content applications services
		s.207	Ministerial Determination – definition of 'closed content application'
		s.208	Ministerial Determination – guideline for 'content incidental to the services provided'
		s.209	Ministerial Determination – guideline for 'limited content applications service'
		s.210	Commission Opinion – on category of services
	Content Requirements	s.212	Commission Designation – Content Forum