



18th BILETA Conference: *Controlling Information in the Online Environment*

*April, 2003
QMW, London*

Service Provider Licensing System in the Malaysian Communications and Multimedia Industry

Safinaz Mohd. Hussein
Universiti Kebangsaan Malaysia,

Introduction

In 1998 the Malaysian government enacted the Communications and Multimedia Act 1998 (Act 588) to cater for the convergence era of telecommunications, broadcasting and information technology. This Act changed the definition of these three previously distinct industries into the communications and multimedia industry. One of the reason behind this was the contention on the part of the government that to differentiate these three industries will do more harm than good due to the fact that technological advances no longer makes it viable to draw the line differentiating them.

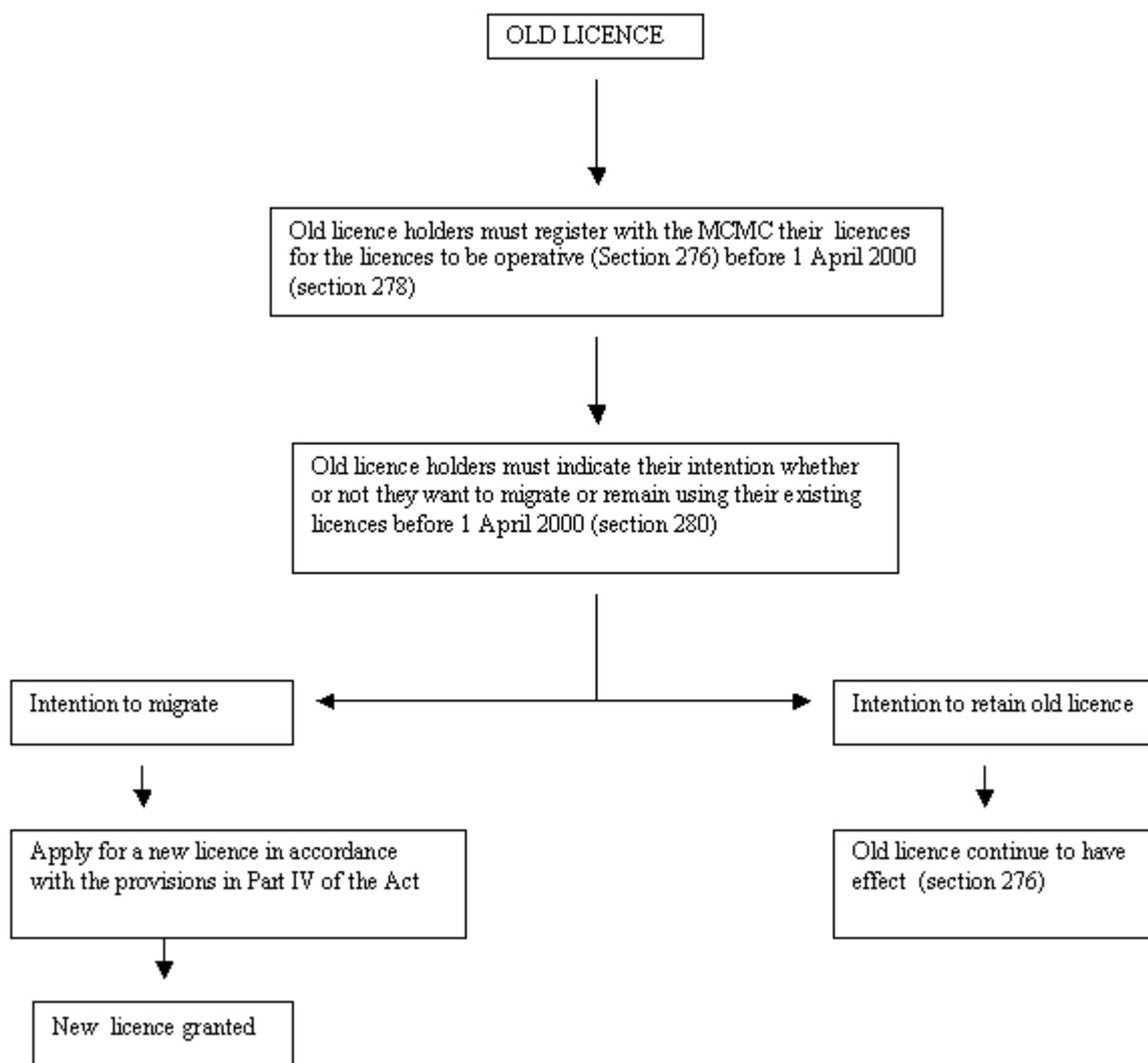
One of the most important part of the Act is the licensing system that is introduced by the Act.^[1] This paper is divided into two parts which will discuss the transitional provisions for existing licence holders and the new licensing system introduced.

Transitional Provisions

Chapter 2 of Part XI of the Act deals with transitional provisions for licences. Sections 276 and 278 provide to the effect that old licences^[2] shall only continue to have effect for a period of twelve months from the appointed date,^[3] unless it has been registered by the Commission^[4] within twelve months from the appointed date.^[5] This simply means that the old licences shall not cease to have effect by the coming into force of the Act. Nevertheless, old licence holders must register their old licences with the MCMC within twelve months from the appointed date.

Section 280 further states that holder of old licences must indicate their intention to the Minister^[6] whether or not to they intend to apply for a new licence under the new Act or continue using the old licence.^[7] The rationale for migrating to the new regulatory regime can be found in section 279 where the section provides that an old licence holder will not receive benefit or rights that is given by the new Act. Nevertheless, they still possess the benefit or right conferred under the old repealed Acts^[8] i.e. Telecommunications Act 1950 and Broadcasting Act 1988. Therefore, it can be said that transition to the new licensing regime is optional but for the registration requirement under section 278. Failure to comply with section 278 will render the old licence inoperative after 1 April 2000. The transition provisions can be summarised in the figure 1 below.

Figure 1 : Transitional Procedure for Old Licences



Licensing Under The Communications And Multimedia Act 1998

The CMA licensing regime provides an activity based licensing regime which is technology neutral. Part IV of the CMA 1998 contains provisions relating to licences. There are two types of licences within four categories of licensable activities under the CMA 1998. A licensee therefore, may choose to provide services between eight possible types of licences. Section 126 of the Act prohibits any person from owning or providing any network facility, network service or applications service except with an individual or class licence. Under the Act any person who owns a network facility, provision of network service or applications services that is solely on the customer side of the network boundary[9] is exempted from licensing requirement under the Act.[10]

Individual Licence

An individual licence is granted to a person who conducts an activity which requires a high degree of regulatory control.[11] Section 6 of the CMA defines an individual licence as *a licence for a specified person to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject*. Section 27(1) further provides that a person who wants to operate under an individual licence may apply in writing to the Communications and Multimedia Commission and the Commission shall make recommendations to the Minister within sixty days of receiving the application whether or not that person should be granted an individual licence.[12] These provisions merely provides the procedures for an application of an individual licence. It does not however,

differentiate it with class licence. Nevertheless, it could be said that an individual licence is similar to any type of licence whereby the applicant has to apply in writing to the regulator concerned or in other words it refers to a licence to operate an activity where there is the highest degree of regulatory control. Examples of local companies holding an individual licences are Digi Telecommunications, Telekom Malaysia Bhd., Celcom (Malaysia) and Maxis International. These companies have each been granted three types of individual licences i.e. network facility individual licence, network service individual licence and applications service individual licence. They provide services like earth stations, fixed links and cables, public payphones facilities, radio communications transmitters and links, satellite hubs, towers, poles, ducts and distribution services, cellular mobile services and IP telephony.[13]

Class Licence

Class licence is a type of licence introduced into the industry by the CMA 1998 to cater for the needs of small operators. It has a lighter form of regulatory control and minimal procedural requirements. In class licence, the minister sets out the rights and obligations which apply *generally* to persons engaged in a particular activity. Section 6 defines a class licence as a *licence for any or all persons to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject*. Section 131 further provides that a person shall not operate under a class licence in respect of any network facilities, network or applications service unless registered by the Commission.

The Minister may grant a class licence in respect of any activity requiring a licence under the CMA [14] and a person who falls within a class licence that has been granted by the Minister under section 44(1) may operate an activity by submitting a registration notice to the Commission.[15] This simply means that a Minister will grant class licences and lists what services fall under these different types of class licences. An operator therefore needs to check whether the type of service he intends to provide fall under any of the services that is listed by the Minister. If the service is not listed in the determination then the operator needs to apply for an individual licence for that same activity. The Communications and Multimedia (Licensing) Regulations 2000 restrict a foreign individual who is not a permanent resident and foreign company (as defined under the Companies Act 1965) from registering a class licence.[16] Examples of local companies who is a registered class licensee are Information Network Services, Time dotNet Bhd. And Maxis Mobile Sdn Bhd. . These companies hold applications service class licence for Internet access, messaging and directory services.[17]

Licensable Activities

Within the two-abovementioned licence types, there are four licensable activities. A person who wishes to provide a service to the industry must provide service that falls within these four categories i.e. network facility, network service, applications service and content applications service.

Network Facilities

Network facility is an activity which provide facilities or infrastructures to the industry upon which network, applications and content applications services depend for example earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radio communications transmission equipment, mobile communications base stations and broadcasting transmission towers and equipment.[18] In addition to this, section 130 provides that the Minister may determine that a licensed network facilities provider, other than the owner of any network facilities, be a nominated facilities provider for the network facilities and thereby exempting the owner of the network facility from the provisions of the Act.

Network Service

The services that fall under this category are services that provide basic connectivity and bandwidth to support a variety of applications services for example broadcasting distribution services, cellular

mobile services, customer access services and mobile satellite services.[19] In other words, network services enable connectivity or transport just like a car on a road. Most of the network service provider in this country are also the owner to a network facility, however, a network service provider who does not own a network facility may provide network service using a network facility owned by another provider.[20]

Applications Service

Applications services provide particular functions or capabilities delivered to end-users such as voice services, data services, electronic commerce and other transmission services.[21] The Act also contains provisions on *required applications service*. Section 192 provides that the Minister may determine a list of required applications services which may include,

- emergency services;
- directory assistance services;
- operator assistance services; and
- services for disabled consumers.[22]

Content Applications Service

Content applications services provide a type of applications service which contains content. In other words, it is a subset of applications service. Examples of content applications services are traditional broadcasting, online publishing and information services.[23]

Section 205 prohibits a person from providing a content applications service unless with an individual or class licence. Further, section 207 and 209 contain provisions for closed content applications service and limited content applications service respectively. Section 207 exempts from licensing requirement any closed content applications service. In the absence of any determination made by the Minister, a closed content applications service is a closed content applications service is confined to a single dwelling or a content applications service provided only to the employees or officers of a single body corporate. [24]

A limited content applications service provider is also exempted from holding an individual licence though he may be subject to a class licence.[25] Lastly, section 208 provides that any content incidental to the service is exempted from licensing.

Matters to be Considered in Determining Licensing Requirement

The process and matters to be considered by a person wishing to apply for a licence under the CMA 1998 is twofold. Firstly, the person has to identify the activity that he is providing. In other words, he has to ensure that his service is one of the four categories of licensable activities, i.e. network facility, network service, applications or content applications. Secondly, he has to determine the type of licence required, i.e. individual or class.[26]

Identification of Licensable Activity

Identification of licensable activity involves the determination on the part of the prospective licensee to break down the services he intends to provide. He has to be able to distinguish the activity to match the type of service he intends to provide. If it involves providing infrastructure like cables, lines and exchanges, then the licensable activity is network facility. If it involves particular functions, it is applications service. After determining the activity, the prospective licensee needs to determine the type of licence required. This step in the process of licensing determines whether there is a need for licensing per se.

Determination of the Types of Licence Required

Determination of the type of licence requirement depends on whether the operator is either a significant provider or a minor provider.[27] A significant service provider relates to amongst others a facility that has a significant economic impact, forms or are part of a network made available to the general public, has a high degree of influence on the community, etc. on the other hand, a minor service provider do not meet the criteria of significant service provider. [28] The Malaysian Communications and Multimedia Commission in its paper on licensing requirement provided the definition of significant service provider as follows:

1. *A significant Network Facility is a network facility that:*

- *Forms a core part of a network used in the provision of communications services that are made available to the general public and are likely to be of broad appeal;*
- *Is likely to have a significant economic impact on the sector; and/ or*
- *The physical nature of the facility is likely to have a material environmental impact.*

2. *A significant network service is a network service that:-*

- *Is made available to the general public and is likely to be of broad appeal; and/or*
- *Is a key input service in downstream markets or a “bottleneck” service; and*
- *Is used to provide basic connectivity services by means of commonly available consumer equipment; or*
- *Is used to provide basic connectivity services by means of which members of the general public acquire standard applications services.*

3. *A significant applications service is an applications service that:-*

- *Is made available to the general public and is likely to be of broad appeal;*
- *Is highly pervasive;*
- *Provides communications functionally by means of commonly available consumer equipment; and*
- *Is considered to be a standard communications applications service.*

4. *A significant content applications service is a content applications service that:-*

- *Is made available to the general public and is likely to be of broad appeal; and*
- *Provides content that is able to be received by commonly available consumer equipment; or*
- *Is likely to exert a high degree of influence in shaping community views in Malaysia.[29]*

Having determined whether or not a person is providing significant or minor service, a prospective licensee may apply for an individual licence if he is providing a significant service and a class licence in the case of a minor service.

Conclusion

The CMA 1998 is a very unique piece of legislation. It has not passed the period of child bearing but for the past four years it has proven to be very promising. The transitional period has lapsed and those who wish to migrate into the new regulatory regime have indicated their intention to do so. The licensing system is based on the government’s contention that it is no longer viable to categorize the licences according to the technology used but rather by the activity the provider seek to provide. This is to ensure that it does not go out of date when new technology is used to provide the same service and it also shows the character of the CMA 1998 which stresses on longevity.

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- [1] The aim of the licensing system is to monitor the players in the industry.
- [2] Old licences here refers to the licences granted under the previous regime namely the Telecommunications Act 1950 and the Broadcasting Act 1988.
- [3] The appointed date here refers to the date of coming into force of the Act which was 1st April 1999.
- [4] The Commission is the regulator for the industry specifically known as the Malaysian Communications and Multimedia Commission (MCMC)
- [5] Section 276 provides, “*Subject to section 278, licences issued under the repealed Acts (“old licences”) shall continue to have effect under this Act.*”
- [6] The Minister refers to the minister for Energy, Communications and Multimedia.
- [7] Section 280 provides, “*A holder of a licence granted under the repealed Acts shall indicate to the Minister in writing whether he intends to seek a licence under this Act within twelve months from the appointed date.*”
- [8] Section 279 provides, “*This Act does not confer any new benefits or right on a registered licensee registered under section 278 except where that benefit or right was conferred under the old licence.*”
- [9] Section 128 provides that in the absence of a determination by the Minister, a network boundary shall be-
- (a) the first equipment socket in a private residence;
 - (b) the main distribution frame in a building; or
 - (c) a point agreed to by the customer and the network facilities provider.
- [10] Section 129.
- [11] Malaysian Communications and Multimedia Commission (MCMC), Licensing Requirements Under the CMA 1998: An Information Paper, August 1999, p. 2.
- [12] Section 27 and 29 of the CMA 1998.
- [13] <http://www.mcmc.gov.my/mcmc/registers/registers.asp> (On line) 31st March 2003.
- [14] Section 44(1) of the CMA 1998.
- [15] Section 45(1) of the CMA 1998.
- [16] Regulation 23, Communications and Multimedia (Licensing) Regulations 2000
- [17] <http://www.mcmc.gov.my/mcmc/registers/registers.asp> On-line 31st march 2003.
- [18] MCMC, Licensing Requirement under the CMA 1998, p. 4.
- [19] Ibid.
- [20] http://www.mcmc.gov.my/mcmc/what_we_do/licensing/cma/framework.asp. On-line 31st March 2003.
- [21] Ibid.
- [22] A discussion paper on “The Determination of a List of required applications services and the classes of network service providers who shall provide them under section 192 and 193 of the CMA 1998 is available at <http://www.mcmc.gov.my>.
- [23] Ibid.
- [24] Section 207(2)
- [25] Section 209
- [26] MCMC, Licensing Requirement, p. 4.
- [27] *ibid*, p.5.
- [28] *ibid*, p.4.
- [29] *ibid*, p.6.