

MALAYSIAN COMMUNICATIONS AND MULTIMEDIA COMMISSION

Guideline on Registration of Access Agreements Pursuant to sections 90-93 and 150 Communications and Multimedia Act 1998

INTRODUCTION

1. The Guideline on Registration of Access Agreements (Guideline) under sections 90-93 and 150 of Communications and Multimedia Act 1998 (CMA) is issued by the Malaysian Communications and Multimedia Commission (MCMC) as a reference to licensees who are parties to an Agreement to comply with the requirements of CMA with respect to the registration of Access Agreements.

LEGISLATIVE BACKGROUND

2. The CMA provides that parties to an Agreement must apply to the MCMC for registration of the Agreement if the CMA so requires. The purpose of the requirement to register Agreements is to ensure that any agreements reached between parties regarding matters under the CMA are consistent with the objects and provisions of the CMA and to preclude agreements between parties which may be detrimental to other providers. If an Agreement which requires registration has not been registered, the Agreement is not valid and unenforceable.
3. Section 90 lays out the duty of parties to a written Agreement to apply to the MCMC for the registration of the Agreement, if the CMA requires such registration. Upon receipt of the same, the MCMC shall register the Agreement if it is consistent with the criteria laid out by section 91.
4. Section 92 provides the effect of registration on
 - 4.1 the Agreement – where the Agreement becomes valid and enforceable only upon its registration
 - 4.2 the parties to the Agreement – the MCMC may direct parties to comply with the registered Agreement
5. Section 93 lays out the requirement with respect to the maintenance of registration of Agreements.
6. Specifically for Access Agreement, as per subsection 150(1), a written Access Agreement for the provision of listed network facilities and network services shall be registered with the MCMC in accordance with section 91.
7. Subsection 150(2) further provides, no written Access Agreement for the provision of listed network facilities and network services shall be enforceable unless it has been registered.

EVALUATION PROCESS

8. After parties to the Agreement submit an Agreement to the MCMC for registration, MCMC shall conduct an evaluation process to
 - 8.1 determine whether the Agreement is an Access Agreement which requires registration; and
 - 8.2 determine whether the Access Agreement is consistent with section 91 and therefore shall be registered.

IS THE AGREEMENT AN ACCESS AGREEMENT IN WHICH REGISTRATION IS REQUIRED BY THE CMA?

9. An Agreement is an Access Agreement within the meaning of subsection 150(1) if it fulfills the following 3 criteria
 - 9.1 the Agreement is in written form;
 - 9.2 the Agreement is for the provision of listed network facilities and network services; and
 - 9.3 the network facilities and network services in the Agreement are listed in a current Access List.
10. If the Agreement is in written form as per section 150(1), registration shall be required. If the Agreement is not written (for e.g. verbal or by implication), registration shall not be required.
11. If the Agreement is for the provision of listed¹ network facilities and network services as per section 150(1), registration shall be required. If the Agreement is for the provision of non-listed network facilities and network services, registration shall not be required.
12. If the network facilities and network services in the Agreement are listed in a current Commission Determination on Access List (Access List)², registration shall be required. If the network facilities and network services in the Access Agreement are listed in a revoked Access List and/or listed in an instrument issued not under the CMA, registration shall not be required.
13. If the 3 criteria above are fulfilled, the Agreement is an Access Agreement within the meaning of subsection 150(1) and therefore requires registration.

¹ Listed network facilities and network services refer to the network facilities and network services that are included in the Commission Determination on Access List under section 145.

² The MCMC may determine an Access List under section 146 or subsection 147 (2), depending on the legislative basis. In terms of the current Access List, MCMC has issued the Commission Determination on Access List, Determination No.1 of 2001 on 24 March 2001 under section 146.

IS THE ACCESS AGREEMENT CONSISTENT WITH SECTION 91 AND THEREFORE SHALL BE REGISTERED?

14. As per section 91, MCMC shall register the written (Access) Agreement if MCMC is satisfied that the (Access) Agreement is consistent with
 - 14.1 the objects of CMA;
 - 14.2 any relevant instrument under the CMA; and
 - 14.3 any relevant provisions of the CMA or its subsidiary legislation.
15. If the Access Agreement complies with section 91, the MCMC shall register the Access Agreement as per section 93.
16. For the purpose of evaluating whether the Access Agreement complies with section 91, it shall be evaluated against the following 3 criteria below.

Consistent with the objects of CMA

17. The first criteria for registration is that the Access Agreement is consistent with the objects of the CMA. Subsection 3(1) of CMA provides that the objects of the CMA are:
 - 17.1 to promote National Policy Objectives for the communications and multimedia industry;
 - 17.2 to establish a licensing and regulatory framework in support of the National Policy Objectives for the communications and multimedia industry;
 - 17.3 to establish the powers and functions for the MCMC; and
 - 17.4 to establish powers and procedures for the administration of the CMA.

18. Subsection 3(2) sets out the National Policy Objectives for the communications and multimedia industry as per below.

National Policy Objectives

- a) To establish Malaysia as a major global centre and hub for communications and multimedia information and content services;
- b) To promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;
- c) To grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;
- d) To regulate for the long-term benefit of the end user;
- 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.

19. Consequently, in considering whether the Access Agreement is consistent with the objects of the CMA, the MCMC shall ascertain whether the Access Agreement in question (and the subsequent registration thereof) would promote or support (rather than detract from) any one or more of the National Policy Objectives.
20. In general, the MCMC shall register the Access Agreement if the Access Agreement promotes or supports any one or more of the National Policy Objectives.

Consistent with any relevant instrument under CMA

21. The second criteria for registration is that the Access Agreement is consistent with any relevant instrument under the CMA.
22. For the purpose of the second criteria, any relevant instrument under the CMA shall include all instruments issued under the CMA insofar as they are relevant to the Access Agreement and the registration process thereof.
23. The relevant instrument under the CMA shall include
 - 23.1 Ministerial Direction;
 - 23.2 Ministerial Declaration;
 - 23.3 Ministerial Determination;
 - 23.4 Commission Determination; and
 - 23.5 Commission Direction.
24. In particular, the relevant instrument under the CMA may include but not limited to, the following:
 - 24.1 Access List; and
 - 24.2 Commission Determination on Mandatory Standard.

Consistent with Access List

25. With respect to the Access List, the Access Agreement shall be consistent with the relevant instrument under the CMA if it is consistent with the Access List. Further, the Access Agreement is consistent with the Access List if:
 - 25.1 the Access Agreement is for the provision of listed network facilities and network services; and
 - 25.2 the network facilities and network services in the Access Agreement are listed in a current Access List.
26. If the Access Agreement is for the provision of listed network facilities and network services and if the network facilities and network services in the Access Agreement are listed in a current Access List, registration shall be required.
27. Conversely, if the Access Agreement is for the provision of non-listed network facilities and network services and/or if the network facilities and network services in the Access Agreement are listed in a revoked Access List and/or listed in an instrument not issued under the CMA, registration shall not be required.

Consistent with the Commission Determination on Mandatory Standard

28. The Access Agreement is consistent with the relevant instrument under the CMA only if it complies with the Commission Determination on Mandatory Standard.
29. The stand is taken to give effect to subsection 105(3) where a person subject to a Mandatory Standard shall comply with the Mandatory Standard. Therefore, if the Access Agreement does not comply with the Commission Determination on Mandatory Standard, the Access Agreement cannot be considered to be consistent with the relevant instrument under the CMA and shall not be registered.
30. As a result, the non-compliance of the Commission Determination on Mandatory Standard will result in the non-registration of the Access Agreement, apart from invoking the sanctions for non-compliance with a Commission Determination on Mandatory Standard under section 109.

Consistent with any relevant provisions of the CMA or its subsidiary legislation

31. The third criterion for registration is that the Access Agreement is consistent with any relevant provisions of the CMA or its subsidiary legislation.
32. For the purpose of the third criterion, any relevant provisions of the CMA or its subsidiary legislation shall include all provisions of the CMA or its subsidiary legislation insofar as they are relevant to the Access Agreement and the registration process thereof.
33. The relevant provisions of the CMA may include, but not limited to, the following:
 - 33.1 sections 90-93;
 - 33.2 sections 94-109;
 - 33.3 sections 110-116; and
 - 33.4 sections 145-156
34. In general, the MCMC shall register the Agreement if the Access Agreement is consistent with the relevant provisions of the CMA or its subsidiary legislation insofar as they are relevant to the Agreement and the registration process thereof.

GENERAL

Supplementary Agreement

35. All Supplementary Agreement (including any variation of the terms and extension of time) to the registered Access Agreement shall be submitted to the MCMC for registration and shall be subjected to the requirement of the CMA and this Guideline.

Notification of Termination or Lapse of Access Agreement

36. Parties to the Agreement shall jointly notify the MCMC within 14 days in the event
 - 36.1 the registered Access Agreement has been terminated; or
 - 36.2 the registered Access Agreement has lapsed.
37. Upon the occurrence of the event in paragraph 36, the Access Agreements shall no longer be registered and therefore shall no longer be valid and enforceable.

Agreement not within the meaning of section 150

38. Parties to the Agreement may perceive that the Agreement is an Access Agreement within the meaning of section 150 (thus perceived to require registration) despite the fact that it does not fulfill the 3 criteria above.
39. In this case, the Agreement shall not be considered as an Access Agreement and does not come under the ambit of sections 90-93 and 150. The non-registered Agreement may be considered by the parties to the Agreement to be a contractual Agreement.

Timeline

40. For all intent and purposes, the timeline for processing and evaluating the application for registration shall begin from the acknowledged date of receipt of the application for the registration of the Agreement.
41. The decision whether to approve or reject the application for the registration shall be communicated to the parties to the Agreement within 45 days of the receipt of the application.
42. The MCMC reserves the right to extend the timeline for notification up to 60 days from the date of the receipt of the application.

Date of Agreement

43. As per section 92(1) and 150(2), an Access Agreement shall only be enforceable once it has been registered. For avoidance of doubt, the date of the Agreement need not necessarily be the date of registration.

APPLICATION AND ENQUIRIES

Submission of Application for Registration

44. Parties to the Agreement shall jointly-submit their application for the registration of the Access Agreement, accompanied by 5 certified true copies of the Access Agreement.
45. The application form is attached to the Guideline in which parties to the Access Agreement shall specify the following;
 - 45.1 the names of the parties to the Access Agreement;
 - 45.2 a general description of the matter pertaining to the Access Agreement;
 - 45.3 the date of the Access Agreement;
 - 45.4 duration of the Access Agreement, if relevant;
 - 45.5 the application for the registration is submitted jointly;
 - 45.6 the application is made pursuant to the requirement of section 90 and subsection 150(1);
 - 45.7 the Access Agreement is in written form as per section 150(1);
 - 45.8 the Access Agreement is for the provision of listed network facilities and network services as per section 150(1);
 - 45.9 the network facilities and network services in the Access Agreement are listed in a current Access List; and
 - 45.10 the Access Agreement is consistent with;
 - 45.10.1 the objects of the CMA;
 - 45.10.2 any relevant instrument under the CMA; and
 - 45.10.3 any relevant provisions of the CMA or its subsidiary legislation
 - 45.11 where there is a registered Access Undertaking;
 - 45.11.1 the party to the Access Agreement is aware of a registered Access Undertaking lodged by the other party to the Agreement
 - 45.11.2 if the Access Agreements complied with the registered Access Undertaking

51. The submission shall be made to;

The Chairman
Malaysian Communications and Multimedia Commission
Level 11 Menara Dato' Onn
Putra World Trade Centre
45 Jalan Tun Ismail
50480 Kuala Lumpur
(attention: General Manager, Monitoring and Enforcement Division)

52. For general enquiries, please contact;

Economic Regulation Department
Monitoring and Enforcement Division
Malaysian Communications and Multimedia Commission
Level 11 Menara Dato' Onn
Putra World Trade Centre
45 Jalan Tun Ismail
50480 Kuala Lumpur

Telephone: 60.3.4047 7000
Fax: 60.3.2694 1803
Email: access.agreements@cmc.gov.my

53. The information contained in this Guideline is to notify the respective parties of the process entailed in the registration of Access Agreement. It is not intended to be exhaustive and is accurate at the time of its issuance.
54. The MCMC reserves the right to consider whether the submitted Agreement is an Access Agreement within the meaning of section 150(1) or not. Further, the MCMC reserves the right to consider whether the Access Agreement shall be registered or not. The MCMC also reserves the right to change and/or amend this Guideline without giving prior notice.