



Malaysian Communications and Multimedia Commission

Guidelines on Mergers and Acquisitions

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Guidelines on Mergers and Acquisitions

Foreword

These Guidelines have been prepared by the Malaysian Communications and Multimedia Commission ("Commission") and establish a process by which the Commission will assess mergers and acquisitions which have been voluntarily notified to it. These Guidelines also sets out the procedures that the Commission will adopt in applying Chapter 2 of Part VI of the Communications and Multimedia Act 1998 ("CMA") in respect of mergers and acquisitions.

These Guidelines may be revised by the Commission from time to time.

1 Introduction

Mergers and acquisitions

- 1.1 The term '*mergers and acquisitions*' traditionally refers to transactions where two (2) or more legal entities combine into a single legal entity through:
 - (a) two or more separate entities, previously independent of one another merging, so that what is left is one single legal entity (i.e. a merger); or
 - (b) one entity being taken over by another through the acquisition of its shares or assets, so that the acquired entity is 'consumed' into the acquiring firm and ceases to exist (i.e. an acquisition).
- 1.2 However, the term '*mergers and acquisitions*' is capable of capturing a broader range of corporate transactions, extending to any transfer or combination in the ownership of two (2) or more companies or business organisations. Such transactions include consolidations, tender offers, purchases of assets and management acquisitions. For purposes of these Guidelines, mergers and acquisitions (used in singular or plural) shall be collectively referred to as "M&A".
- 1.3 M&A are common corporate transactions and are beneficial to an efficiently functioning economy. Such transactions allow a merged or acquired entity to access efficiencies which are usually only available to larger firms or operations. These include:
 - (a) economies of scale and scope. For example, bulk buying, the availability of lower interest rates, and economies gained through the sharing of organisational resources;
 - (b) the ability to diversify risk over a larger set of operations; and
 - (c) the ability to absorb the risk and costs of long term investment in research and development projects.
- 1.4 The benefits of a M&A to the economy and to a firm itself often translate into benefits to consumers. A merged or acquired firm which implements the efficiencies outlined above can cut its costs and reduce its prices due to a lower margin, or increase the quality or level of innovation of its product offering to the benefit of consumers.
- 1.5 Beyond this, a M&A can be beneficial to competition in market more generally through:
 - (a) preventing the exit of a failing or underperforming firm which would otherwise have left the market;
 - (b) creating a countervailing source of power against an existing source of dominance in a market such as a competitor or supplier; and

- (c) enhancing a domestic market's ability to compete against international entrants, either in the domestic market or in international markets.

M&A and its effect on competition

- 1.6 Effective competition is required for the proper functioning of an economy.
- 1.7 Competitive markets distribute resources efficiently and fairly without the need for a single centralised controlling authority. Competition is seen as a process of rivalry which compels firms to win customers by offering a better deal than their rivals, which enhances consumer welfare.
- 1.8 Competition maximises benefits to society through:
 - (a) **allocative efficiency**, i.e. ensuring resources are allocated between alternative uses in a way that maximises community wellbeing;
 - (b) **productive efficiency**, i.e. output is being produced at its lowest possible average cost; and
 - (c) **dynamic efficiency**, i.e. encouraging market participants to innovate and invest in new technologies at the best time.
- 1.9 Despite the contribution of M&A to a functioning economy, such transactions must be closely monitored due to their inherent ability to negatively affect competition.
- 1.10 The negative effects of a M&A on competition may include, reducing the number of competitors in a market, strengthening the position of one firm in relation to other competitors so that it creates or strengthens an existing position of dominance, increasing barriers to entry to new entrants, or increasing barriers to expansion to existing competitors.
- 1.11 Such 'anti-competitive effects' can create or enhance the market power of one firm to the detriment of consumers.

Regulation of competition

- 1.12 The CMA regulates the converging communications and multimedia industries.
- 1.13 Under the CMA, the Commission issues licences which allows a licensee to undertake activities in a specific communications market in Malaysia.
- 1.14 Chapter 2 of Part VI of the CMA establishes a regime for the regulation of competition between such licensees in the communications markets. This regime is established through the following provisions in relation to licensees' conduct:
 - (a) Section 133 of the CMA prohibits licensees from engaging in '*any conduct which has the purpose of substantially lessening competition in a communications market*'.

- (b) Subsection 139(1) of the CMA gives the Commission the power to *'direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market'*.
- 1.15 A person who contravenes section 133 of the CMA or a direction made under subsection 139(1) of the CMA, commits an offence pursuant to section 143 and/or section 53 of the CMA.
- 1.16 The Commission has been established by the Malaysian Communication and Multimedia Commission Act 1998 ("**MCMCA**") to administer the provisions of the CMA.
- 1.17 In administering the prohibition in section 133 of the CMA and assessing whether to exercise its power in subsection 139(1) of the CMA, the Commission will:
- (a) investigate any civil or criminal offence under paragraph 68(b) of the CMA or its subsidiary legislation which it has grounds to believe was, is or will be committed (Chapter 4 of Part V of the CMA); and
 - (b) enforce the remedies available to it, including directing licensees to cease conduct, seeking injunctive relief, and the application of financial and other penalties (Chapter 2 of Part VI of the CMA).
- 1.18 Section 140 of the CMA permits licensees to apply to the Commission for authorisation of conduct prior to engaging in any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market, whereby such conduct may be authorised if the same is found by the Commission to be in the national interest.
- 1.19 As such, in administering its functions to achieve the objects of the CMA, the Commission will balance enforcement of the prohibition in section 133 of the CMA and the exercise of its power in subsection 139(1) of the CMA against the national interest, in authorising such conduct.
- 1.20 Before authorising a conduct, the Commission may require a licensee to submit an undertaking regarding their conduct in any matter relevant to the authorisation, pursuant to subsection 140(3) of the CMA.

Regulation of M&A

- 1.21 The provisions in section 133 and subsection 139(1) of the CMA directs the competition regime towards the licensees *'conduct'*.
- 1.22 The term *'conduct'* is not defined in the CMA, however the Commission considers it to include commercial and other activities that are undertaken by a licensee in a

communications market. The Commission regards M&A to constitute a form of conduct for the purposes of section 133 and subsection 139(1) of the CMA.¹

- 1.23 Despite the absence of provisions in the CMA relating to M&A, all such transactions are subject to the risk of investigation by the Commission in administering and enforcing the provisions of the CMA.
- 1.24 Accordingly, these Guidelines set out how the Commission will apply, investigate and enforce the general prohibition in section 133 of the CMA and decide whether to exercise its power under subsection 139(1) of the CMA in respect of a conduct by a dominant operator which it deems to be a M&A.

Assessment of mergers and acquisitions

- 1.25 The competition regulation regime established by the CMA does not contain any express provisions for M&A control and assessment. As such, there is no process established, nor is there a legal requirement that parties to a M&A notify the Commission in respect of such transactions.
- 1.26 Recognising the benefits of M&A to a functioning economy, and the need to balance this benefit against potential anti-competitive effects, the Commission will assess M&A affecting the communications and multimedia sector which are voluntarily submitted to it in the manner set out in these Guidelines.
- 1.27 The procedures established through these Guidelines can enable M&A parties to:
 - (a) obtain the Commission's view in respect of the competitive effects of a M&A; and
 - (b) decide whether to apply to the Commission for authorisation of a M&A subject to various undertakings or in a restructured form to avoid breaching the provisions of the CMA.

The legislation

- 1.28 The Commission relies on the following powers and functions conferred upon it by the CMA to administer the prohibition in section 133 of the CMA and exercise its power under subsection 139(1) of the CMA in respect of M&A, including the assessment of such transactions which have been voluntarily submitted to the Commission for assessment:
 - (a) Section 51 of the CMA, in which the Commission may, from time to time, issue directions in writing to any persons regarding the compliance and non-compliance of any licence conditions, and including but not limited to the remedy of breach of a licence condition, and the provisions of the CMA or its subsidiary legislation.

¹ Guideline on Substantial Lessening of Competition (24 September 2014) issued by the Commission.

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- (b) Section 55 of the CMA, in which the Commission may, from time to time, determine any matter specified in the CMA as being subject to the Commission's determination.
- (c) Paragraph 68(b) of the CMA, which permits the Commission to investigate any matter pertaining to the administration of the CMA or its subsidiary legislation if the Commission has grounds to believe that a civil or criminal offence under the CMA or its subsidiary legislation was, is or will be committed.
- (d) Section 73 of the CMA, which gives the Commission the power to direct any person to provide it with information which is relevant to the performance of its powers and functions under the CMA or its subsidiary legislation.
- (e) Section 137 of the CMA, which permits the Commission to determine that a licensee is in a dominant position in a communications market.
- (f) Subsection 139 (1) of the CMA, which permits the Commission to:
 - (i) direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in a communications market; and
 - (ii) implement appropriate remedies.
- (g) Section 140 of the CMA, permits the Commission to authorise a conduct of a licensee which may be construed to have the purpose or effect of substantially lessening of competition in a communications market, and may subject such authorisation to the provision of an undertaking from that licensee if the Commission is satisfied that such conduct is in the national interest.
- (h) Section 142 of the CMA, permits the Commission to seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2 of Part VI of the CMA.
- (i) Section 143 of the CMA, imposes a fine or imprisonment, for contravening any prohibition under Chapter 2 of Part VI of the CMA.

Purpose of these Guidelines

- 1.29 In releasing these Guidelines, the Commission provides licensees with information that can be drawn on to:
- (a) increase their understanding on how section 133 and subsection 139(1) of the CMA will apply to M&A in the communications and multimedia sector;
 - (b) assess the likely level of scrutiny a M&A will receive from the Commission;

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- (c) assist in structuring (or restructuring) M&A to reduce or eliminate competition concerns;
 - (d) identify information to assist the Commission to assess whether a M&A is likely to affect competition; and
 - (e) identify the Commission's approach to authorisation of possible anti-competitive M&A through undertakings.
- 1.30 The CMA is relevant to the Commission's assessment of M&A.
- 1.31 In addition to these Guidelines, the following guidelines and reports published by the Commission will form the substantive assessment of mergers and acquisitions which have been submitted to the Commission for assessment:
- (a) *Guideline on Substantial Lessening of Competition*. These guidelines, published under section 134 of the CMA, explain the Commission's interpretation of the substantial lessening of competition test and the factors which may be taken into account by the Commission when considering whether a M&A is likely to have the purpose or has, or may have, the effect of substantially lessening competition.
 - (b) *Guideline on Dominant Position*. These guidelines, published under section 138 of the CMA, set out the Commission's general approach to the application of the "dominant position" test under section 137 of the CMA.
 - (c) *Market Definition Analysis*. This report sets out the Commission's proposed market definitions for a range of communications related products, services and facilities.
- 1.32 Additionally, the *Guidelines on Authorisation of Conduct* published by the Commission set out the procedural aspects relating to how licensees may apply for authorisation of conduct which would be construed to have the purpose or effect of substantially lessening competition and sets out the Commission's general approach to assessing such applications.
- 1.33 Parties to a M&A may apply for assessment of their transaction under these Guidelines and if unsuccessful, may then apply for authorisation of conduct under the Guidelines on Authorisation of Conduct.
- 1.34 Parties to a M&A may have an additional option of making parallel applications under these Guidelines and the Guidelines on Authorisation of Conduct at the same time. How the said parties who wish to proceed with the application under both of the said Guidelines, is a matter for them to decide.
- 1.35 The documents listed above are available on the Commission's website. Interested parties should refer to these documents for further background in respect of the Commission's approach to interpreting Chapter 2 of Part VI of the CMA.

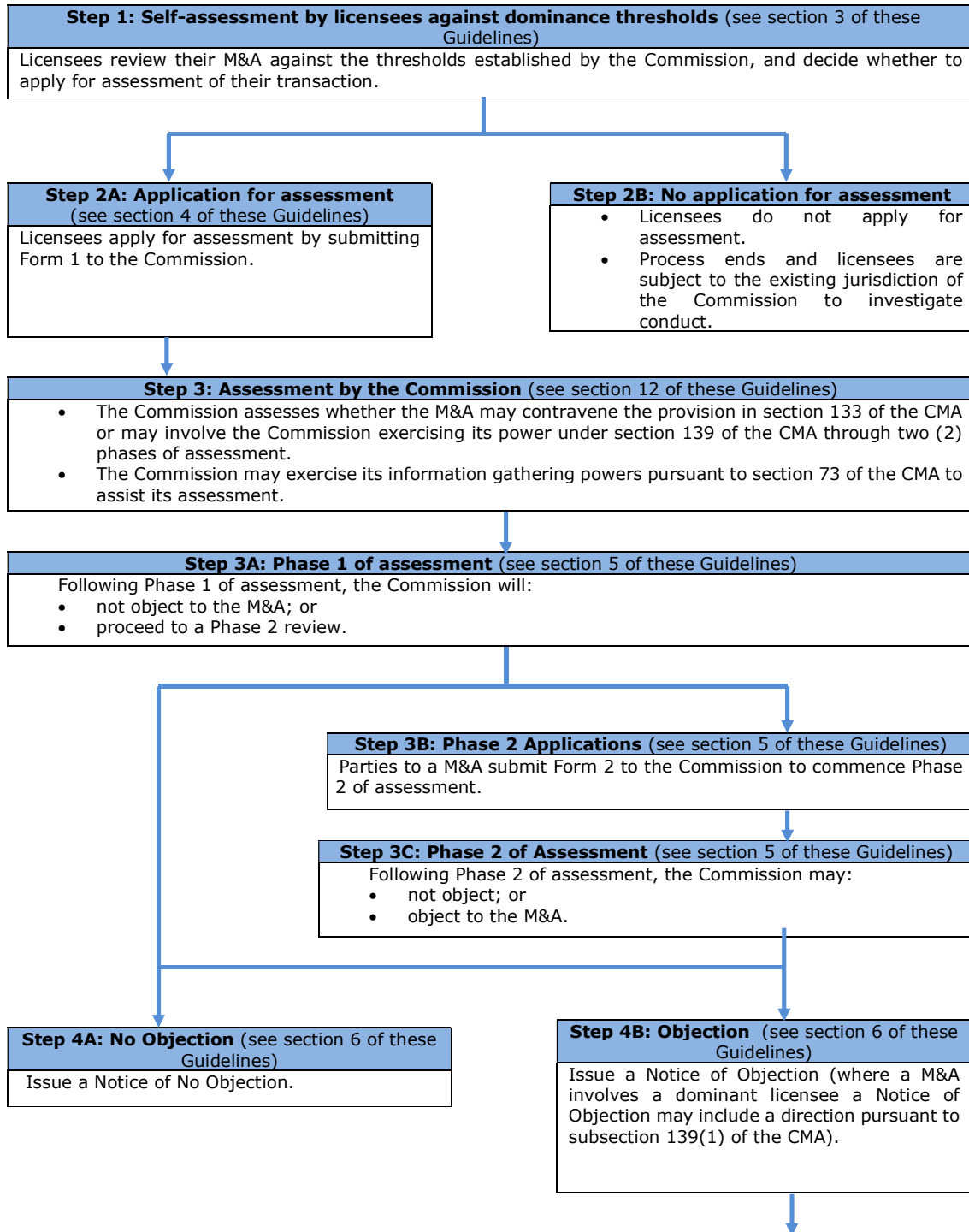
Development of these Guidelines

- 1.36 Competition in Malaysia is regulated through various acts and regimes.
- 1.37 The Competition Act 2010 (“**CA**”) has a general application to all sectors, regulating all commercial activity not already regulated under other Acts. M&A are not currently covered by the CA. The CA also excludes the following industries:
- (a) the communications and multimedia industry, which is regulated by the CMA;
 - (b) the civil aviation industry, which is regulated by the Malaysian Aviation Commission Act 2015;
 - (c) the energy industry, which is regulated by the Electricity Supply Act 1990; and
 - (d) the petroleum industry, which is regulated under the Petroleum Development Act 1984 and the Petroleum Regulations 1974 insofar as the commercial activities regulated under these regulations are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia.
- 1.38 The only competition regime in Malaysia which provides for M&A control and assessment is the regime established under the Malaysian Aviation Commission Act 2015.
- 1.39 As such, in developing these Guidelines, the Commission has had regard to international best practices and the guidelines issued by overseas competition regulators.

2 Overview of the Commission's procedures for the notification and assessment of M&A

- 2.1 Section 2 of these Guidelines provides an overview of the framework the Commission will use in administering its current functions and powers to the assessment of M&A voluntarily submitted to the Commission by licensees. That framework is set out in **Figure 1** below.
- 2.2 The CMA does not contain any express provisions for the notification and assessment of M&A involving a licensee in a communications market. Additionally, there is no legal requirement that licensees notify the Commission in respect of their M&A.
- 2.3 In this context, parties to a M&A proceeding with a transaction have traditionally had to bear the risk of a potential finding post-M&A that the transaction contravenes the prohibition in section 133 of the CMA, or the risk of the Commission exercising its power under subsection 139(1) of the CMA and directing a licensee in a dominant position to cease a particular conduct in relation to that transaction.
- 2.4 The Commission has therefore prepared these Guidelines to provide a **voluntary process** through which parties to a M&A can choose to reduce their risk by proactively submitting their transactions to the Commission **prior** to completion, to obtain its view on the competitive effect of their transactions.
- 2.5 Under this voluntary process, parties to a M&A retain the right to proceed with a M&A without submitting it to the Commission for assessment. However, if parties to a M&A choose to proceed with their transactions without obtaining the Commission's view, they bear the risk of an objection by the Commission, which may result in enforcement actions under the CMA.
- 2.6 It is therefore **recommended** that parties to a M&A:
- (a) take advantage of the voluntary process established in these Guidelines and where appropriate, submit their transaction to the Commission for assessment before proceeding to completion; and
 - (b) consider including a condition precedent to completion of the M&A in their transactional documents, requiring the approval or acquiescence of the Commission in circumstances that would indicate that the M&A would have the potential to raise competition concerns and be suitable for assessment pursuant to these Guidelines.
- 2.7 The Commission recognises that prior to the publication of these Guidelines, M&A may have proceeded without the benefit of the voluntary assessment process. As such, these Guidelines also set out a process by which the Commission will assess completed M&A. However, as noted above, the Commission is limited in its response to such M&A to the enforcement mechanisms and penalties available to it under the CMA.

Figure 1: The Commission’s approach to the assessment of M&A



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Step 5: Remedies for non-compliance with any direction made pursuant to Step 4B (see section 7 of these Guidelines)

- The Commission may implement appropriate remedies which may include an interim or interlocutory injunction pursuant to section 142 of the CMA in respect of any failure by a licensee to comply with a direction of the Commission issued pursuant to section 139 of the CMA in respect of a M&A.
- The Commission may seek to enforce any of the penalties applicable under section 143 of the CMA, including the imposition of a financial penalty or imprisonment.



Step 6: Appeal rights (see section 9 of these Guidelines)

- Licensees who do not agree with a decision or direction made by the Commission may appeal to the Appeal Tribunal under section 120 of the CMA for review.
- Licensees may apply for judicial review after exhausting all other remedies under the CMA.
- Determinations made by the Commission that a licensee is in a dominant position are not subject to appeal.

3 Scope of M&A

Section 3 of these Guidelines set out a set of thresholds which have been developed by the Commission to identify types of M&A which may be suitable for licensees to submit to the Commission for assessment. These thresholds include details in respect of:

1. the types of transactions the Commission will deem to be a M&A and which may be appropriate for assessment; and
2. the elements of such M&A which need to be met for an application for assessment to be suitable.

The decision of whether to submit a transaction for assessment remains with the licensee. The process established under these Guidelines is voluntary and the thresholds set out in this section are for indicative purposes to assist licensees to decide whether to apply to the Commission for assessment of their transaction.

The thresholds set out in this section do not act as a replacement for the substantive assessment to be undertaken by the Commission of whether a transaction may contravene the prohibition in section 133 of the CMA or may involve the Commission directing a licensee in a dominant position pursuant to subsection 139(1) of the CMA. That substantive assessment will be undertaken in accordance with the test set out in section 12 of these Guidelines.

- 3.1 When administering its functions under the CMA in respect of the assessment of M&A, the Commission will limit its review to transactions which raise or have the potential to raise competition concerns. Such transactions are those that have the potential to contravene the prohibition in section 133 of the CMA or may involve the Commission exercising its power under subsection 139(1) of the CMA:
 - (a) section 133 of the CMA prohibits licensees from engaging in *'any conduct which has the purpose of substantially lessening competition in a communications market'*; and
 - (b) subsection 139(1) of the CMA gives the Commission the power to *'direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market'*.
- 3.2 On this basis, the Commission will be interested in M&A which have the purpose, or have, or may have the effect of substantially lessening competition in a communications market, including in the following scenarios:
 - (a) where the parties to a M&A operate in, and the M&A takes place in, the same communications market;

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- (b) where the parties to a M&A operate in different communications markets, and the M&A allows the said parties to leverage market power held in one communications market in another communications market; and
 - (c) where at least one (1) of the parties to a M&A is operating in a communications market, and the M&A allows the said parties to leverage market power in a communications market.
- 3.3 In each of the scenarios noted in section 3.2 above, at least one (1) of the parties to the M&A must be a licensee.
- 3.4 While every M&A is different, the Commission recognises common characteristics of transactions which give the Commission reasonable grounds to believe a transaction may raise competition concerns and thus may warrant further investigation.
- 3.5 The Commission has translated these characteristics into thresholds which establish the standard for M&A which may be suitable to be notified to the Commission for assessment. These thresholds are set out in sections 3.20 and 3.21 below and are summarised in **Figure 2** below.
- 3.6 When a licensee who is a party to a potential M&A believes that the said transaction will meet the thresholds set out in these Guidelines, the said licensee is encouraged to notify the Commission and submit the transaction for assessment in accordance with the procedures set out in these Guidelines.
- 3.7 M&A which do not meet these thresholds are unlikely to require investigation and may not need to be notified to the Commission or submitted for assessment.
- 3.8 The thresholds set out in these Guidelines are provided for indicative purposes only.

What is a M&A?

- 3.9 The provisions in section 133 and subsection 139(1) of the CMA are set out in respect of a licensee's conduct in general. The term '*conduct*' is not defined in the CMA, however, as set out in section 1.22 of these Guidelines, the Commission views M&A to constitute a form of conduct to which section 133 and subsection 139(1) of the CMA will apply.
- 3.10 For the purposes of these Guidelines and in the absence of a definition of the term '*mergers*' or '*acquisitions*' in the CMA, the Commission will deem a M&A² to take place when any of the following conduct occurs:
- (a) two (2) or more previously independent firms merge by:

² The Commission will assess whether a transaction submitted to it for assessment is a "M&A" for the purposes of section 3.10 of these Guidelines on a case by case basis.

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- (i) combining into a new firm, with each firm ceasing to exist as separate legal entities; or
 - (ii) one (1) firm being absorbed into another, where the former firm ceases to exist as a legal entity and the latter firm retaining its legal identity;
- (b) one (1) or more firms acquire direct or indirect control of whole or part of one (1) or more of other firms;
 - (c) a firm acquires assets (including goodwill) of another firm which results in the former firm replacing the latter in the business it was engaged in immediately before the acquisition; or
 - (d) a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity, and involves changes in the shareholding structure of the firm.³
- 3.11 For the purposes of section 3.10(d) above, the Commission considers a 'lasting basis' to mean the joint venture is intended to, and can, operate for such a length of time that the joint venture involves a lasting change in the structure of the parent company, the structure of the market and competition in the market.⁴
- 3.12 The common feature of the transactions the Commission views to be a form of conduct constituting a M&A is that the transactions place a firm in a substantially strengthened position to control or dominate a market.
- 3.13 That control can be achieved through amalgamating with another firm to form a merged entity, acquiring the assets of another firm and replacing that firm, or as set out at section 3.10(b) above, through acquiring direct or indirect control over another firm.

When will a party have control?

- 3.14 The transaction set out at section 3.10(b) above would cover traditional transactions including 'corporate takeovers' i.e. where one firm acquires control of a publicly listed company through acquisition of voting shares in that company.
- 3.15 However, for the purposes of these Guidelines, the transaction set out in section 3.10(b) above extends beyond corporate takeovers to include any transaction

³ For the purposes of these Guidelines, a joint venture which involves creating an entity which only takes over a single function of its parent company will not be considered to be a M&A. Further, a joint venture which simply involves two (2) companies undertaking to perform a certain project or a certain conduct jointly will not be considered to be a M&A. Such transactions or arrangements are subject to the operation of the CMA more generally.

⁴ Whether a joint venture is created to perform all the functions of an autonomous economic entity on a 'lasting basis' is contextual and will be determined by the Commission based on the circumstances of the M&A being assessed.

where one (1) or more firms acquire direct or indirect **control** of the whole or part of one (1) or more of other firms.

3.16 For the purposes of section 3.10(b) above, the Commission will consider 'control' to exist when one firm can exercise **decisive influence** over the activities of another firm by reason of rights, contracts or other means. A firm can obtain control of another firm through:

- (a) **legal control**, i.e. having more than 50% ownership of all voting rights in a firm (i.e. all the voting rights attributable to the share capital of a firm which are currently exercisable at a general meeting); or
- (b) **de-facto control**, i.e. circumstances in a relationship between two (2) or more firms which allows one (1) firm to influence another's activities to affect its key strategic commercial behaviour.

There are no rigid criteria which can be applied to determine whether de-facto control exists, and is a determination to be made based on the circumstances of each individual relationship being assessed. Circumstances which may suggest de-facto control exists include:

- (i) an agreement that one (1) party will cease all production and only source its requirements from another;
- (ii) the existence of financial/lending arrangements, which allow one (1) firm to gain decisive influence over another firm's activities; or
- (iii) the ability of minority shareholders to veto decisions essential for the strategic commercial behaviour of the undertaking through additional rights (such as decisions relating to budgets or business plans).

Dominance thresholds

3.17 In light of the provisions in section 133 and subsection 139(1) of the CMA, the Commission views that a M&A may raise competition issues and be suitable for notification and assessment if:

- (a) one (1) of the parties to the M&A is a licensee who is already in a dominant position in a communications market; or
- (b) the M&A results, or may result in a licensee obtaining a dominant position in a communications market.

3.18 When applying the thresholds set out above to a M&A situation, licensees may rely on a prior determination of the Commission, that they are in a dominant position.

3.19 Licensees which have not been subject to such a determination should assess whether the Commission is likely to take the view that they are in a dominant

position once the M&A takes place. Such assessment should be made by making reference to the Guideline on Dominant Position, issued by the Commission.

- 3.20 For the purposes of section 3.17(b) above, obtaining a dominant position in a communications market can be indicated if the merged or acquired entity is likely to have a post-M&A market share of 40% or more.
- 3.21 The Commission recognises that the use of dominance thresholds is for indicative purposes only and is not capable of identifying all M&A which may be suitable for notification and assessment. As such, in addition to the factors recognised in the dominance threshold, the Commission considers a M&A may be suitable for notification and submission to the Commission for assessment in the following circumstances:
- (a) if one (1) or both parties to a M&A is a licensee which is subject to an ongoing investigation by the Commission in respect of any conduct that is prohibited under the CMA; or
 - (b) if there is significant cross shareholding between the parties to a M&A of 40% or more.
- 3.22 The assessment process set out in these Guidelines involve a necessary amount of public and third-party consultation. As such, for the purposes of these Guidelines, the Commission does not encourage parties to a M&A to notify it in respect of a proposed M&A unless it has been publicly announced (or is made known to the public generally) and the parties to a M&A have a bona fide intention to proceed with the M&A.
- 3.23 Licensees who are a party to a proposed M&A which does not meet the requirements in section 3.22 above, and accordingly where there is a level of confidentiality surrounding the M&A, are encouraged to consider whether their transaction is appropriate for confidential assessment through the process set out in section 11 of these Guidelines.

M&A thresholds – self assessment

- 3.24 The Commission has formulated the framework below which reflects how the guidance in the previous sections should be practically applied to a M&A. This framework is intended to assist licensees to decide whether to notify and submit their proposed M&A to the Commission for assessment.
- 3.25 Notification and submission for assessment is a voluntary process. While licensees may proceed with a M&A without obtaining the Commission's view on whether the said M&A may contravene the prohibition in section 133 of the CMA or may involve the exercise of the Commission's power to direct a licensee in a dominant position under subsection 139(1) of the CMA, such M&A will be subject to the risk of self-initiated investigations by the Commission.

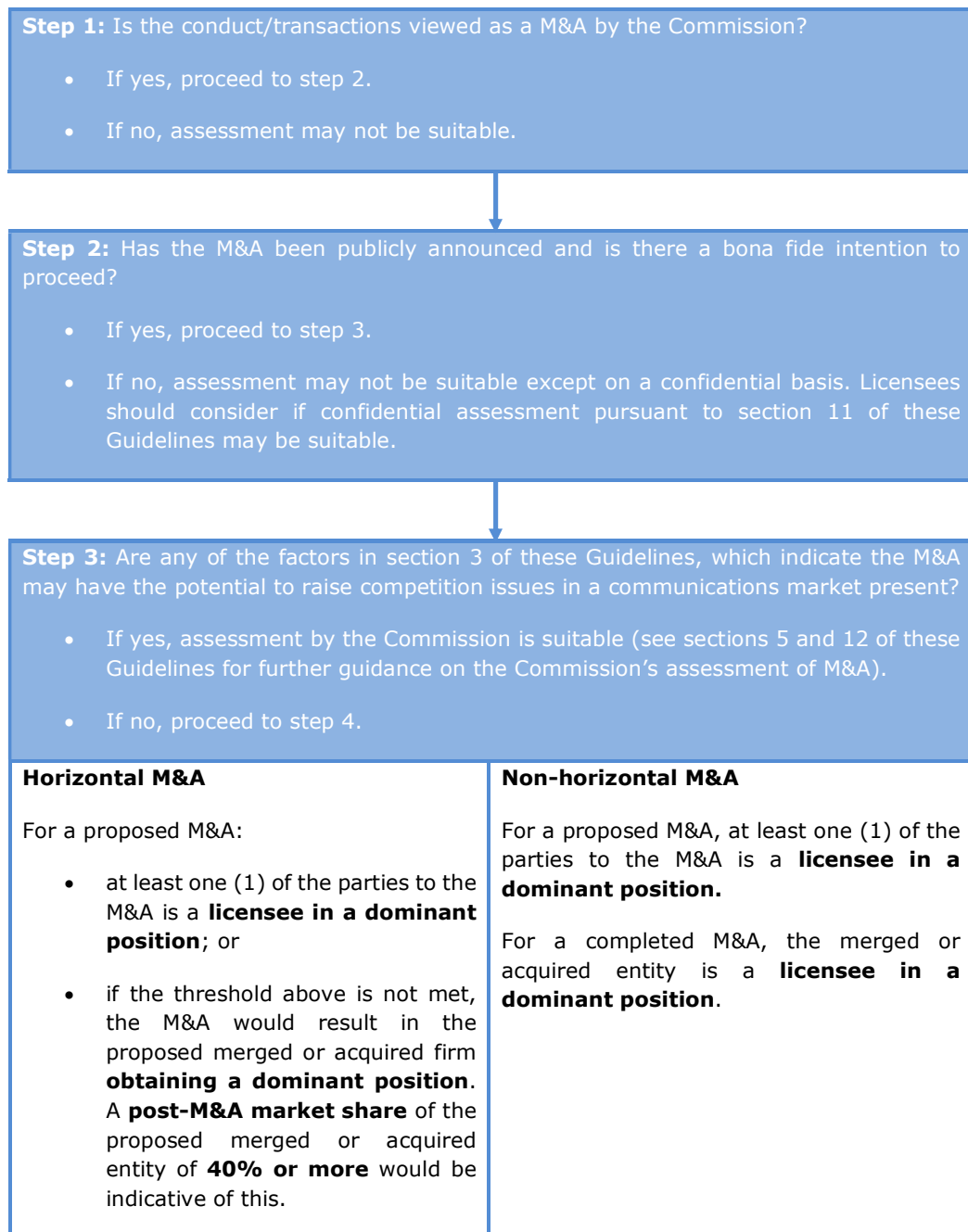
- 3.26 As such, if licensees apply the thresholds set out in the framework below to their M&A and believe it is suitable for notification and assessment by the Commission, it is recommended that the parties to the M&A notify the Commission in respect of the said M&A and submit it for assessment in accordance with the procedures set out in these Guidelines.
- 3.27 A licensee who is a party to M&A which does not meet the thresholds set out in the framework below may not need to notify the Commission or submit the said M&A for assessment. While such M&A are unlikely to raise competition concerns and can proceed without notification or assessment, the Commission reserves its right to investigate such M&A at any time.
- 3.28 The thresholds outlined in this section are to assist licensees to determine whether to submit their M&A for assessment and **do not** replace the substantive assessment of a M&A by the Commission against section 133 and subsection 139(1) of the CMA.
- 3.29 Meeting the thresholds set out in this section only suggests that investigation by the Commission may be warranted. Whether the Commission proceeds to an objection or non-objection to a M&A on the basis set out in these Guidelines will depend on the outcome of the substantive assessment of the M&A. This substantive assessment will be in respect of whether the M&A may contravene the prohibition in section 133 of the CMA or may involve the Commission exercising its power to direct a licensee in a dominant position under subsection 139(1) of the CMA, in the manner set out in sections 5 and 12 of these Guidelines.
- 3.30 The question to be answered in respect of whether the Commission takes any action in response to a M&A remains whether it has the purpose, has or may have the effect of **substantially lessening competition** in a communications market.

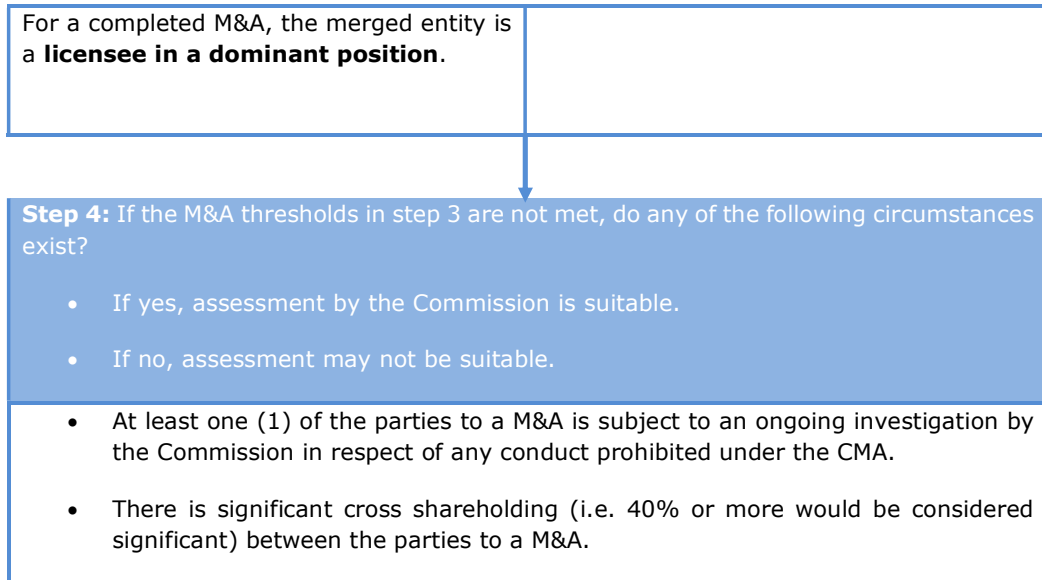
Framework for M&A thresholds

- 3.31 In formulating a framework for M&A thresholds, the Commission recognises that M&A can take any of following forms:
- (a) a **horizontal** M&A, which involves firms at the same functional level of the supply chain;
 - (b) a **non-horizontal** M&A, which includes:
 - (i) a **vertical** M&A, which involves firms at different functional levels of the market; and
 - (ii) a **conglomerate** M&A, which is a M&A which is neither horizontal nor vertical. A conglomerate M&A involves firms operating in different product markets. The firms involved in a conglomerate M&A may supply goods which are not related in any way or are related but in a non-functional way (for example, complementary products).

- 3.32 The effects of horizontal and non-horizontal M&A on competition are distinct, and as such, the thresholds applicable to a M&A will depend on whether the M&A is horizontal or non-horizontal.
- 3.33 The framework licensees should apply to their M&A situations is set out in **Figure 2** below.

Figure 2: Thresholds for horizontal and non-horizontal M&A





- 3.34 Licensees who are a party to a proposed M&A should note that while their M&A situation may not meet the thresholds applicable to proposed M&A, the Commission can make a determination post-M&A that the merged or acquired entity is in a dominant position. Therefore, licensees are encouraged to take a conservative view and approach the Commission if they are unsure whether notification would be appropriate.
- 3.35 The market share percentage outlined in step 3 above is indicative only. If the proposed merged or acquired entity would not strictly reach this threshold and the parties are nonetheless concerned that the proposed merged or acquired entity would have the potential to raise competition issues, the parties should use their discretion in deciding whether to notify the Commission in respect of the M&A.
- 3.36 If licensees, after self-assessing their M&A against the thresholds set out in **Figure 2** above, determine that their M&A may be suitable for assessment, they must then decide whether to voluntarily submit the M&A to the Commission for assessment in accordance with the process set out in section 4 of these Guidelines.
- 3.37 If licensees choose to submit their M&A for assessment, the Commission will undertake a substantive assessment of the said M&A in accordance with sections 5 and 12 of these Guidelines.

Figure 3: Notification scenarios

Scenario 1

Firm A and Firm B are **independent licensees** supplying products in the retail market for mobile telephony at the same functional level of the supply chain. **Neither firm is subject to a prior determination by the Commission that it is in a dominant position.** Firm A holds **10% of the market** and Firm B holds **20% of the market.**

Firm A and Firm B have announced that they have signed a heads of agreement (“**HoA**”) relating to an in principle agreement for a **proposed M&A** under a new Malaysian company, proposed to be implemented by inter-conditional schemes of arrangement. The parties have entered a period of exclusivity during which they intend to conduct due diligence.

Application of M&A thresholds:

- This transaction would be viewed by the Commission to be merger as it involves two (2) previously independent firms merging.
- The transaction is a proposed merger, which has been publicly announced. The parties have a bona fide intention to proceed with the merger, evidenced through the signing of a HoA.
- The relevant factors that may indicate that competition issues may arise in this proposed M&A include the proposed M&A entity having more than 40% market share, or Firm A or Firm B being a licensee in a dominant position.
- The proposed M&A would not meet the market share dominance threshold, as the merged or acquired entity would only have a post-merger market share of 30%.
- As neither party is subject to an existing determination that it is in a dominant position, each party should assess whether they are likely to be determined by the Commission to be in a dominant position or whether (despite its potential market share) post-merger, the merged or acquired entity may be in a dominant position.
- If the parties consider they may be in a dominant position, then they should decide whether to submit the transaction for assessment. If the parties do, the Commission will conduct the assessment as per the discussion in sections 5 and 12 of these Guidelines.

Scenario 2

Firm C and Firm D are **independent licensees** in the same market and at the same functional level of the supply chain. **Firm C has previously been determined by the Commission to be in a dominant position in the relevant market, while Firm D has not.**

Firm C is a public company limited by shares, with 100 shares with one (1) voting right attached to each share. Firm C and Firm D entered into a share purchase agreement whereby **Firm C has agreed to issue 100 shares to Firm D.** The issue of shares has not yet been presented to shareholders for approval.

Application of M&A thresholds:

- Firm D's acquisition of 100 shares in Firm C constitutes obtaining 50% of the voting rights in Firm C and would amount to it acquiring legal control and thus would be deemed to be a M&A.
- As Firm C and D operate in the same functional level of the supply chain and the M&A has not been effected, the applicable threshold is for a proposed horizontal M&A.
- The applicable threshold is met, as Firm C is in a dominant position.
- Firm D, as the acquiring firm, should consider submitting an application for assessment. If Firm D does submit an application for assessment, the Commission will conduct the assessment as per the discussion in sections 5 and 12 of these Guidelines.

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Scenario 3

Firm E and Firm F are **independent licensees** in the same communications market and operate at different functional levels of the supply chain. **Neither firm is subject to a prior determination by the Commission that it is in a dominant position.**

Firm E and Firm F have been parties to **ongoing negotiations whereby Firm E is being taken over and absorbed into Firm F.** The Firms have agreed in principle that a M&A will take place but have not announced the proposed M&A to the market.

Application of M&A thresholds:

- The proposed transaction would be viewed by the Commission to be M&A as it involves two (2) previously independent firms merging.
- As the transaction is a proposed M&A which has not been publicly announced, the standard M&A assessment process would not be available. However, the parties should consider if the confidential assessment process is warranted at this stage.
- As the proposed M&A is between two (2) firms at different functional levels of the supply chain, the said M&A is a vertical M&A and the dominance threshold in relation to non-horizontal M&A would apply.
- As neither party is subject to a prior determination by the Commission that it is in a dominant position, each party should consider whether the Commission may determine Firm E or Firm F to be a licensee in a dominant position, or whether the M&A entity may be determined by the Commission to be a licensee in a dominant position.
- If the parties consider that the Commission would come to such determinations, then the M&A may be appropriate for assessment by the Commission and the firms should decide whether to voluntarily submit the M&A for confidential assessment.
- If the parties do submit an application for confidential assessment, the Commission will conduct the assessment as per the discussion in sections 11 and 12 of these Guidelines.

4 Application for assessment

Section 3 of these Guidelines sets out the thresholds developed by the Commission to assist licensees to decide whether their M&A may be suitable for assessment.

If licensees believe their transaction may be suitable for assessment and wish to submit their transaction for assessment, they should do so in the manner set out in this section.

Section 4 of these Guidelines sets out the practical aspects of how licensees should apply to the Commission for assessment of a M&A.

This section provides information in respect of:

- the appropriate party that should apply for assessment;
- the relevant forms which must be completed;
- how confidentiality should be claimed; and
- technical aspects relating to submission of forms and supporting documentation to the Commission.

An application for assessment **does not** constitute an application for authorisation of a M&A pursuant to section 140 of the CMA. See section 8 of these Guidelines for more information on authorisation.

4.1 Applications for assessment must be made in accordance with this section of these Guidelines.

Applicants

4.2 To ensure the assessment process is efficient, the Commission will not accept multiple parallel applications for assessment of a M&A. The Commission expects a level of cooperation between parties to a M&A in preparing and applying for assessment.

4.3 An application for assessment should be made by the following parties:

- (a) for a proposed M&A, the acquiring party; and
- (b) for a completed M&A, the merged entity or the entity that has acquired control.

4.4 An applicant should give written notice to all other parties to a M&A that an application has been submitted to the Commission, within two (2) business days from the date an application for assessment is submitted. A copy of that written notice must be provided to the Commission.

- 4.5 An applicant is required to notify the Commission of its obligations to notify other relevant agencies or authorities in respect of the M&A and the applicable timelines by those agencies or authorities. In its absolute discretion, the Commission will have regard to any such applicable timelines when conducting the assessment process.

Form 1 and Form 2

- 4.6 An applicant applies for assessment of a M&A by completing and submitting **Form 1** to the Commission.⁵
- 4.7 The Commission will use the information provided to it in **Form 1** to undertake Phase 1 of the assessment process.
- 4.8 If the Commission decides that Phase 2 of assessment is required, an applicant will be required to complete and submit **Form 2** to the Commission.⁶
- 4.9 Prior to commencing Phase 1 or Phase 2 of assessment, the Commission will review the validity of an application.
- 4.10 If an application is accepted as valid, the Commission will notify an applicant in writing, within five (5) business days from the date the application was received.
- 4.11 The applicant is required to provide sufficient information to facilitate the assessment to be carried out by the Commission. The Commission may request for additional information, as and when required, if the information provided by the applicant is deemed insufficient.
- 4.12 Background on the substantive aspects of Phase 1 and Phase 2 of the assessment process is set out in section 5 of these Guidelines.

Invalid Applications

- 4.13 The Commission may deem an application for assessment to be invalid if the application:
- (a) is not complete in respect of all information required; or
 - (b) is not supported by the relevant documentation.
- 4.14 Applications that are deemed invalid by the Commission will be rejected. In rejecting an invalid application, the Commission will send the applicant a Notice of Rejection within ten (10) business days from the date the application was received.

⁵ Form 1 is set out at Annexure 1 to these Guidelines, and is subject to variation by the Commission from time to time. An updated copy will be made available at the Commission's website.

⁶ Form 2 is set out at Annexure 2 to these Guidelines, and is subject to variation by the Commission from time to time. An updated copy will be made available at the Commission's website.

- 4.15 A Notice of Rejection will set out the grounds of invalidity of the application. For the assessment process to continue, an applicant must submit an amended application that remedies the invalidities identified in the Notice of Rejection.

The Commission's information gathering powers

- 4.16 Under subsection 73(2) of the CMA, the Commission has the power to direct any person to provide it with information which it has reason to believe is relevant to the performance of its powers and functions under the CMA or its subsidiary legislation. This may include an applicant or third parties.
- 4.17 At any stage during Phase 1 or Phase 2 of the assessment process, the Commission may rely on its information gathering powers to obtain further information from applicants or third parties which would assist the assessment of a M&A.
- 4.18 If the Commission makes a request for information pursuant to this power, it will be by written request.
- 4.19 Information received by the Commission in response to a request for information pursuant to subsection 73(2) of the CMA will be made available to the public pursuant to section 79 of the CMA.
- 4.20 Section 80 of the CMA imposes limitations on the publication of any information (or any part of any information) provided to the Commission in response to a request for information pursuant to subsection 73(2) of the CMA and establishes factors to be considered by the Commission before publication including the following:
- (a) the Commission must be satisfied that publication is consistent with the objects of the Act;
 - (b) the Commission must consider the commercial interests of the parties to whom the information relates; and
 - (c) the Commission shall not publish any information, or any part of any information disclosed to it, if the publication would:
 - (i) disclose any confidential information;
 - (ii) would prejudice the fair trial of a person; or
 - (iii) involve the unreasonable disclosure of personal information of any individual (including a deceased individual).

The Commission will have regard to the factors set out at section 80 of the CMA before publishing any information in accordance with its obligations under section 79 of the CMA.

Claims of commercial-in-confidence by applicants

- 4.21 The Commission may consult with third parties in respect of any part of an application submitted to it for assessment.

- 4.22 Applicants must provide the Commission with a public version of any document submitted to it in accordance with the procedure set out in section 4.23 below, which can be used in consultations and which can be disclosed to third parties if necessary.
- 4.23 A public version of any document must be in identical form to the original application, but may be redacted to protect commercially sensitive or confidential information. Any redactions must be marked with the reference "C-I-C" (i.e. commercial in confidence).
- 4.24 Original versions of documents will not be provided to third parties and will only be used by the Commission for its internal purposes. The Commission may suspend assessment of a M&A if, in its view, an applicant has made excessive claims that information is confidential or commercially sensitive. The Commission may refuse to recommence the assessment process until the applicant resubmits an appropriate public version.
- 4.25 The Commission does not consider information which is, or becomes, generally available to the public at the time of the application for assessment to be confidential or commercially sensitive.

Submission of forms and supporting documentation to the Commission

- 4.26 Applications submitted to the Commission (including supporting documentation, information provided by way of an informal request or a request made pursuant to the Commission's information gathering powers, and any additional public version of any such document) must be submitted in the following forms:
- (a) one (1) original hard copy; and
 - (b) one (1) soft copy in Microsoft Format, provided on a USB.

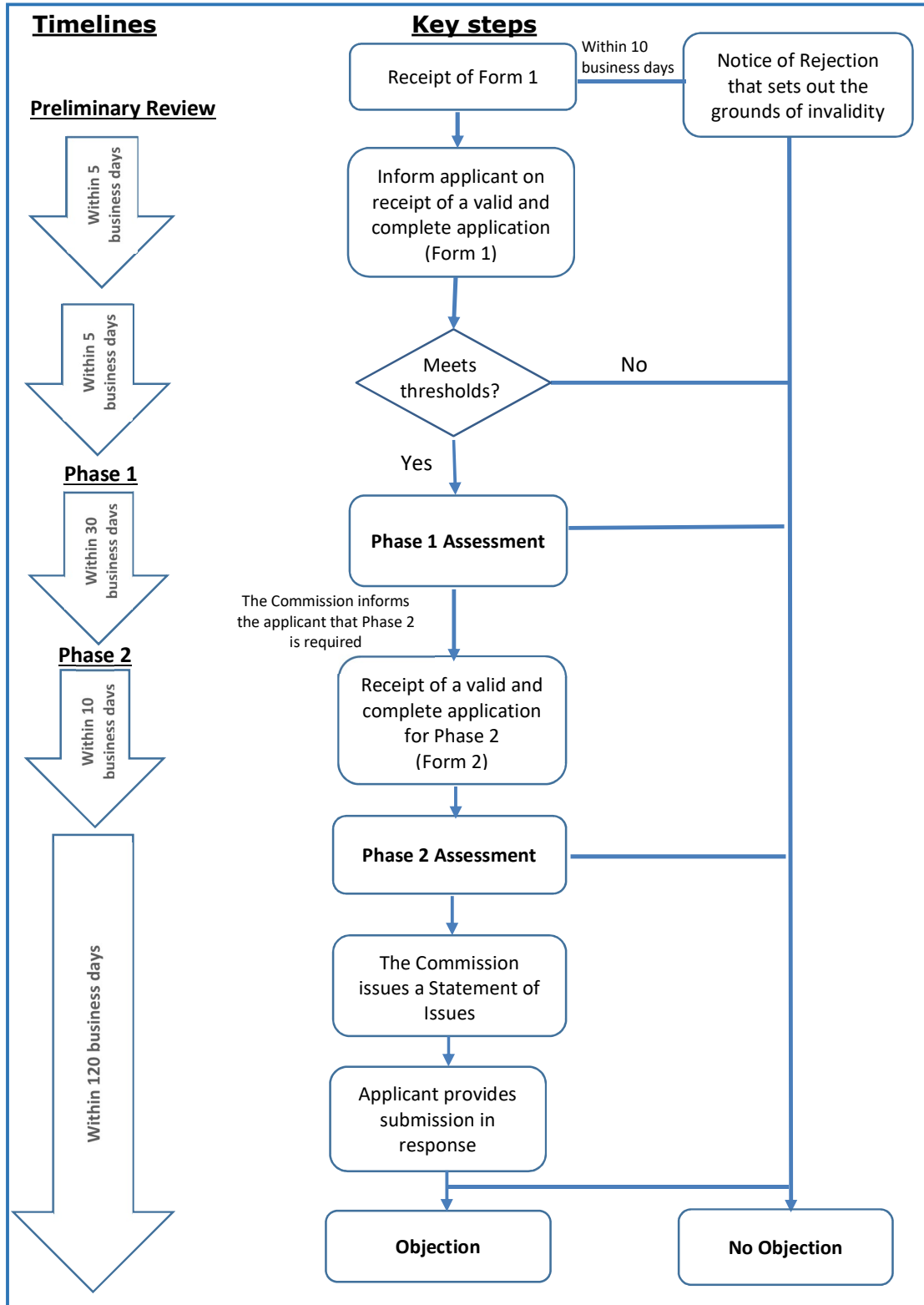
Declarations as to the accuracy of information provided

- 4.27 Pursuant to section 75 of the CMA, it is an offence to give false or misleading information to the Commission or to fail to disclose or omit to give any relevant information.
- 4.28 **Form 1 and Form 2** contain a declaration stating that the information contained in an application is true and correct to the best of the applicant's knowledge and belief. Applications which are not accompanied by a signed declaration will not be accepted.
- 4.29 If there is any material change to any of the information provided by an applicant to the Commission, the applicant is obliged to inform the Commission.

5 Assessment

- 5.1 Section 5 sets out the procedure the Commission follows when assessing M&A which have been voluntarily submitted to it.
- 5.2 The Commission assesses M&A submitted to it through a two (2)-phase process. In both phases of assessment, the Commission will make the same assessment, i.e. does a M&A have the purpose or has, or may have, the effect of substantially lessening competition in a communications market.
- 5.3 The two (2) phases are distinguished by the extensiveness of the information sought and the extensiveness of the assessment undertaken by the Commission.
- 5.4 Two (2) phases of assessment facilitates the efficient assessment of M&A as it removes the need for parties to non-complex M&A to provide the level of detail only necessary for the Commission to assess complex M&A.
- 5.5 An overview of the Commission's assessment process is set out in **Figure 4** below.

Figure 4 – Overview of the assessment process



- 5.6 The Commission will commence the assessment process after receiving a valid **Form 1** application.

Preliminary review

- 5.7 The submission of M&A to the Commission for assessment is a voluntary process. The Commission relies on applicants appropriately applying the M&A thresholds set out in section 3 of these Guidelines to their M&A when deciding to apply for assessment.
- 5.8 As such, before commencing Phase 1 of assessment, the Commission will undertake a preliminary review to determine whether:
- (a) the transaction is deemed to be a 'M&A' in accordance with the definition set out in section 3 of these Guidelines; and
 - (b) the transaction meets the applicable thresholds, or any other grounds exist to justify assessing the M&A.
- 5.9 If a M&A submitted to the Commission does not meet the relevant thresholds and will not be assessed, the Commission will notify an applicant within ten (10) business days from the date of receipt of an application.
- 5.10 Notification that a M&A will not be assessed does not constitute authorisation or clearance of that M&A by the Commission, and the Commission reserves its rights to review or investigate such M&A at any time in the future.

Phase 1 of assessment

- 5.11 During Phase 1 of the assessment process, the Commission will assess the purpose or effect of a M&A on the basis of the information obtained by the Commission from the applicant or from third parties. The Commission may also hold consultations with the applicant or third parties for this purpose.
- 5.12 The indicative timeframe for completion of Phase 1 of assessment is within thirty (30) business days from the date the Commission notifies applicants of receipt of a valid **Form 1** application.
- 5.13 The time frame set out in section 5.11 above may be extended by the Commission at its absolute discretion, including if:
- (a) it requests further information from an applicant informally;
 - (b) requests information from an applicant or third party pursuant to its information gathering powers; or
 - (c) if the Commission considers it needs more time to assess an application.
- 5.14 Subject to section 5.13 above, the timing set out in section 5.12 above is the indicative timing for the completion of Phase 1 of the assessment process. Phase 1

may be completed in less or more time than that indicated if the Commission considers that it is warranted in the circumstances of the M&A being assessed.

- 5.15 Following Phase 1 of the assessment process, the Commission will issue an applicant with:
- (a) a Notice of No Objection; or
 - (b) a notice informing an applicant that a Phase 2 of assessment is necessary.
- 5.16 The Commission will only proceed to Phase 2 if it is unable to determine the effect or purpose of a M&A on the basis of information obtained through Phase 1 of the assessment process.

Phase 2 of assessment

- 5.17 Phase 2 assessments require a more detailed and extensive assessment of the effects of a M&A on competition. The Commission requires more comprehensive information in respect of the market/s the M&A is to take place in and the business the M&A parties and the merged or acquired entity will be engaged in.
- 5.18 The Commission will commence Phase 2 of the assessment process within ten (10) business days from the date of receipt of a valid **Form 2** application.
- 5.19 The indicative timeframe for completion of a Phase 2 assessment is within 120 business days from the date of commencement.
- 5.20 The time frame in section 5.179 above may be extended by the Commission at its absolute discretion, including if:
- (a) it requests further information from an applicant informally; or
 - (b) requests information from an applicant or third party pursuant to its information gathering powers.
- 5.21 Subject to section 5.20 above, the timing set out in section 5.19 above is the indicative timing for the completion of Phase 2 of the assessment process. Phase 2 may be completed in less or more time than that indicated if the Commission considers that it is warranted in the circumstances of the M&A being assessed.

Statement of issues

- 5.22 If the Commission reaches the view that it is likely to issue an unfavourable decision, it will issue an applicant with a Statement of Issues prior to making a final decision.
- 5.23 A Statement of Issues will set out the Commission's preliminary findings from the assessment process, and will specify the grounds on which the Commission believes the M&A may contravene or has contravened the prohibition in section 133 of the

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CMA, or requires or may require the Commission to exercise its power to direct a licensee in a dominant position under subsection 139(1) of the CMA.

- 5.24 On receiving a Statement of Issues, an applicant will be given thirty (30) days to provide the Commission with submissions in response.
- 5.25 Before making a final decision to object to a M&A, the Commission will have regard to any submissions provided to it.

6 Decisions

- 6.1 This section sets out the range of decisions the Commission will make following completion of its assessment of a M&A, and the practical effect of such decisions for applicants.
- 6.2 On completing its assessment, the Commission may either:
- (a) make a favourable decision and not object to the M&A; or
 - (b) make an unfavourable decision and object to the M&A.
- 6.3 A favourable decision may be made after the Commission completes Phase 1 or Phase 2 of the assessment process, however an unfavourable decision will only be made after completion of Phase 2 of assessment.

No objection

- 6.4 If the Commission decides that a M&A does not have the purpose, or does not have, or is not likely to have the effect of substantially lessening competition in a communications market, or result in a dominant position, it may make a favourable decision. On making a favourable decision, the Commission may issue an applicant with a Notice of No Objection.
- 6.5 A Notice of No Objection provides an applicant with confirmation that the Commission will not oppose an applicant from proceeding with the M&A in the structure submitted to the Commission for assessment.
- 6.6 The Commission recognises that the competitive dynamics in a market evolve over time. As such, a Notice of No Objection will only be valid for a period as specified in the notice.
- 6.7 A Notice of No Objection will state the period for which it will be valid. Generally, the Commission will provide that a Notice of No Objection will be valid for a period of one (1) year from the date of issue, however such timeframes may vary at the Commission's discretion.
- 6.8 The Commission may object to any M&A that is effected outside of the period specified in the Notice of No Objection.
- 6.9 Parties to a M&A may apply to the Commission in writing to extend the period of validity of the Notice of No Objection. The application must set out:
- (a) the reason the M&A has not or cannot be effected within the original period of validity specified;
 - (b) the length of the extension sought;
 - (c) how the competitive environment in the relevant market has changed since the Notice of No Objection was issued;

- (d) how the M&A's effect on competition will differ if effected outside of the original period of validity; and
 - (e) extension of time provided by other regulators, if any.
- 6.10 The Commission will consider requests for extensions to the period of validity of a Notice of No Objection at its absolute discretion.
- 6.11 If the Commission rejects a request to extend the period of validity of a Notice of No Objection, it is recommended that the M&A parties reapply for assessment.
- 6.12 All application for extension of validity period must reach the Commission no later than 90 days prior to the expiry of the validity period, to provide sufficient time for assessment.

Revocation of a Notice of No Objection

- 6.13 The Commission may revoke a Notice of No Objection before expiry of the period of validity which it has issued in respect of a M&A, and commence investigations if:
- (a) the information an applicant provided to the Commission was materially incomplete, false or misleading;
 - (b) if the M&A has been effected, it is materially different to the transaction submitted to the Commission for assessment; or
 - (c) there has been a material change of circumstance since the Commission issued the Notice of No Objection.
- 6.14 If the Commission revokes a Notice of No Objection and the M&A has completed, the merged or acquired entity will be subject to investigation by the Commission. Such investigation will be focused on whether the M&A contravenes any part of the CMA pursuant to its general powers of investigation.
- 6.15 If the Commission revokes a Notice of No Objection and the M&A has not been effected or completed, the Commission, in its absolute discretion, may allow the parties to the M&A to re-apply for assessment of the M&A.

Objection

- 6.16 The Commission may object to a M&A if it decides that a M&A has contravened, or a proposed M&A (upon completion) will contravene, the prohibition in section 133 of the CMA or may involve the MCMC exercising its power to direct a licensee in a dominant position under subsection 139(1) of the CMA.
- 6.17 On objecting to a M&A, the Commission may issue a Notice of Objection, giving an applicant notice of an unfavourable decision.
- 6.18 On making an unfavourable decision, the Commission will consider the enforcement options and remedies available to it. The Notice of Objection may refer to the

Commission's decision to utilise any of the enforcement options or remedies available to it, as set out in section 7.

7 Enforcement measures and remedies

- 7.1 This section sets out the enforcement measures and remedies which the Commission may rely on following a decision that a M&A submitted to it for assessment has the purpose of, or has, or may have the effect of substantially lessening competition or result in a dominant position in a communications market.
- 7.2 The enforcement measures and remedies available to the Commission on making an unfavourable decision are set out in Chapter 2 of Part VI of the CMA:
- (a) Subsection 139(1) of the CMA permits the Commission to direct a licensee in a dominant position to cease conduct which has or may have the effect of substantially lessening competition in a communications market and to implement appropriate remedies;
 - (b) section 142 of the CMA allows the Commission to seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2 of Part VI of the CMA; and
 - (c) section 143 of the CMA provides that anyone who contravenes a prohibition under Chapter 2 of Part VI of the CMA is liable to a fine or imprisonment.
- 7.3 The enforcement measures and remedies available to the Commission will depend on the circumstances of the M&A, including whether it is proposed or completed, whether it has the purpose or effect of substantially lessening competition in a communications market, and whether it involves a licensee in a dominant position as follows:
- (a) section 53 of the CMA is available for failure to comply with a direction issued by the Commission pursuant to subsection 139(1) of the CMA;
 - (b) section 139 of the CMA is available in respect of proposed or completed M&A which have, or may have, the effect of substantially lessening competition in a communications market but may only be exercised in respect of a licensee in a dominant position;
 - (c) section 142 of the CMA is available for breaches of the prohibition in section 133 of the CMA i.e. conduct which has already occurred; and
 - (d) section 143 of the CMA is available for breaches of the prohibition in section 133 of the CMA i.e. conduct which has already occurred:

Notices of Objection

- 7.4 If Commission decides to use any of the enforcement measures or remedies available to it under subsection 139(1), sections 142 or 143 of the CMA when issuing a Notice of Objection, it will do so in the manner set out in this section.

Proposed M&A

- 7.5 If a proposed M&A involves a licensee in a dominant position and the M&A would have the effect of substantially lessening competition in a communications market or result in a dominant position, a Notice of Objection may include a direction issued pursuant to subsection 139(1) of the CMA including requirements that the licensee:
- (a) must not continue with or complete the M&A; and
 - (b) must not transfer any licences or spectrum assignments granted pursuant to the CMA (if permitted pursuant to the terms and conditions applicable to the assignment) to another entity.
- 7.6 The Commission may seek an interim or interlocutory injunction pursuant to section 142 of the CMA in response to any failure by parties to a M&A to comply with section 133 of the CMA i.e. conduct which has already occurred or take action under section 53 of the CMA for failure to comply with a direction issued by the Commission, in a Notice of Objection.
- 7.7 If a proposed M&A does not involve a licensee in a dominant position or likely to result in a dominant position but has the purpose of substantially lessening competition in a communications market, the Notice of Objection may include a statement to the effect that the Commission will seek an interim or interlocutory injunction against the parties to the M&A if the M&A is continued or completed.

Completed M&A

- 7.8 If a M&A has already completed and does not involve a licensee in a dominant position or result in a dominant position but has the purpose of substantially lessening competition in a communications market, the Notice of Objection may include a statement to the effect that the Commission will seek an interim or interlocutory injunction pursuant to section 142 of the CMA, to prevent further integration between the parties to the M&A, or to prevent the merged or acquired entity from trading.
- 7.9 If a M&A has already completed and involves a licensee in a dominant position and has the effect of substantially lessening competition in a communications market:
- (a) the Notice of Objection may include a direction pursuant to section 51 of the CMA to prevent further integration between M&A parties, or to prevent the merged or acquired entity from trading; and
 - (b) if the merged or acquired entity fails to comply with the direction in the Notice of Objection, the Commission may seek to enforce any of the penalties applicable under section 53 of the CMA.

8 Authorisations and undertakings

Section 8 sets out the interaction between the assessment of a M&A pursuant to these Guidelines and authorisation of conduct pursuant to section 140 of the CMA and the Guidelines on Authorisation of Conduct.

An application for assessment of a M&A under these Guidelines **does not** constitute an application for authorisation of a M&A pursuant to section 140 of the CMA. The Guidelines on Authorisation of Conduct sets out the process by which licensees should submit applications for authorisation of conduct to the Commission and the assessment the Commission will undertake in respect of such applications.

Licensees may submit an application to the Commission for authorisation of a M&A at the same time or after submitting an application for assessment of a M&A pursuant to these Guidelines. Licensees may also decide to submit an application for authorisation without applying for assessment of the M&A.

M&A assessment and authorisation

- 8.1 Authorisation will not be available in respect of all M&A (being assessed by the Commission or otherwise).
- 8.2 Pursuant to subsection 140(1) of the CMA, the right to apply for authorisation of a M&A is limited to M&A where:
 - (a) at least one (1) of the M&A parties is a licensee; and
 - (b) the proposed M&A has not yet taken place.
- 8.3 If the M&A has already completed, the parties to the M&A are not able to apply for authorisation of the conduct.
- 8.4 The Commission will accept applications for authorisation made pursuant to section 140 of the CMA at any time during the M&A assessment process.
- 8.5 The Commission will assess applications for authorisation of a proposed M&A in accordance with the Guidelines on Authorisation of Conduct.⁷

Authorisation

- 8.6 Pursuant to section 140 of the CMA, licensees may apply to the Commission prior to engaging in any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market, for

⁷ Guidelines on Authorisation of Conduct (17 May 2019) issued by the Commission.

authorisation of the conduct. The Commission shall authorise the conduct if the Commission is satisfied that the authorisation is in the **national interest**.

- 8.7 The Commission may authorise such conduct subject to a licensee submitting an undertaking regarding his conduct in any matter relevant to the authorisation.⁸
- 8.8 As such, M&A which may be construed to have the purpose or the effect of substantially lessening competition in a communications market may be authorised by the Commission, if it is in the national interest, but subject to certain restrictions or limitations imposed on the parties to the M&A by the Commission.
- 8.9 Before authorising any conduct, the Commission may require the parties to the M&A to submit an undertaking pursuant to subsection 140(3) of the CMA. This may include submitting an undertaking in respect of, but not limited to, any of the following:
- (a) an undertaking to proceed with the M&A in a substantially restructured form;
 - (b) an undertaking that a specific division will be sold off;
 - (c) an undertaking that the negative competitive effects of the M&A will be addressed in some other form;
 - (d) an undertaking to expand or allow fair and reasonable access to vital infrastructure or services to customers or competitors;
 - (e) an undertaking to not acquire assets within a specific time period, if doing so would have the effect of strengthening the merged or acquired entity's market power;
 - (f) in the case of M&A involving a firm acquiring direct or indirect control of another firm, an undertaking that all dealings between the parties will continue on an arm's length basis and that measures will be put in place to ensure this remains the case.
- 8.10 As such, the potential outcomes of the Commission objecting to a M&A pursuant to section 6 of these Guidelines extend beyond issuing a Notice of Objection (and associated enforcement options and remedies, as per section 7 of these Guidelines), and can include authorisation on application by the parties to the M&A.

⁸ Subsection 140(3) of the CMA.

9 Appeal rights

- 9.1 This section sets out an applicant's right to appeal against a decision of the Commission that its M&A situation contravenes the prohibitions in section 133 of the CMA or to exercise of the Commission's power to direct a licensee in a dominant position under subsection 139(1) of the CMA.

Requesting a statement of reasons from the Commission

- 9.2 Pursuant to section 119 of the CMA, parties to the M&A may request in writing, a statement of reasons from the Commission, setting out the basis for any decision reached from the M&A assessment process.
- 9.3 If requested, the Commission will provide a copy of a statement of reasons and any relevant information taken into account in making its decision within thirty (30) days from the date of receipt of the written request.

Review of decisions by the Appeal Tribunal

- 9.4 Pursuant to section 120 of the CMA, parties to the M&A may apply to the Appeal Tribunal for review of:
- (a) a decision of the Commission in respect of the purpose, effect or likely effect of a M&A submitted to it for assessment; or
 - (b) any direction of the Commission under subsection 139(1) of the CMA to a licensee in a dominant position.
- 9.5 Determinations made by the Commission that a party to a M&A is in a dominant position are not subject to appeal.
- 9.6 Third parties are not permitted to appeal to the Appeal Tribunal to seek review of decisions or directions of the Commission.

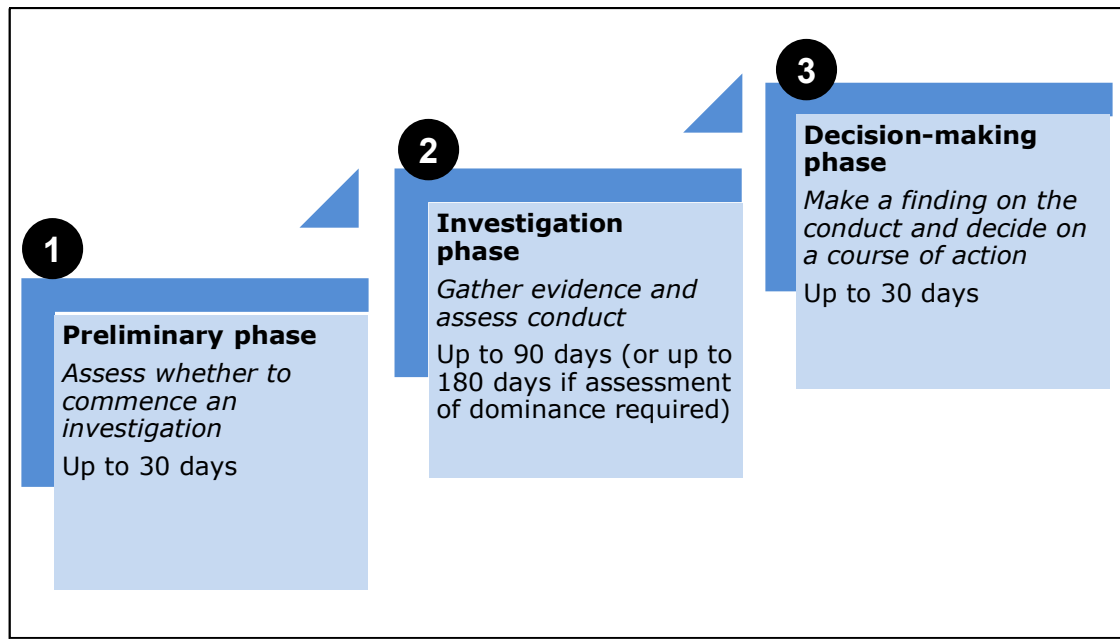
Judicial Review

- 9.7 Pursuant to section 121 of the CMA, parties to the M&A affected by the decision of the Commission in respect to the purpose, effect or likely effect of the M&A, may apply to the court for a judicial review. However, this can only be undertaken after exhausting all other remedies provided for under the CMA.

10 Investigations conducted by the Commission

- 10.1 Pursuant to section 68(b) of the CMA, the Commission may commence an investigation into a M&A that has not been voluntarily submitted to it if it has grounds to believe that the M&A has, is or will lead to a criminal or civil offence being committed.
- 10.2 The procedure the Commission will follow in conducting a self-initiated investigation in respect of allegations of anti-competitive conduct under Chapter 2, Part VI of the CMA is outlined in the **Guideline to Substantial Lessening of Competition**.
- 10.3 The Commission's investigation process consists of three (3) phases. This process is summarised in **Figure 5** below.

Figure 5: The Commission's investigation process



11 Confidential assessment

- 11.1 A proposed M&A may meet the thresholds set out in section 3 of these Guidelines, but will not be assessed by the Commission if it has not been publicly announced and the parties to the M&A do not have a bona fide intention to proceed.
- 11.2 The Commission's assessment of the competitive effect of a M&A involves public consultation with suppliers, competitors and customers. Public consultation cannot occur if the confidentiality of a M&A needs to be preserved.
- 11.3 However, the Commission recognises that parties in the planning stages of a M&A may wish to obtain the Commission's view as to the competitive effects of a M&A and whether notification would be advisable.
- 11.4 As such, the Commission will provide the parties to the M&A with a limited 'confidential assessment' of confidential M&A in the form of an informal preliminary view in accordance with this section.
- 11.5 The Commission will not consult with third parties in respect of a confidential assessment and will not make an announcement in respect of conducting an assessment or its final decision.

Confidential assessment process

Applicable thresholds

- 11.6 Most M&A which are confidential are in the pre-planning or negotiation stages.
- 11.7 To justify any assessment by the Commission of a confidential M&A, the M&A must be more concrete than a speculative or hypothetical M&A and the parties must show that there is a good reason for the Commission to conduct an assessment outside of the standard assessment process set out in the previous sections of these Guidelines.
- 11.8 For the Commission to undertake a confidential assessment of a M&A:
- (a) the M&A must:
 - (i) not be publicly announced;
 - (ii) be more than speculative or hypothetical; and
 - (b) the parties to the M&A must have a good faith intention to proceed with the M&A.

Application

- 11.9 The application process for confidential assessment is informal. As a first step, the parties should contact a representative of the Commission to advise the Commission of its desire for confidential assessment and should set out how it meets the applicable thresholds set out in section 3 and section 11.8 above.
- 11.10 Once the Commission determines that the confidential M&A meets the relevant thresholds, it will provide the parties to the M&A with a provisional timeline for assessment.
- 11.11 The requesting party is expected to provide the Commission with the same information that is provided by an applicant in **Form 1**. The Commission will not undertake any third-party consultation due to the confidential nature of the M&A being assessed.

Decisions

- 11.12 After completing a confidential assessment, the Commission may provide one of the following views:
- (a) the M&A is likely to have the purpose or effect of substantially lessening competition in a communications market, and a full assessment is required once the M&A has been publicly announced;
 - (b) on the basis of the information currently available in respect of the M&A (and subject to any view taken by the Commission on a full assessment once the M&A has been publicly announced or further information is obtained which would result in a contrary view) the M&A is not likely to have the purpose or effect of substantially lessening competition in a communications market; or
 - (c) the purpose or effect of the M&A cannot be determined, and a full assessment is required once the M&A has been publicly announced.
- 11.13 Any view taken by the Commission following a confidential assessment is non-binding and qualified by the need for a full assessment of the M&A once it has been publicly announced. The Commission reserves the right to investigate any M&A over which it has given a confidential assessment.
- 11.14 Once the Commission has undertaken a confidential assessment of a M&A, it will expect the parties to the M&A to keep it informed of any developments relating to that M&A.

12 Substantive assessment of M&A

Section 12 sets out the substantive aspects of the assessment that the Commission must undertake in accordance with the process set out in section 5 of these Guidelines when assessing a M&A that has been voluntarily submitted to it.

The substantive assessment which the Commission must make is whether the M&A may contravene section 133 of the CMA or would indicate that the Commission should exercise its power to direct a licensee in a dominant position under subsection 139(1) of the CMA.

Substantial lessening of competition

- 12.1 'Substantial lessening of competition' is a concept which is at the core of the provisions in section 133 and subsection 139(1) of the CMA.
- 12.2 When assessing a M&A that has been submitted to it, the Commission will seek to establish whether the M&A has the purpose, or has, or may have, the effect of **substantially lessening competition** in a communications market.
- 12.3 In the case of completed M&A, as conduct has already occurred, the assessment that the Commission will undertake is whether the completed M&A has the purpose, or has, or would have the effect of substantially lessening competition.
- 12.4 In the case of a proposed M&A, the Commission's assessment is whether the proposed M&A has the purpose or may have the effect of substantially lessening competition if it were to proceed.
- 12.5 Whether a M&A has the effect of lessening competition generally is a question of fact and a matter of degree. A lessening of competition may be equated with an increase in market power for one (1) or more participants in a market, or can also occur if a firm engages in conduct which maintains its market power.
- 12.6 In assessing whether lessening of competition is 'substantial', the Commission takes the view that lessening of competition is substantial if the reduction in competitive constraints in the communications market (or the resulting increase in market power) is considerable or big.⁹

Framework for assessing lessening of competition

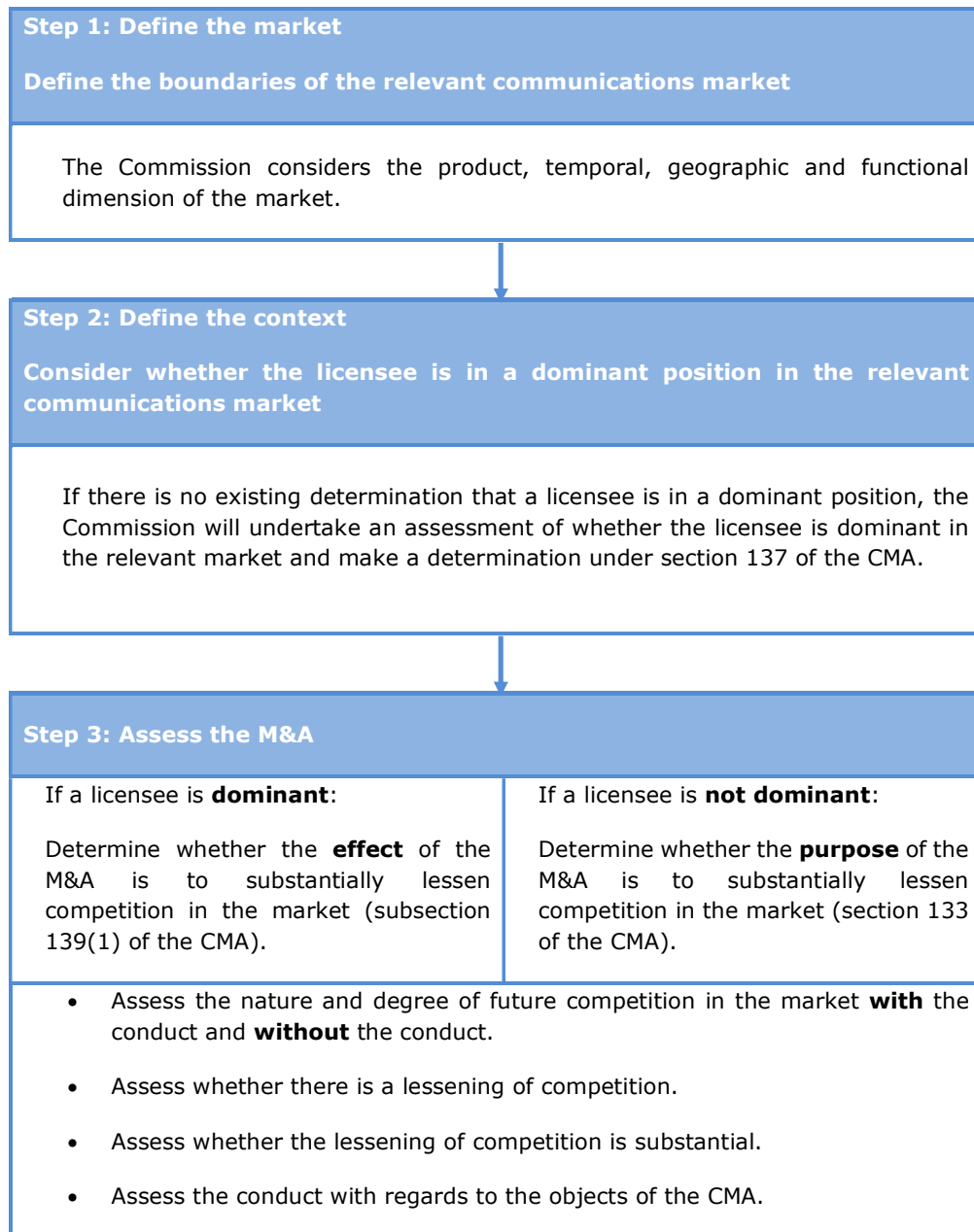
- 12.7 In the Guideline on Substantial Lessening of Competition, the Commission sets out a three (3) step process it will engage in, to determine whether a licensee is engaging in a conduct which has the purpose or has, or may have, the effect of substantially lessening competition in a communications market.

⁹ Guideline on Substantial Lessening of Competition (24 September 2014) issued by the Commission.

12.8 The Commission will follow that process when assessing the purpose or effect of a M&A on competition. That process will be supplemented by the approach outlined in the **Guideline on Dominant Position**.

12.9 The Commission’s approach in assessing substantial lessening of competition is set out in **Figure 6** below.

Figure 6: The Commission’s approach to assessing substantial lessening of competition



Step 1: Defining the 'market'

- 12.10 The first step in assessing a M&A is to determine the boundaries of the relevant communications market.
- 12.11 Defining a market helps to identify the products and firms which compete with each other for the purposes of determining whether competition is substantially lessened.
- 12.12 Under section 6 of the CMA, the term 'communications market' is defined as "*an economic market for a network service, or an applications service, or for goods or services used in conjunction with a network service or applications service, or for access to facilities used in conjunction with a network service or an applications service*".
- 12.13 When undertaking the first step of defining a market, the Commission will rely on the relevant markets set out in a prior Market Definition Analysis published by the Commission.
- 12.14 If such Market Definition Analysis has not already been published, the Commission will define the relevant market according to the framework established in the Guideline on Dominant Position.

Redefining markets

- 12.15 The Commission will not review the definition of markets set out in the Market Definition Analysis for the purposes of M&A assessment unless a change in circumstances justifies a review or the Commission determines that the market being considered and competitive dynamics should give rise to a different market definition.
- 12.16 If the Commission determines that a review of the relevant market definition is required, the Commission will define the relevant communications market in accordance with the framework for defining communications markets set out in the Guideline on Dominant Position.

Step 2: Defining the context

- 12.17 The context the Commission must define is whether either of the parties to the M&A being assessed is a licensee in a dominant position, or whether the merged or acquired entity is, or the proposed merged or acquired entity may be, a licensee in a dominant position.
- 12.18 This context is relevant because the provision applicable to a M&A, and thus the threshold relevant to determining whether a M&A substantially lessens competition, or is likely to substantially lessen competition, differs depending on whether the M&A involves a licensee in a dominant position:

- (a) section 133 of the CMA requires the assessment of the **purpose** of a M&A; and
- (b) subsection 139(1) of the CMA requires the assessment of the **effect** of a M&A.

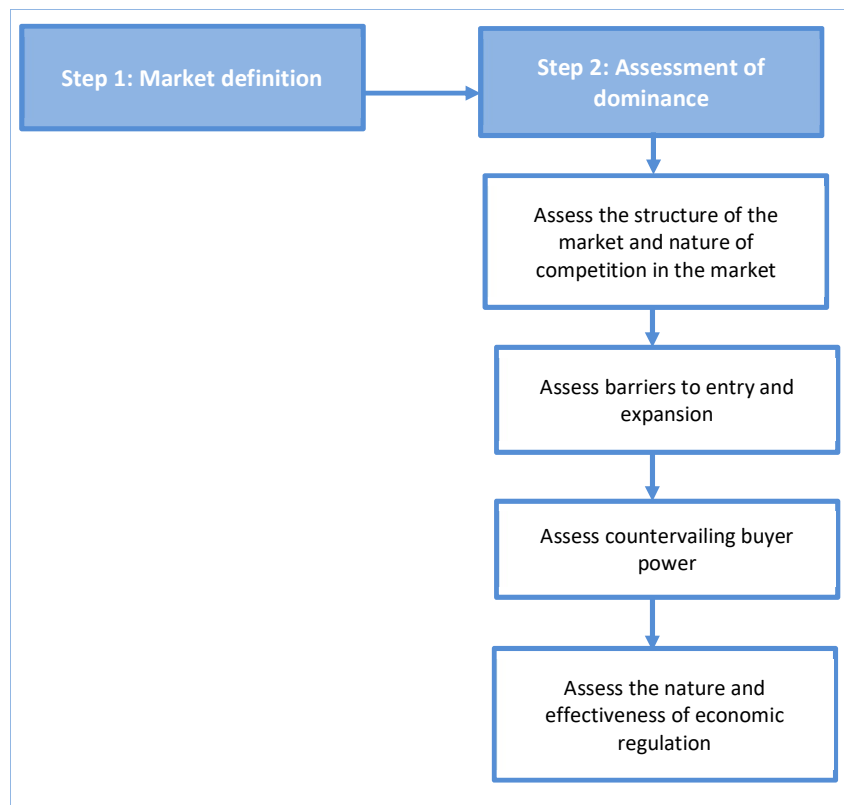
12.19 The determination that a licensee is in a dominant position is a pre-requisite for the exercise of the Commission’s power under subsection 139(1) of the CMA. However, this does not stop the Commission examining M&A which may contravene the prohibition in section 133 of the CMA, or determining as part of that examination, that a licensee is dominant and contemporaneously making a determination under section 139 of the CMA.

12.20 When defining this context, the Commission may rely on a prior determination that a party to a M&A is a licensee in a dominant position.

12.21 If such determination has not already been made, the Commission will conduct an assessment according to the framework established in the Guideline on Dominant Position.

12.22 That framework is summarised out in **Figure 7** below.

Figure 7: The Commission’s approach to the assessment of dominance



Step 3: Assessment of M&A

12.23 Making a determination of whether competition is lessened by a M&A is a question of fact and a matter of degree. Not all conduct that lessens competition is prohibited by the CMA, it is only when that conduct substantially lessens competition in a communications market that the Commission will take action.

12.24 The Commission takes the view that a lessening of competition is 'substantial' if the reduction in competitive constraints (or the resulting increase in market power) is considerable or big.

With and Without Test

12.25 When assessing whether a M&A has the purpose or has, or may have the effect of substantially lessening competition in a communications market the Commission will use the 'with or without' test. The test considers:

- (a) what competition in the market would look like with the conduct taking place; and
- (b) what competition in the market would look like without the conduct taking place.

12.26 If the level of competition in the market with the M&A is substantially lower than the level of competition in the market without the M&A, the M&A will be considered by the Commission to 'substantially lessen competition'.

12.27 Assessing the 'level of competition' in a market in the future with the M&A against the future without the M&A, involves an assessment of the following factors:

- (a) the structure and nature of **existing competition**, by considering:
 - (i) the number of existing competitors in the market;
 - (ii) the relative market shares of each of the participants in the market;
 - (iii) the behaviour of participants in the market, including pricing and other competitive behaviour; and
 - (iv) any other competitive dynamics in the market.
- (b) **potential competition**, including barriers to entry or expansion and the height of those barriers. The Commission will also consider the extent to which potential competition may act as a competitive constraint in the market. This is dependent on the ease with which potential entrants or existing competitors can enter into or expand operations in a market. The **extent of barriers to entry** into the market will involve the consideration of the following factors;
 - (i) cost of entry/expansion;

- (ii) access to facilities and inputs;
 - (iii) regulatory and legal requirements;
 - (iv) contractual restrictions;
 - (v) economies of scale and/or scope; and
 - (vi) conduct by incumbents.
- (c) other sources of competitive constraint, including the existence or strength of **countervailing power** of buyers. The greater the degree of countervailing buyer power, the less likely it is that conduct will be considered to have the purpose or effect of substantially lessening competition. The Commission will consider the following factors in assessing the level of countervailing power:
- (i) the number and size of customers in the market;
 - (ii) the ability of customers to bypass the supplier by acquiring the products or services from another supplier;
 - (iii) the ability for customers to bypass the supplier by sponsoring market entry;
 - (iv) the ability of the customer to vertically integrate to bypass the supplier; and
 - (v) the switching costs borne by each customer in the market.

12.28 When conducting the with or without test in relation to M&A between firms that do not operate in the same communications market, the Commission will assess competition with and without the M&A **in both communications markets**.

12.29 Interested parties should refer to the Guideline on Substantial Lessening of Competition and Guideline on Dominant Position for further background on how the Commission will assess these factors.

Other considerations

12.30 In assessing whether a M&A has the purpose or effect of substantially lessening competition in a relevant market, the Commission will also consider the following factors:¹⁰

- (a) the **degree of concentration** in the market with and without the merger or acquisition taking place;
- (b) the level of **dynamic competition** in the market;

¹⁰ These factors are taken from page 25 of the Guideline on Substantial Lessening of Competition.

- (c) the effect of the M&A on the relevant firm's **ability to raise prices**; and
- (d) the existence and degree of any **efficiencies brought about by the M&A**.

Specific effects of horizontal and non-horizontal M&A on competition

- 12.31 The Commission recognises that M&A have the potential to create effects on competition in a market as distinct from other conduct generally. As such, in addition to relying on the factors established in the Guideline on Substantial Lessening of Competition for assessing the impact of general conduct on competition, the Commission will also consider the M&A specific factors set out in this section.
- 12.32 As the structure of horizontal and non-horizontal transactions are distinct, they may not have the same effects on competition. For example, the direct impact of a horizontal M&A on competition through the removal of a competitor is not shared with a non-horizontal M&A, as such M&A take place between two (2) separate levels in the supply chain.
- 12.33 As such, the M&A specific effects on competition in this section are set out separately for horizontal and non-horizontal M&A.

Horizontal M&A

Coordinated effects

- 12.34 Coordinated effects of a M&A arise when a M&A reduces the competitive constraints in a market, creating or strengthening conditions that facilitate the ability of competitors to coordinate their competitive behaviour and engage in conduct which would be anti-competitive.
- 12.35 When assessing whether a M&A results in coordinated effects on competition, the Commission will attempt to establish whether a M&A materially increases the likelihood that firms in a market will successfully coordinate their behaviour or strengthen any existing coordination.
- 12.36 The following conditions in a market will be relevant to establishing the presence of coordinated effects pre-M&A and post-M&A:
- (a) **The ability of firms to align on the terms of coordination.** Factors including market transparency, product homogeneity, cross shareholding, and the existence of maverick firms (i.e. small firms in a market which compete aggressively) will give firms in a market a greater or lesser ability to align on terms of coordination depending on the factor.
 - (b) **Incentives to maintain coordination.** The collective interests of a group of coordinating firms is to maintain coordination. However, the short-term interests of a firm are to 'cheat' on coordination and gain an advantage by

cutting prices, increasing market share, or selling outside of accepted territories.

For coordinating firms to maintain coordination, the important terms of coordination must be observable, cheating must be detectable in a timely manner, and there must be ways of responding to the cheating. Responses to cheating may include rapidly cutting prices or expanding output. Simply having incentives to not cheat may be sufficient to establish coordination.

- (c) **Weak competitive constraints.** The dynamics of competition need to be conducive to sustaining coordination. A market which is sufficiently stable with such limited competition that coordination is not likely to be disrupted will be capable of sustaining coordination.

Unilateral effects

- 12.37 Unilateral effects of a M&A on competition flow from the non-coordinated action of M&A parties and arise when the elimination of competition between M&A parties enables the exercise of market power.
- 12.38 If two (2) independent firms sell products or services which are close substitutes, an increase in the price of one firm's product or service may result in customers switching to the others firm's product. This switching effect exists as a constraining effect on the pricing strategies of firms in a market, and operates to enhance competition. However, if these two (2) firms were to merge, any decrease in sales in response to an increase in price in one product are internalised as customers switch to the other product which is now also sold by the merged or acquired entity. This has the result of removing a constraint on a firm's ability to engage in anti-competitive conduct.
- 12.39 When a market has limited alternative to effective constraints, unilateral effects resulting from a M&A can have the effect of substantially lessening competition.
- 12.40 Non-M&A parties may also benefit from unilateral effects of a M&A, finding it profitable to raise prices in response to the now merged or acquired firm raising its prices due to limited competition remaining post-M&A. Unilateral effects may also have a detrimental effect on incentives to produce products of a high quality, and on customer choice.
- 12.41 In assessing whether the unilateral effects of a horizontal M&A substantially lessen competition, the Commission will look at:
- (a) whether the products and services sold by each of the parties to the M&A are close substitutes;
 - (b) whether rivals have an incentive and the ability to respond to a price increase by a merged or acquired firm so that they can capture sales and replace competition lost by the M&A;

- (c) the significance the M&A parties have to the competitive process; and
- (d) the competitive constraint each of the M&A parties exerted on each other pre-M&A.

Non-horizontal M&A

- 12.42 As non-horizontal M&A are between parties that do not compete in the same level of the supply chain, they do not have the same direct anti-competitive effect of reducing the number of horizontal competitors.
- 12.43 Non-vertical M&A have the potential to generate substantial efficiencies in a market and are rarely anti-competitive. However, in some cases, such M&A may cause competition concerns.
- 12.44 Newly vertically integrated firms may be able to constrain the ability of competitors to compete by excluding them from a market or by raising their costs.
- 12.45 Competitive concerns in respect of a vertical M&A are likely to only arise if market power already exists in one or more markets along the supply chain.

Unilateral effects - Foreclosure

- 12.46 Foreclosure is one way in which a vertically integrated firm may exercise unilateral market power.
- 12.47 Various examples of foreclosure strategies which may be used by a newly vertically integrated firm include:
- (a) charging a higher price for an important input into the production process of downstream (non-integrated) rivals to eliminate a competitor or potential competitor from entering the market; or
 - (b) refusing to supply products or services or limiting supply by downstream or upstream rivals to important inputs.
- 12.48 For conglomerate M&A, foreclosure strategies may take the form of bundling or tying complementary products. Such strategies may have the effect of incentivising purchasers to source products from the merged or acquired entity so as to reduce any transactions costs that would be involved in sourcing products from multiple suppliers.
- 12.49 The Commission will seek to establish foreclosure by assessing:
- (a) **The merged or acquired firm's ability to foreclose.** Relevant factors include whether inputs sold by other upstream firms are close substitutes, whether upstream rivals have excess capacity, and the existence of potential new market entry.

- (b) **Incentives a merged or acquired firm has to foreclose.** There must be an economic incentive to foreclose rivals.
- (c) **The likely effect of any such foreclosure.** The Commission will assess whether consumers are harmed as a result of the transaction, or whether competition is lessened.

Unilateral effects – Barriers to entry

- 12.50 A vertical M&A may raise barriers to entry if, as a result of a M&A, new entrants would need to enter multiple stages of the vertical supply chain rather than one. In some cases, this may constitute substantial lessening of competition.
- 12.51 A conglomerate M&A may result in formerly separate markets becoming part of one integrated market in which suppliers must offer the full range of complementary products to compete. Future entry may therefore require an offering of the full range of products, potentially increasing the sunk costs associated with entry or exit which may have the purpose or effect of substantially lessening competition.

Unilateral effects – Access to commercially sensitive information

- 12.52 A vertical M&A may result in unilateral effects if the now integrated merged or acquired firm has access to commercially sensitive information which allows it to distort the dynamics of competition.

Coordinated effects

- 12.53 In some cases, non-horizontal M&A increase the potential for coordination between firms. An inherent feature of non-horizontal M&A is an increase in transparency, greater scope for alignment, and the ability to monitor adherence to a coordinated strategy which create conditions for coordination between firms.
- 12.54 The factors relevant to establishing coordinated effects of a horizontal M&A as set out in section 12.36 above will also be relevant to non-horizontal M&A.

Other assessment issues

- 12.55 There are other issues which the Commission will consider which are relevant to both horizontal and non-horizontal M&A.

Failing firms defence

- 12.56 If a M&A involves a firm or division which is facing imminent failure which would cause the assets of that firm or division to exit the relevant market, the M&A is not likely to create or enhance market power and have an anti-competitive effect. In such cases, the effect of the M&A on the competitive dynamics of a market would be no worse than had the M&A not occurred and the firm exited the market due to failure.

Guidelines on Mergers and Acquisitions

- 12.57 The Commission considers a M&A involving a failing firm to be a defence to a finding that the M&A would otherwise have the purpose or effect of substantially lessening competition.
- 12.58 For the failing firm defence to be available to M&A parties, the following must be established:
- (a) the failing firm must be in such a deteriorated financial situation that it and its assets would exit the market in the near future without the M&A;
 - (b) there must be no serious prospect of restructuring the business without the M&A; and
 - (c) there should be no available alternatives to the M&A which would be less anti-competitive.
- 12.59 Any party claiming the failing firm defence must provide evidence to the Commission to establish each of the factors outlined above.

Removal of a vigorous and effective competitor

- 12.60 Vigorous and effective competitors can have a significant impact on the state of competition in the market. The presence of a vigorous competitor, even if that competitor has a relatively low market share, may act as an effective constraint on the ability of a licensee to increase prices or reduce output.
- 12.61 A M&A that removes a vigorous and effective competitor may remove a competitive constraint on market participants, and therefore increases the potential for a significant and sustainable increase in the unilateral market power of the merged or acquired firm or an increase in the ability and incentive of a small number of firms to engage in coordinated conduct.
- 12.62 When assessing the dynamics of competition in a market, the Commission will consider whether either of the M&A parties is a vigorous and effective competitor and whether the removal of this competitor has an anti-competitive effect.

Cross jurisdictional issues

- 12.63 At the most basic level, a pre-requisite to the exercise of the Commission's powers in section 133 and subsection 139(1) of the CMA is that at least one (1) of the parties to the proposed M&A is a licensee operating in the Malaysian communications market.
- 12.64 Despite this, applicants should be aware that not all M&A which the Commission will be interested in will be purely domestic. M&A that have an international aspect will at times fall within the application of the CMA and investigation by the Commission.
- 12.65 As such, the M&A the Commission will be interested may include:

Guidelines on Mergers and Acquisitions

- (a) a M&A between a domestic licensee and a non-domestic entity;
- (b) a M&A between a domestic entity and a non-domestic entity, when the resulting merged or acquired entity would be in a position to obtain a licence to undertake activities in a specific communications market in Malaysia; or
- (c) a situation where the M&A of two international companies cause the consequential M&A of two (2) or more of their Malaysian subsidiaries, and where at least one (1) of the Malaysian subsidiaries is a licensee.

12.66 With such M&A, despite the international connection, the Commission's focus remains on the purpose or effect, or likely effect, of the M&A on competition in the Malaysian communications market.

12.67 Parties to such internationally connected M&A should be aware that their obligations under applicable international regulatory instruments (including obligations to notify the relevant agencies or authorities in respect of their M&A) will continue to apply regardless of the submission of any such M&A to the Commission for assessment.

13 Submission of Application

Completed applications for M&A should be submitted in the prescribed pro-forma application form and should be addressed to:

Head
Competition Department
Compliance Division
Malaysian Communications and Multimedia Commission
MCMC Tower 1
Jalan Impact, Cyber 663000 Cyberjaya
Selangor Darul Ehsan
www.mcmc.gov.my

Contact Number: 603-8688 8000

Annexure 1

Form 1 – Application for Assessment

All applicants are required to provide answers in respect of this part. The responses should be comprehensive and substantiated with evidence. Failure to provide sufficient information may render the application to be invalid as it will impact the Commission's assessment of the application.

PART A

Applicant and Target

1. In respect of the applicant and the target, provide the details below:

- a) Name and Company Registration Number, and place of registration;
- b) Describe the business or businesses carried on including the products and services supplied, and the level in the supply chain of the product or service.
- c) Provide details of all related bodies corporate including the Company Registration Number;
- d) Address in Malaysia for service of documents;
- e) Name and address of any person for whose benefit or on whose behalf the shares or assets to be acquired will be held; and
- f) A copy of Annual Report for the past three (3) financial years.

2. Reporting Obligation

An applicant is required to notify the Commission of its obligations to notify other relevant agencies or authorities in respect of their M&A and the applicable timelines by those agencies or authorities.

3. Transaction

Provide the following details in respect of the transaction:

- a) Transaction structure, i.e. merger, acquisition, obtaining corporate control, joint venture;
- b) Transaction status i.e. completed or anticipated;
- c) Describe the market the transaction is occurring/will occur in;
- d) When was the transaction publicly announced? Attach any documents prepared to evaluate the proposed transaction;
- e) Timelines and key milestones planned for the transaction, including, if it is a proposed M&A, the expected date of completion;
- f) Commercial rationale (including strategic and economic) for the transaction;
- g) Valuation of the new or acquired entity;
- h) Shareholding structure of the new or acquired entity;
- i) Composition of the management team of the new or acquired entity. Provide details of the Chief Executive Officer, Chief Operating Officer and Chief Financial Officer.

4. Background to the Parties

- a) List all goods and services sold by both parties to the M&A in Malaysia. Describe the areas of overlap between the parties and any related bodies corporate (including overlapping goods or services sold by both M&A parties), and areas over which the parties are current or potential competitors;
- b) Composition of customer segment currently served by application, for example, Residential, Government/Government Linked Companies, Small Medium Enterprise, Education, Corporate, Students, Youths, etc

Segment	Percentage of subscription
Residential	
Government	
SME	
Education	
Corporate	
Students	
Youths	
Others: Please specify	

- c) Provide details of any existing horizontal or vertical arrangements between the parties;
- d) Describe any other cooperative arrangements to which any of the parties to the M&A is a party;
- e) Provide details of any acquisitions made by the parties to the M&A and any other acquisitions made in the [industry sector/market] during the past five (5) years; and
- f) Provide details of the total group turnover for each party to the M&A (Worldwide and Malaysia).

5. Relevant Communications Market

Relying on the communications market set out in the Market Definition Analysis report, identify:

- a) the communications market the M&A has taken place in; or
- b) if the M&A is proposed, the communications market the M&A it is proposed to take place.

6. Market share

For each of the relevant markets which the M&A takes place in, or is proposed to take place in, as identified above,¹¹ provide details of the following, for the last five (5) years and measured by reference to revenue, number of subscribers, total

¹¹ For clarity, market share information is not required for every communications market set out in the Market Definition Analysis report dated 24 September 2014

assets and any other measurement deemed suitable, for example, number of towers, etc:

- a) total market size individually and after the M&A;
- b) market share for each of the M&A parties as well as the merged or acquired;
and
- c) market share of competitors.

PART B ASSESSMENT

7. Dominant positions of the parties to the M&A

Where applicable, identify whether either of the parties to the M&A (applicant or target) are licensees which have been subject to a prior determination that they are a licensee in a dominant position.

8. The Industry, Competitors, Suppliers and Customers

Provide details of the following:

- a) details of each competitor for the markets identified above;
- b) the market shares of each competitor;
- c) the competitive dynamics in the market, including but not limited to pricing behaviour, indirect constraints to competition due to market share, levels of innovation;
- d) the degree of vertical integration in the market;
- e) the existence of a vigorous and effective competitor;
- f) the supply chains of which the overlapping goods or services are a part;
- g) intermediate customers (distributors etc.);
- h) end customers;
- i) the extent to which intellectual property rights are necessary to compete in the market;
- j) the extent to which regulation already deals with anti-competitive activities, or the extent to which regulation imposes or reduces barriers to entry; and
- k) current industry trends and developments.

9. Countervailing buyer power:

- a) the number and size of customers in the market;
- b) the ability for customers to bypass the supplier by acquiring products from other suppliers, sponsoring a new market entrant, or vertically integrating;
- c) the switching costs borne by customers in the market and the time it takes to switch between suppliers;
- d) the ability of suppliers to switch from supplying inputs to the parties to the M&A to other avenues;
- e) the ability of competitors to increase supply;
- f) which market participants hold the market power; and
- g) to what extent will this power constrain the parties to the M&A, post-M&A.

10. Barriers to entry

Provide details in respect of the existence of any of the following barriers to entry in each of the markets identified above.

- a) Costs of entry/expansion including, but not limited to, sunk costs and capital investment required;
- b) access to key resources, facilities and inputs, including but not limited to, infrastructure, spectrum and content;
- c) contractual restrictions, including long term supply contracts in a market or preferential terms of supply;
- d) economies of scale/scope; and
- e) regulatory and legal restraints.

In each of the markets identified above, provide details of the following:

- a) any exclusivity in relation to the M&A parties' access to infrastructure; and
- b) any exclusive government funding, public partnership arrangements, or any special government contracts which are held by the parties to the M&A.

11. Counterfactual

Provide details of what competition in the market would look like without the M&A taking place.

12. Vertical effects

Describe whether the transaction would, or would be likely to, result in any vertical relationship between firms involved at different functional levels in the relevant markets.

Describe the extent of vertical integration in competitors.

13. Failing firm

If relevant, state whether one or more M&A parties is a failing firm and if so, provide reasons why the M&A should be allowed to proceed on this basis, including evidence that:

- a) the financial situation of the firm has deteriorated to such an extent that without the M&A, it and its assets would exit the market in the near future;
- b) there are no prospects for reorganising the business; and
- c) there are no less anti-competitive alternatives to the M&A.

14. Efficiencies

Detail any beneficial effects of the M&A on competition e.g. economies of scale and scope, pooling of resources, etc.

15. Supporting documents

- a) Economic data relating to price elasticity in the market;
- b) Any statement made by an applicant in an application must be accompanied by evidence in support;
- c) A copy of final or near to final versions of all documents for the transaction;
- d) Annual reports and accounts for each M&A party for the past three (3) years;

- e) Copies of all analyses, reports, studies, surveys, and similar documents prepared for the purpose of assessing, analysing or giving a view on the M&A with respect to market shares, competitive conditions, competitors (actual and potential), the rationale for the M&A, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions;
- f) Copies of the two most recent business plans for each party to the M&A and, where available, a copy of the (draft) business plan for the merged or acquired entity; and
- g) Copies of any relevant market research reports that are available to either of the M&A parties. Where geographic markets are arguably wider than national, market research that focuses on areas outside of, or including Malaysia, is relevant.

16. Third party contact details

Each party to the M&A is to provide names and contact details of a representative sample of small, medium and large sized competitors, suppliers and customers in the relevant communications market in which it operates as follows:

Size	Value Chain	Company Name	Contact Details (Physical Address, telephone, fax, email address, website address)	Name and Position of Contact Person	Contact details of the contact person (email address, direct telephone number)	Communication Market
Small	Competitor					
	Supplier					
	Customer					
Medium	Competitor					
	Supplier					
	Customer					
Large	Competitor					
	Supplier					
	Customer					
Date of Verification:						

17. Other information

Provide any other information which may be relevant to the application.

18. Applicant Contact details:

In the event there are further enquires to the information submitted in this Form 1, please designate a contact person for the Commission to contact as follows:

Name : _____
Designation : _____
Office Tel : _____
Hand phone : _____
Email address: _____
Date : _____

Form 1

Declaration

Pursuant to section 241 of the Communications and Multimedia Act 1998, a person who knowingly gives false or misleading information to the Malaysian Communications and Multimedia Commission commits an offence and shall, on conviction, be liable to a fine or to imprisonment as set out in the above mentioned Act.

The applicant as listed below, declares and confirms that all information and supporting documentation provided with this application is true and correct to the best of their knowledge and belief.

Signed for and on behalf of the applicant
Company, identified below, in accordance
with section 66 of the Companies Act 2016.

Company name (**Applicant**)

Signature of director

Full name of director (print)

Date

Signature of director/secretary

Full name of director/secretary
(print)

Date

Annexure 2

Form 2

All applicants are required to provide answers in respect of this part. The responses should be comprehensive and substantiated with evidence. Failure to provide sufficient information may render the application to be invalid as it will impact the Commission's assessment of the application.

MARKET CONDITIONS IN RELEVANT MARKETS

Structure of supply in relevant markets

1. Identify the five (5) largest independent suppliers to the parties to the M&A and their individual shares of purchases from each of these suppliers (of raw materials or goods used for purposes of producing the relevant goods) in each relevant market. Provide current contact details as follows:
 - a) Company name;
 - b) Contact details (physical address, telephone, facsimile, website address);
 - c) Name and position of contact person;
 - d) Email address and direct phone number of contact person (date of verification); and
 - e) For customers: indicate proportion of Malaysian and worldwide revenue for which this customer accounts.
2. Explain the distribution channels and service networks that exist in the relevant markets. In so doing, take account of the following where appropriate:
 - a) the distribution systems prevailing in the market and their importance, as well as the extent that distribution is performed by third parties and/or undertakings belonging to the same group as the parties to the M&A (as outlined in response to Form 1 of these Guidelines); and
 - b) the service networks (such as maintenance and repair) prevailing and their importance in these markets, as well as the extent that such services are performed by third parties and/or undertakings belonging to the same group as the parties (as defined in Form 1 of these Guidelines).
3. Provide an estimate of the total Malaysia-wide capacity for the last three (3) years for each relevant market, including the proportion of this capacity that is accounted for by each of the parties to the M&A, and their respective rates of capacity utilisation. Include the basis for this estimate. If applicable, identify the location and capacity of the manufacturing facilities of each of the parties to the M&A in the relevant markets.

4. Specify whether any of the parties to the M&A or any of the competitors have "pipeline products", i.e. products likely to be brought to market in the near term, or plans to expand (or contract) production or sales capacity. If so, provide an estimate of the projected sales and market shares of the M&A parties over the next three (3) to five (5) years, and the basis for this estimate.
5. Specify any other supply-side considerations that the applicant(s) considers to be relevant for the purpose of assessing the notification.

Structure of demand in relevant markets

1. In each relevant market, explain the structure of demand in terms of:
 - a) of the markets, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand;
 - b) customer preferences, for example, in terms of brand loyalty, the provision of pre- and after-sales services, the provision of a full range of products, or network effects;
 - c) product differentiation in terms of attributes or quality, and the extent to which the products of the M&A parties are close substitutes;
 - d) the degree of concentration phases or dispersion of customers;
 - e) the different groups of customers with a description of the 'typical customer' of each group;
 - f) the importance of exclusive distribution contracts and other types of long-term contracts; and
 - g) the extent to which the public sector is a source of demand.

RESEARCH AND DEVELOPMENT

1. Explain the importance of research and development to a firm's long-term competitiveness in the relevant markets.
2. Explain the nature of the research and development in the relevant markets carried out by each of the M&A parties. In doing so, take account of the following, where appropriate:
 - a) trends and intensities of research and development in these markets and for the M&A parties;
 - b) the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems, and so on);
 - c) the major innovations that have been made in these markets and the undertakings responsible for these innovations; and
 - d) the cycle of innovation in these markets and where the parties to the M&A are in this cycle of innovation.

COOPERATIVE AGREEMENTS

1. Describe the prevalence of cooperative agreements (horizontal, vertical, or other) in the relevant markets.
2. Provide details of the important cooperative agreements engaged in by the parties to the M&A in the relevant markets, such as research and development, licensing, joint production, specialisation, distribution, long term supply and exchange of information agreements. Where deemed useful, provide a copy of these agreements.

EFFECTS OF THE M&A

1. Explain, in the applicant's view, the changes that would likely occur in each of the relevant markets as a result of the M&A, in particular, with respect to the details submitted above.

EFFICIENCIES

1. State how efficiency gains generated by the M&A, if any, are likely to enhance the ability and incentive of the merged or acquired entity to act pro-competitively and how they will be sufficient to outweigh any anti-competitive detriments caused by the M&A. Please provide a description of, and supporting documents relating to, each efficiency (including cost savings, new product introductions, and service or product improvements) that the parties to the M&A anticipate will result from the M&A relating to any relevant product. For each claimed efficiency, provide:
 - a) a detailed explanation of how the M&A will allow the merged or acquired entity to achieve the efficiency. Specify these steps that the parties to the M&A anticipate taking to achieve the efficiency, and the risks, time and costs involved;
 - b) where reasonably possible, a quantification of the efficiency and the basis for the quantification. Where relevant, provide an estimate of the significance of efficiencies related to new product introductions or quality improvements. For efficiencies that involve cost savings, state also the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings; and
 - c) why the efficiency cannot be achieved to a similar extent by means other than through the M&A, and in a manner that is not likely to raise competition concerns.

SUPPORTING DOCUMENTS

1. Please ensure that the following documents (where relevant) have been included in this Form 2:
 - a) All relevant documents to support the claims made in this Form 2; and
 - b) In respect of failing firms, all relevant documents to support the claims, including documents demonstrating that:
 - i. include evidence that trading conditions and performance are unlikely to improve);
 - ii. all refinancing options have been explored and exhausted; and
 - iii. there are no other credible bidders the firm/division concerned is indeed about to fail imminently under current ownership (this should in the market, and that all possible options have been explored.

Applicant Contact details:

In the event there are further enquires to the information submitted in this Form 2, please designate a contact person for the Commission to contact as follows:

Name : _____
Designation : _____
Office Tel : _____
Handphone : _____
Email address: _____
Date : _____

Form 2

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Pursuant to section 241 of the Communications and Multimedia Act 1998, a person who knowingly gives false or misleading information to the Malaysian Communications and Multimedia Commission commits an offence and shall, on conviction, be liable to a fine or to imprisonment as set out in the above mentioned Act.

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Signed for and on behalf of the applicant
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with section 66 of the Companies Act 2016.

Company name (**Applicant**)

Signature of Director

Full name of Director (print)

Date

Signature of Director/Secretary

Full name of Director/Secretary
(print)

Date