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The 3C's: Competition, Communications and Convergence

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ABSTRACT

Competition law has become the latest hype in Malaysia since the enforcement of the Malaysian Competition Act 2010 in January 2012. However, this is nothing new, as competition regulation in the communications industry has been around since 1999 under the Communications and Multimedia Act 1998. Competition law involves the promotion or maintenance of a competitive market, which has various objectives and benefits. This paper examines the definition of competition, communications and convergence, and how competition law is affected by the converging communications industry.

Keywords: Competition law, communications, convergence, Communications and Multimedia Act

INTRODUCTION

The 3C's: Competition, Communication and Convergence "Competition encourages efficiency, innovation and entrepreneurship", states the Malaysian Competition Act 2010. The Competition Act 2010 regulates business-related competition in Malaysia, however, the communications and multimedia industry is the first industry in Malaysia to have a detailed, specific regulation to govern competition in its industry through the Economic Regulation of the Communications and Multimedia Act 1998 (CMA 1998). Preceding the CMA 1998, competition was regulated in the form of guidelines issued to the telecommunications industry as stated in the National Telecommunications Policy. The CMA 1998 introduced industry-specific provisions to regulate competition in the industry. The Economic Regulation of the CMA 1998 regulates licensing, general competition practices and access to services. Regulating competition in an industry like the communications industry, where natural monopoly exists, is important to ensure the survival of new players. For example, this is apparent in the area of access to services where the incumbent has an advantage over its competitors, as the incumbent owns the infrastructure vital for connection, especially

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in the local loop (the local loop is the part of the network located between the main distribution frame and the terminal installed in the user's premises). Hence, competition law ensures that all players are given an equal chance to survive in the industry, as well as monitors anti-competitive practices.

This paper will first explore the objectives and benefits of competition law, before defining what it constitutes, specifically in reference to market definition. The purpose is to show what competition law and market definition are, before defining communications and convergence. This exercise of defining concepts is to show how convergence in the communications industry affects the first essential step in the assessment of competition.

OBJECTIVES AND BENEFITS OF COMPETITION LAW

Competition law promotes and maintains competition in the market. It regulates the behavioural and structural conduct of players in the market through anti-monopoly prohibitions, concerted conduct laws and merger laws. Around the world, the development of competition law has largely been geographical in nature. The existence of competition can be traced as early as the Roman Empire in Article 59(2) of the Constitution of Emperor Zeno of 483 AD, which prohibited price-fixing and monopolization of clothing, fishes, sea urchins and other goods, for which the punishment was perpetual exile (Whish, 2003). However, the cradle of modern competition law has been stated to be the US Sherman Act of 1890 (Furse, 1999; Singleton, 1992), where the word 'anti-trust' is used in reference to competition. This Act developed from attempts (made in the US) to demolish 'trusts' or anti-competitive cartels or groups of the main manufacturers, in particular industries that had banded together to strengthen their hold on such industries with the goal of ensuring that high prices and amenable terms and conditions were retained. The US legislation is aimed at breaking such trusts; and hence the term 'anti-trust' is utilized (Singleton, 1992).

The competition law in various jurisdictions have their respective objectives, including: for the maintenance of effective competitions stated in the European Community (EC) competition rules (OECD, 2003; Roth, Rose, 2001); for the achievement of 'workable competition' (Furse, 1999); or and to inhibit and break up concentrations of economic power (Encyclopedia of Competition Law, 2004). In Malaysia, the importance of competition law arises from the need to foster fair trade practices, which in turn contributes to greater efficiency and competitiveness in the economy. It was stated (at that time that) in the draft of "Malaysian Fair Trade Practice Law (FTPL)" (as it was known at that time), that it aims to prevent anti-competitive behaviour such as collusion, price-fixing, and the abuse of market power (Eighth Malaysia Plan; Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna, 2003). Today, the Competition Act 2010 states that, "it is an Act to promote economic development by promoting and protecting the

process of competition, thereby protecting the interests of consumers…the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers".

In summary, the purpose of competition law is for the promotion and/or preservation of competition in the market. Though this is expressed through a different usage of words and terms applied by various laws in different jurisdictions, the laws have similar objectives as mentioned above. The promotion and preservation of competition is achieved through the elimination of conduct, which would suppress competition, and includes behaviours such as collusion, cartel, price-fixing, market allocation and the abuse of market power.

However, there is an ongoing argument that suggests that in certain jurisdictions, the objective of competition law might be for the protection of competition, while in some others, it might be for the protection of competitors. This means that there is a difference between protecting competition and protecting competitors. There is also a proposition that competition law should protect competition and consumers, instead of protecting competitors in the market (Fox, 2003). Although it is true that ultimately, the welfare of consumers is of central importance in of competition law, the result of cases has sometimes been inconsistent and contradicts this view (Whish, 2009). The different objectives and purposes enunciated by various competition laws are a good articulation of the different concerns placed by different countries. The concerns placed by a particular legislation can be on consumer protection, redistribution, protection of the competitors or even a single market imperative (Whish, 2009). Therefore, it can be said that there is no one conclusive objective or a one-size-fits-all approach when the objectives of competition law are concerned. The question of objective is very subjective and often 'fluid.' Nevertheless, the purposes and objectives of competition law correspond closely to its many benefits. The success of competition has been associated with lower prices, better products, wider choices and greater efficiency (Whish, 2009). De-monopolisation, liberalisation and privatisation result in lower prices, better products and greater efficiency because players need to compete with each other to remain in the market. The failure to be innovative and produce better products with lower prices, for example, will cause the player its placing in the market. Though there is no single conclusive objective, it is safe to assume that the objective of competition includes the breaking-up of concentration, the prevention of anti-competitive practices or the prevention of abuse of market power. The benefits of competition are clear: With lower prices and better products, the market works better to the advantage of the consumer.

COMPETITION LAW

It is of vital importance to define what competition law is, in order to see whether

the Economic Regulation of the CMA 1998 embraces the necessary elements of competition in line with international standards.

Competition law protects competition, and in an industry where growth is rapid, competition is vital to ensure the healthy growth of the industry. A system of competition law will likely deal with the following three issues:

1. The prevention of firms from entering into agreements which have the effect of restricting competition, either between themselves or between them and third parties (horizontal and vertical agreements);
2. The control of attempts made by monopolists or firms with market power to abuse their position and prevent new competition from emerging (abusive non-pricing and pricing principles) and the maintenance of workable competition in oligopolistic industries (tacit collusion, oligopoly and parallel behaviour);
3. The prevention or modification of mergers between independent undertakings, which may concentrate the market and diminish the competitive pressures within it. (Whish, 2009; Taylor, 2006)

To define what competition law is, it is only natural to see what the term "competition" refers to. Competition can be defined according to its literal meaning, and its meaning within the economic theory (Gerla, 1996). Literally, the word 'competition' means "the act of competing, struggle or rivalry" or "a contest for some prize, honour or advantage. "To compete" means "to outdo another for supremacy or profit," (Random House Dictionary). In the commercial context, "competition" refers to the striving for custom and business of people in the market place. The Oxford Dictionary of Law defines "competition law" as "the branch of law concerned with the regulation of anti-competitive practices, restrictive trade practices, abuses of dominant position or market power." These definitions suggest that competition is all about struggle or rivalry, and the law that deals with competition has to address matters associated with the struggles and rivalries of firms or undertakings in businesses. These matters relate to two broad categories of anti-competitive practices or restrictive trade practices and abuses of dominant position or market power.

Various statutes that govern competition law do not provide a definition for the term competition. However, the observations gathered from these statutes find that although no definition was made, the term 'competition' is explained in terms of what the law seeks to do, the processes and benefits involved. For example, the United Nations Conference on Trade and Development (UNCTAD) Model Law On Competition (United Nations, UNCTAD *Serieson Issues in Competition Law and Policy,* 2004) does not give a definition on competition, but rather states what 'competition law' seeks to do. The UNCTAD Model Law On Competition states, "Competition law

is a law that seeks to prevent distortions of competition resulting from anti-competitive arrangements between enterprises or from the abuse of market power by dominant firms. (United Nations, UNCTAD Key Terms and Concepts, 2004). On the other hand, the Treaty for the Functioning of the European Union (TFEU), which is the main source of competition law in the EU states the process involved in assessing competition, namely, market definition is the key to the application of competition rules (European Commission, 1997). The United Kingdom (UK) Competition Act 1998 does not provide a definition for the term competition, nevertheless, the UK Competition Commission described competition as "a process of rivalry between firms … seeking to win customers' business over time." (UK Competition Commission, *Merger References: Competition Commission Guidelines*, 2003; UK Competition Commission, *Market Investigation References: Competition Commission Guidelines*, 2003). Based on the above, the UNCTAD's description of competition law referred to it as a process, principle or mechanism without any explanation as to what the word "competition" means. The same is true for the TFEU for its deficiency in providing a characterization on the term "competition". However, credit should be given to the UK Competition Commission for its description of competition. It provides a basic idea of what competition is: "… a rivalry…to win…"

In the US, the term ”competition” used to be defined according to its dictionary definition: ”rivalry among firms for business of consumers”. However, in the 1970s, this method of defining competition changed, and a new definition of competition emerged. This new definition arose from judges and commentators belonging to or influenced by the Chicago School, which defines competition as ”an allocation of resources in which economic welfare … is maximized”. However, it is also suggested that defining competition by its literal dictionary meaning is both sound in law and economics. As Harry S. Gerla stated,

> *Rivalry as competition is sound law because principles of statutory interpretation imply that competition means rivalry when that term or concept is utilized in the antitrust statutes. Rivalry as competition is sound economics because contemporary studies indicate that promoting rivalry will increase the internal efficiency of firms, spur innovation and help develop world-class competitive industries.*
>
> (Gerla, 1996)

This development of defining competition in the economic sense also seemed to have an influence in Australia.

In Australia, the Australian Trade Practices Act 1974 (ATPA) (as it was known then) also does not give a definition of competition. However, it was held in *Re*

Queensland Co-op Milling Association Ltd.; Re Defiance Holdings Ltd.(1976) 8 ALR 481 that under the ATPA 1974, the term ”competition” is defined as that meaning similar to the meaning of competition in economic theory. Nevertheless, it was not further defined what competition in economic theory is, rather the essential features of competition in the economic sense were provided:

1. Competition is a dynamic process and not a situation;
2. In a competitive market, no individual player or group of players could set the price of its product or services, to choose its level of profits by producing less and charging more, or to exclude the entry of other competitors;
3. Barriers to entry in a competitive market are low or non-existent, and the threat of entry of a competitor puts pressure on the firm or firms already in the market to keep ahead by developing new products, new technology, more efficient services or improved cost efficiency (see *Re Queensland Co-op Milling Association Ltd.; Re Defiance Holdings Ltd.* (1976) 8 ALR 481; 25 FLR 169);
4. Whether or not a market is a competitive market depends largely on the structure of the market and the determining elements of market structure:
   a. The number and size distribution of independent sellers, especially the degree of market concentration;
   b. The height of barriers to entry, which is the most important element of market structure in the determination of competition;
   c. The extent to which products of the industry are characterized by extreme product differentiation and sales promotion;
   d. The character of ‘vertical relationships’ with customers and with suppliers and the extent of vertical integration; and
   e. The nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities (see *Re Queensland Co-op Milling Association Ltd.; Re Defiance Holdings Ltd.* (1976) 8 ALR 481; 25 FLR 169 at 189; *General Newspapers Pty Ltd v Telstra Corp* (1993) 45 FCR 164 at 181; 117 ALR 629 per Davies J. and Einfeld J).

The Australian Independent Committee of Inquiry for the National Competition Policy (The Hilmer Committee) stated that:

> *Competition law or policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition (Whish, 2003) in the interest of economic efficiency (Corones, 1994) while accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives.*
>
> (Whish, 2003)

Thus, there are two theories under the economic theory of competition. They are the price theory, which relates to the demand, supply and prices of goods and services, and the organisational theory, which relates to market structures, behaviour of firms and the effectiveness of the market in relation to consumer interest. What is the relationship between competition and the economic theory? A simple analogy can be drawn from the literal definition of the term "competition" and the economic theories mentioned above. As seen earlier, competition literally means, "to compete, struggle or rival". This, in relation to the price theory refers to competition of firms for the demand, supply, and prices of goods and services. Under the organisational theory, firms fight to literally outdo one another in the market. This determines the market structure and behaviours of firms.

Not surprisingly, the position in Malaysia is not very different. Competition is not defined in both the Communications and Multimedia Act 1998 and the Competition Act 2010. Instead, reference as to what competition is has been made in the Guidelines on Substantial Lessening of Competition (MCMC, 2000). The Guideline states that competition is "the process of actual or potential rivalry between firms in a market. The level of competition in a market is simply the level of this rivalry" (MCMC, 2000). The Guideline lists the factors, which the Malaysia Communications and Multimedia Commission (MCMC) will take into account as indicators of the level of competition in the industry. These factors are:

1. The number of independent suppliers: The more the number of suppliers, the higher the level of competition;
2. The degree of market concentration: The lower the degree of market concentration, the higher the level of competition. Lower market concentration acts as an indicator of relatively less market share of competitive rivals, which in turn forces rivals to respond independently to price signals;
3. The level of product or service differentiation: The lesser the differentiation in the product or service, the easier it is to substitute them, and thus, the higher the level of competition;
4. The extent of vertical integration with firms in upstream and downstream markets: Vertical integration can provide opportunities for an integrated firm to extend market power in one market into the market in question. This might include conduct which impacts the independence of its rivals, for example by manipulating prices in intermediate markets or by imposing conditions in intermediate markets. This could lead to lower levels of rivalry and competition;
5. The nature and enforceability of any arrangements between firms in the market, which restrict their independence of action: These types of arrangements may reduce the level of rivalry and competition in the market;
6. The height of barriers to entry and exit: Entry or exit of potential rivals into the market should be low to indicate a

higher level of competition (MCMC, 2000).

Similarly, the Organisation for Economic Co-operation and Development (OECD) has provided similar indicators to those provided by the MCMC on the evaluation of competition in the telecommunications industry. The OECD divided the indicators into categories of market structure and supplier behaviour. Market structure includes market share and entry barrier. Market share indicators are measured by volume-based (call minutes, or number of subscribers), value-based (revenues) and capacity-based (number of lines installed) calculations. Entry barrier (ease of entry) is measured by the number of firms in the market, the existence of regulatory restrictions (for instance, licensing limitation), control of essential facilities, and vertical integration (the existence of vertically integrated firm and its price levels). Supplier behaviour indicators are calculated in the rivalry in price, anti-competitive behaviour and collusion and diversification and speed for innovative services (OECD, 2003).

Comparing the indicators for the evaluation of competition provided by the OECD and MCMC, the similarities are evident. To illustrate, Table 1 (in Appendix) on indicators for the evaluation of competition provided by OECD and MCMC gives a comparison on the similarities used by both parties.

After examining the various statutes that govern competition law, certain observations can be gathered. Firstly, the range of statutes on competition law do not define the term "competition", but rather, competition law is referred to as a process which involves certain steps, for example market definition, or what competition law seeks to do – to prevent distortions of competition, or to prevent competition, which is a process of rivalry to win customers. These explanations of competition in the statutes mentioned earlier can therefore be broadly divided into two categories: the prevention of anti-competitive conduct, and the abuse of dominant position. Secondly, in defining competition, reference is made to its literal meaning and what competition is in the economic sense. This seems to be accepted in the US and in cases decided in Australia. Thirdly, in a jurisdiction where regulating competition is more advanced, the lack of definition of competition does not seem to affect the workings of the law. Cases have developed to fill in those gaps that the statutes failed to fill. Australia is a good example where the court in *Re Queensland Co-operative Milling Association Ltd.; Re Defiance Holdings Ltd* (1976) 8 ALR 481 asserted that competition is to be defined in its economic sense. As stated earlier, the position in Malaysia is of no difference. The Communications and Multimedia Act 1998 (CMA 1998) and the Competition Act 2010 do not define the word "competition". It is referred to as a process, which refers to the process of actual or potential rivalry between firms in the market, and this rivalry is an indication of the level of competition in the market. It is therefore submitted that this definition as applied in the Guideline on Substantial Lessening of Competition in the

Communications and Multimedia industry be applied when defining "competition" in Malaysia. It is also similar to the literal definition of competition as applied in the US. The application of a literal definition would be easier for a country where competition law is still new, and there is a lack of case laws. It is also recommended that this approach be extended when defining "competition" under the Competition Act 2010 to ensure consistency in the enforcement of competition in Malaysia.

MARKET DEFINITION

Market definition is important in the assessment of anti-competitive conduct. Defining the market is the key to the application of competition rules. It is considered the essential firststep in the assessment of competition-related behaviour. In order to assess the effects of an agreement or practice on competition, and whether or not there is a dominant position, or an abuse of that position, or whether a player has market power to affect competition, it is essential to first define the **relevant market**. This is seen in decisions made under Article 101 and 102 of the TFEU. In the case of *Europemballage Corp. And Continental Can Co. Inc. v. E.C.Commission [1973] E.C.R. 21,* it was stated that the definition of the relevant market is required in the assessment of competition-related abuses. The relevant marketconstitutes the identification of product or service substitutes. It includes all possible substitutes of a product or service within a region that provide a significant competitive constraint on the supplier of the product or service (Bishop, Walker, 1999).

The European Commission in its Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, December 1997 in Paragraph 17 stated that:

> *"Market definition is a tool whose purpose is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of any effective competitive pressure. It is from this perspective, that market shares may provide meaningful information for the purposes of assessing dominance or for the purposes of applying Article 85. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the*

set of products and geographical areas is such that small, permanent increases in relative prices would be profitable."

This is also referred to as the Small but Significant Non-transitory Increase In Price, or SSNIP Test.

The application of the SSNIP Test in the Malaysian communications industry is stated in the Malaysian Communications and Multimedia Commission's report on the assessment of dominance in the communications market (MCMC, A Report on a Public Inquiry: Assessment of Dominance in Communications Market, 2004). The Malaysian Communications and Multimedia Commission stated that the SSNIP test would be used to identify relevant communications market. If the hypothetical monopolist is prevented from increasing by a readily available alternative or substitute, this product or service is included in the relevant market. The test is then applied again to the wider market including the substitutes identified. The test is repeated until a set of products or services is reached where such a price increase would indeed be profitable. The smallest set of substitutes thus established is then defined as the relevant market (MCMC, A Report On A Public Inquiry: Assessment of Dominance In Communications Market, 2004). In a converged market, the possible substitutes for a product are usually more in number, and therefore the market would be larger as compared to when there is no convergence.

Therefore, market definition is an important tool for assessing the competitive impact of an agreement, practice, market conduct or concentration. This is established in most jurisdictions, including Malaysia. Defining the market is the first step to the assessment of any competitive impact of an agreement, conduct or concentration. In defining the market, the concept of substitutability is applied widely, and in reaching all possible substitutes the SSNIP Test is used. This seems to be the commonly accepted order of application.

CONVERGENCE AND COMMUNICATIONS

Having laid down what competition law is and the importance of defining the market, it is further necessary to see the correlation between competition law, market definition and communications and convergence. In the age of convergence, communications play an important role in society. However, convergence has an impact on competition law, including on the market definition, institutional arrangements and dominant position. The conventional method of addressing these issues may have to change with convergence, especially in the communications industry.

Communications. The word "communications" is commonly used to refer to the converging industries of telecommunications, broadcasting and information technology (IT). Various jurisdictions employ different terms to the communications industry. "Communications" for this purpose refers to a method of communication that utilizes

electronic technology. The EU applies the word "electronic communications". It is explained as,

> *Services provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services* (European Parliament and Council Directive (EC) 2002/21, Article 2(c)),

and,

> *Transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or other electromagnetic means, including satellite networks, fixed (circuit-and-packet-switched, including Internet) and mobile terrestrial networks, networks used for radio and television broadcasting, power line systems and cable TV networks, irrespective of the type of information conveyed* (European Parliament and Council Directive (EC) 2002/21, Article 2(a)).

Applying these two definitions, electronic communications may be regarded as being closely related to activities that consistof conveying, transmitting or routing. It is similar to the transportation in which data is taken from one point to another. However, the element of "electronic form" makes it different from transportation or other types of transmission, where they possess a more 'physical' nature. In electronic communications, objects are not transmitted in their original form. The objects are translated or transformed into signals, which are then 'transported' or conveyed through the networks and translated back into their original form upon reaching their destinations (Nihoul, Rodford, 2004).

In Malaysia, the Communications and Multimedia Act 1998 (CMA 1998) utilizes the term "communications" rather than "electronic communications" as applied in the EU to refer to the industries that underwent convergence. The CMA 1998 defines "communications" under section 6 as "any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms." It can be concluded that electronic communications involves the transmission of signals, which may include sound, data or images.

There seems to be no consensus in the use of the terms which have reference to the conveyance of signals, data, sound, text, images between persons, or from

one point to another by electronic means. It may be referred to as "electronic communications" or "communications". However, when the term "communications" is used, it must be differentiated from the customary form of communication that relates to the print. Nevertheless, whatever the term used, communications or electronic communications refers to the form of communications that is used in the convergence era, which does not discriminate the technology used in conveying the information. This is paramount, as there is no longer a distinct periphery between telecommunications, broadcasting and the IT industries. In fact, the electricity industry may also be part of this electronic communications industry in the near future (Hardy, McAuslan, Madden, 1994).

Convergence: Concept and Definition. Convergence refers to the ability to deliver different types of services on the same network. In other words, different types of technology can 'talk' to one another with little or no need of any conversion steps to establish technical compatibility (Hardy, McAuslan, Madden, 1994). Convergence can be seen when there is a fusion in technologies and industries. This can be observed in the broadcasting, telecommunications and information sectors where there no longer exists a significant difference between telecommunications, broadcasting and IT services. These services seemed to be the same – for example, both the Internet and broadcasting are carried by mobile carriers.

Convergence becomes a challenge in the communications industry if the traditionally separate industries of telecommunications, broadcasting and IT remain regulated separately. In this case, problems can be expected, as industry-specific regulators will find difficulty in isolating their individual jurisdictions.

This phenomenon, referred to as 'convergence' attributed to the amendment of the old regulatory framework in Europe. The European legislators set out to draw regulatory consequences from this occurrence. They wanted to assess whether the existing rules are still appropriate. Hence, the new regime, the "New Regulatory Framework" (NRF) gave electronic transmission equal treatment regardless to which sector they previously belonged to. However, content-related issues remain regulated according to the sector in which the activities in question fit (Nihould, Rodford, 2004).

In Malaysia, the Malaysian Communications and Multimedia Act 1998 (CMA 1998) aims to support convergence in line with the global development in this industry, and more importantly, to make Malaysia a communications hub. The CMA 1998 does not demarcate the boundaries within the converging industries of telecommunications, broadcasting and IT. The CMA 1998 has consolidated the regulation of these three industries into the communications and multimedia industry. Its aim is to ensure the prolonged application of the Act. However, internationally, the World Trade Organisation (WTO) rules

continue to be developed on the basis of the distinction between broadcasting and telecommunications - a state of affairs which, according to Paul Nihoul and Paul Redford, is contrary to the needs of convergence (Nihould, Rodford, 2004). A regulatory regime, which attempts to keep these boundaries distinct may be faced with difficulties when separation is no longer capable, because the services are intertwined with one another. The EU for example, has combined these industries via the New Regulatory Framework (NRF), and they are now known as the electronic communications industries. The same is seen in Malaysia with reference to the communications and multimedia industry.

Effect of Convergence on Competition. Convergence affects competition law in the assessment of market definition. Market definition is the first step to the assessment of anti-competitive behaviour. When convergence occurs, the boundary of the market is altered. The market may become larger, hence 'diluting' the anti-competitive nature of a particular behaviour. Another effect relates to the nature of law itself, where for instance, if the law that regulates competition is an industry-specific law, convergence will raise issues relating to the applicability of this industry-specific law when industries start to merge. Rapid and complex technological advancement in the communications sector results in the complicated exercise of market definition. Competition and regulatory authorities experienced enormous strain in defining and analyzing the relevant market (market definition is important in the assessment of anti-competitive conduct, and it is considered the "essential first-step" in the assessment of competition related behavior) in which they have to undertake a dynamic and prospective (forward-looking) approach (Garzaniti, 2003). In this respect, it has been suggested by Bazanella and Gerard (Garzaniti, 2003) that "the complexity of the convergence process will require competition authorities to possess expertise not only in the application of competition rules, but also in the sectors concerned." It is also acknowledged by the European Commission that any attempt made by the competition authorities or national regulator to define a particular product market in the communications sector in their guidelines or notices would involve the risk of the definition becoming inaccurate and irrelevant given the pace of technological change in this sector (European Commission, *SMP Guidelines,* 2002*;* European Commission*, Access Notice,1998)*.

CONCLUSION

Most statutes that regulate competition do not have a specific definition of the term "competition". In the US, it was stated that it is not wrong to define competition by both its literal and economic sense. This seems a sound argument. In any case,it is more important to understand what competition law does and its importance to the market. Thus, competition law is seen as a process which prevents anti-competitive behavior and abuse of dominant position, and as a process it involves the assessment

of concepts like market definition and dominant position, which is further used as a tool for the evaluation of competition.

Though convergence is not directly associated with competition, it is important because it is a phenomenon that is taking place in the communications industry. The relevant competition laws regulating the communications industry should be tailored to address converging communications industry, rather than regulating on the basis on traditionally separate industries of telecommunications, broadcasting and IT.

Lastly, in addressing competition in the communications industry, the assessment of competition should not abandon the notion of convergence for the simple reason that convergence changes the market definition, which is the first step in the assessment of anti-competitive conduct.

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APPENDIX

Indicators for the Evaluation of Competition provided by OECD and MCMC

Category	MCMC		OECD	
	Indicators	**Parameters**	**Indicators**	**Parameters**
Market Structure	Degree of market concentration	Lower degrees of market concentration indicate relatively less market share of competitive rivals, which forces rivals to respond independently to price signals. Hence, higher level of competition.	Market share and its trends	Volume-based: Call minutes, number of subscribers Value based: Revenue Capacity based: Number of lines installed
	Number of independent suppliers	The more the number of suppliers, the higher the level of competition.	Entry barrier / Ease of entry	**Parameters for absolute barriers**: Number of firms, regulatory restrictions, control of essential facilities, extent of economies of scale and scope.
	Nature and enforceability of arrangements between firms in the market, which restrict independence of action	These types of arrangements may reduce rivalry and competition in the marketEntry or exit of potential rivals into the market should be low to indicate a higher level of competition.		**Parameters for strategic barriers**: Advertising & capital intensity.
	Extent of vertical integration with firms in upstream and downstream markets	Vertical integration can provide opportunities for integrated firms to extend market power in one market into the market in question. This might include conduct which impacts the independence of its rivals.		**Vertical integration/ Parameters for exclusionary barriers**: Existence of vertically integrated firm and its price levels, including non-discriminatory access to wholesale products.

Supplier behaviour			Active competition in price and rivalries	**Rivalry in price competition**: Pricing trends, the extent of reaction to a price change, existence of price leadership. **Rivalry in non-price competition**: Level of marketing & advertising costs, coverage of services or networks. **Indirect measure**:The existence of recent entry or exit, the extent of such movement in the past.
	Nature and enforceability of any arrangements between firms in the market, which restrict their independence of action	These types of arrangements may reduce the level of rivalry and competition in the market.	Absence of anti-competitive behaviour and collusion provision of innovative services.	**Anti-competitive practices:** Number and time spent for agreements on LLU by incumbent, existence of carrier pre-selection and number portability, number of complaints reported. Existence and level of collusion (subjective assessment according to context).
	Level of product or service differentiation	Less differentiation in the product or service enables the ease of substitution; thus, a higher level of competition.	Profitability and its trends	Rate of diversification (differentiation) and speed for innovative services. Trends in profits across firms.