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New Licensing Requirements on the Provision of Cloud Services in Malaysia to Come Into Operation on 1 April 2022

Introduction

In line with one of the initiatives set out in the Malaysia Digital Economy (MyDIGITAL) Blueprint - i.e. to shift towards a cloud first strategy and to enhance the usage of cloud services nationwide - the Malaysian Communications and Multimedia Minister, Tan Sri Annuar Musa, announced on 15 October 2021 that the Malaysian Communications and Multimedia Commission ("**MCMC**") would be implementing a light touch licensing requirement on cloud services in Malaysia. The licensing requirement came into effect on 1 January 2022, but will only be fully enforced from 1 April 2022.

The main intention of the proposed licensing of cloud services is to enable MCMC to ensure cloud service providers maintain a high level of data security whilst conferring legal protection to consumers and public agencies in Malaysia.

Existing Regulatory Approach Towards Cloud Services

The Communications and Multimedia Act 1998 ("**CMA**") and the Communications and Multimedia (Licensing) Regulations 2000 ("**Licensing Regulations**") are the primary legislative instruments that regulate the licensing regime of the communications and multimedia industry in Malaysia.

Prior to these light touch requirements being announced, the CMA regulated cloud services from the perspective of security, reliability, and integrity, but did not specifically impose a requirement on cloud service providers to be licensed under the CMA.

By way of background, it may be relevant to briefly touch upon the two main categories of CMA licences, namely:

- (a) ***individual*** licences, which are granted to providers of services or facilities that are subject to a high degree of regulatory control, impose foreign shareholding restrictions and, if granted, will be valid for a period of up to 10 years; and
- (b) ***class*** licences, which are granted to providers of services and facilities which are comparatively niche in nature, do not impose any foreign shareholding restrictions and, if granted, are to be re-registered annually as they are only valid for a period of one year.

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Under each of these two categories, there are in turn four sub-categories of licensable activities regulated under the CMA, namely: (i) Network Facilities Providers; (ii) Network Service Providers; (iii) Applications Service Providers ("**ASP**"); and (iv) Content Applications Service Providers, save that MCMC now only issues class licences for ASPs.

The Proposed Licensing Requirement on Cloud Services

Applications Service Providers Class Licence

Under the proposed licensing requirement, MCMC has issued:

- (a) the Advisory Notice on Cloud Service Regulation Introduced to Increase Accountability for User Data Security and Sustainability of Services, dated 15 October 2021 ("**Advisory Notice**"); and
- (b) the Information Paper on Regulating Cloud Services, dated 17 December 2021 ("**Information Paper**"),

both of which provide that the Applications Service Providers Class ("**ASP (C)**") licence will be imposed on those parties providing "**cloud services**" to end users in Malaysia.

It is also pertinent to note that the ASP (C) licence does *not* impose any foreign shareholding restrictions and, if granted, is to be re-registered annually.

In addition, the Advisory Notice provides that the requirement to contribute to the Universal Service Provision ("**USP**") Fund¹ is waived specifically for the provision of cloud services by ASP (C) licensees.

The Definition of Cloud Services

The Advisory Notice provides that a "**cloud service**" is defined as "*any service made available to end users on demand via the internet from a cloud computing provider's server*".

In order to provide further clarity on the definition of a "**cloud service**", it should be noted that the Information Paper states that:

- (a) services that are currently exempted under the CMA licensing regime will remain exempted;
- (b) the specific types of cloud service which are required to be licensed are "Platform as a Service" ("**PaaS**") and "Infrastructure as a Service" ("**IaaS**"), but **not** "Software as a Service" ("**SaaS**"), as SaaS is viewed as a service which relies on other cloud service platforms or infrastructure; and

¹ i.e. a fund established by MCMC to fund communications infrastructure projects in underserved areas, where certain licensees are required to contribute [up to] six percent (6%) of their annual weighted net revenue derived from designated services

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resellers of cloud services without any control of the cloud service products are not required to be licensed.

When the Proposed Licensing Requirement will be Implemented

The Information Paper provides that:

- (a) although the ASP (C) licence requirement has come into legal effect on 1 January 2022, a **grace period of three months, or until 31 March 2022**, is provided, during which MCMC will accept any voluntary registration from cloud service providers;
- (b) the ASP (C) licence requirement will be fully in force starting 1 April 2022; and
- (c) for existing ASP (C) licence holders that are providing cloud services, these licence holders may continue providing cloud services under their current ASP (C) licence, but will be required to include the provision of cloud service as one of the activities undertaken during the re-registration of their licence upon expiry in the following year.

Which Cloud Service Providers are Required to be Licensed?

In assessing the applicability of the ASP (C) licensing requirement on cloud service providers, the Advisory Notice and Information Paper further provide that only cloud service providers that are locally incorporated, or local data centres that provide cloud services to end users are required to be registered under the ASP (C) licence.

Based on the illustrations provided in the Information Paper, the general guidelines in respect of the applicability of the ASP (C) licensing requirement for cloud services can be summarised as follows:

- (a) an ASP (C) Licence for Cloud Services is required where:
 - a locally incorporated company provides PaaS or IaaS cloud services to end users in Malaysia;
 - a locally incorporated company provides PaaS or IaaS cloud services for resale by an agent to end users in Malaysia; or
 - a local data centre assists foreign cloud providers to provide their PaaS or IaaS cloud services to end users in Malaysia; and
- (b) an ASP (C) Licence for Cloud Services is not required where:
 - a foreign cloud service provider (with no local presence in Malaysia) provides PaaS or IaaS cloud services directly² to end users in Malaysia;

² i.e. without using any local data centres

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- a foreign cloud service provider with a local branch³ but without a locally incorporated company in Malaysia provides PaaS or IaaS cloud services directly to end users in Malaysia;
- a foreign cloud service provider, utilising a local data centre that in itself has already been licensed / registered with MCMC to provide such cloud services, makes available PaaS or IaaS cloud services to end users in Malaysia;
 - a locally incorporated company, utilising other PaaS or IaaS cloud service providers, provides SaaS cloud services to end users in Malaysia; or
 - an agent resells PaaS or IaaS cloud services to end users in Malaysia, where the said PaaS or IaaS cloud services are obtained from a company that has been duly licensed / registered with MCMC to provide such PaaS or IaaS cloud services.

What does the Proposed Licensing Requirement mean for Cloud Services Providers?

Following the implementation of the ASP (C) licensing requirement for the provision of PaaS or IaaS cloud services, a licensee under the CMA will be bound by way of imposition by MCMC of licence conditions to comply with all such instruments, guidelines or regulatory policies issued pursuant to the CMA. Any failure by a cloud service provider to obtain an ASP (C) licence is an offence under the CMA and shall, on conviction, be liable to a fine not exceeding RM500,000 (where US\$1.00 = RM4.20, approximately) or to imprisonment⁴ for a term not exceeding five years, or both. Such service provider shall also be liable to a further fine of RM1,000 for every day or part of a day during which the offence is continued after conviction.

It is also pertinent to note that MCMC is seeking to further regulate the provision of cloud services by way of technical standards issued by Malaysian Technical Standards Forum Berhad (MTSFB) in order to address various issues relevant to the provision of cloud services, such as data security, data privacy, data protection, and data flows. While the intention of MCMC to improve the security of cloud services locally is laudable, a consequence of these regulations is that it subjects cloud service providers with a presence in Malaysia to additional compliance requirements, which in turn impacts existing businesses and may deter investors and innovators. It also remains to be seen whether the standards to be introduced will in fact improve cloud services. Having said this, the new licensing requirement does not impose foreign shareholding restrictions or require contributions to the USP Fund, as compared to other licensed services under the CMA, and should not, therefore, be an insurmountable requirement to fulfil.

As such, all existing unlicensed or exempted cloud service providers that provide cloud services to end users in Malaysia should assess the applicability of the requirement to obtain an ASP (C) licence based on its business model and consider the impact of ASP (C) licensing requirements on its business if a licence is now required, given the rather severe penalties under the CMA for non-compliance with these new licensing requirements. This may entail restructuring the business model to ensure its continued

³ i.e. branch office of a foreign company

⁴ This applies to a director, chief executive officer, manager, secretary, or other similar officers purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate.

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ability to meet the relevant licensing and compliance requirements, or to reorganise the cloud services so that it falls outside the purview of these new licensing requirements.

In the event an ASP (C) licence is required, cloud service providers should immediately commence the process of applying for an ASP (C) licence, or apply for it in the annual re-registration of its existing ASP (C) licence, and put in place the relevant measures to ensure compliance with all such instruments, guidelines, technical standards, or regulatory policies as may be imposed by MCMC from time to time.

If you wish to further understand the proposed licensing requirement on cloud services, please feel free to contact our team members below who will be happy to assist.

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