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RE: Second Public Consultation on the Draft Code of Practice for Competition in the Provision of Telecommunication and Media Services

The Asia Video Industry Association (AVIA) welcomes the opportunity to comment once again on IMDA's Draft Code of Practice for Competition. AVIA is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. AVIA is the interlocutor for the industry with governments across the region and leads the fight against video piracy, as well as publishing industry reports and hosting industry conferences. Its aim is to support a vibrant video industry for the benefit of all stakeholders. AVIA was founded in 1991 and currently represents nearly 90 companies, located in 17 Asian countries and regions, providing television programming and curated over-the-top video content to over 700 million homes in Asia and Australasia. AVIA's members are pillars and major international investors in Singapore's media sector.

In this submission we wish to comment only on the proposed actions mentioned in the Second Public Consultation paper with respect to the Cross-Carriage Mechanism (CCM). Through our predecessor organization CASBAA, as well as IMDA's predecessor MDA, we have over the past decade conducted a lively conversation on the CCM. We are very pleased to see that IMDA has taken on board the views expressed in the First Public Consultation on the Draft Code of Practice, and that in the current (second) consultation paper, IMDA has proposed a very substantial reduction in the scope of the CCM, applying it only to live events. This is without doubt a major positive step, and we wish to salute the spirit with which IMDA has approached this consultation and its very constructive willingness to re-visit this existing regulatory structure with a view to ascertaining its continuing relevance and necessity. Many governments maintain outdated regulatory structures simply out of inertia; IMDA's forward-looking willingness to push back against that inertia is much appreciated within the international industry.

The proposed reduction in scope of the CCM to cover only live events will effectively exclude the vast majority of entertainment programming from the CCM, and this is a positive move. It will allow the producers and distributors of TV programming the freedom to strike their own contractual arrangements

for distribution of the content, as is provided by the relevant international treaties. Our Association, and our industry, remain strong supporters of this freedom to contract, and we are gratified to see it restored for much of the industry.

However, IMDA is proposing to retain the CCM and its infringement of contracting rights for all live content. In practice, this means live news and sports. Historically, exclusive carriage contracts have been more common and more valuable for sports broadcasters than for news broadcasters, but there is no guarantee this will always be the case. However, as the consultation paper notes, it is in the sports sector that IMDA's previous cross-carriage determinations have actually taken place, so we will confine our remarks to that sector.

The limitation of the CCM's scope to live sporting events means that the current proposal would affect the highest-value part of the television industry. Sporting content is precious to sports leagues, broadcasters, distribution firms and consumers alike precisely because of its live immediacy. We are therefore concerned that in singling out the entire stratum at the top of the market for regulatory intervention, IMDA would ensure that continued application of the CCM would have disproportionate overall economic impact.

Our concerns remain rooted in the provisions of the Berne Convention and its "three-step test" for the admissibility of regulatory interventions that infringe the contracting rights of content owners. Under the Convention (and associated other agreements including the WTO's accord on Trade-Related Aspects of Intellectual Property Rights – TRIPS), contracting parties including Singapore are obliged to provide exclusive rights of "communication to the public" to content owners. Limitations or exceptions to those rights are to be "confined...to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." With respect to live sporting events, distribution via exclusive carriage arrangements is certainly a normal part of exploitation of the work, and abridging that commercial opportunity will prejudice the legitimate interests of the rights holders. It would be clearly preferable for the CCM to be eliminated entirely, rather than focused on the highest-value part of the industry.

Also, at a practical level, we have concerns about how it will be possible for pay TV suppliers to implement the CCM and at the same time limit the cross-carriage only to live event streams. As IMDA may be aware, when purchasing rights to specific content, especially on a global level, pay TV operators usually negotiate rights to either an entire channel or bundle of content. It is very unusual for an operator to acquire access to just a specific program. The channel or bundle of content frequently includes both live and recorded content -- it is likely to involve portions which are "live sports" during specific times of the day along with replays or additional programs for other portions of the day. The challenge is that the rights that are usually sold to pay-TV operators do not permit the operator to unbundle the content by editing out the non-live portions. The operator is also not permitted to repackage just the live content into a separate channel stream which can be cross-carried. These two factors would thus imply that for a sports channel, in particular, to meet the requirements of the CCM would involve the entire bundled content to be cross-carried. The effects of the "live content" mandate would thus be more sweeping than IMDA intends, and the negative economic impact higher.

Therefore, both because of the infringement of the contracting rights of sports content owners, and because of the difficulty of implementing live-content-only cross-carriage orders, we recommend that IMDA adopt the more straightforward and simple approach of eliminating the CCM entirely, and not attempting to preserve it in the live (sports) content domain.

Finally, we would like to offer a parenthesis designed to avoid any doubt about AVIA's role on this issue: As in our previous cross-carriage submissions to MDA and IMDA, we wish to note that the views submitted in this process are those of AVIA's members other than the two Singapore pay-TV platforms, Singtel and StarHub. While both of those companies are valued members of AVIA, they can and will express their own views on this consultation directly to the Singapore authorities.