

Comments
On
IDA Consultation Paper
The Proposed Revised Section Nine of the Telecom Competition Code
The Proposed Telecommunication Consolidation Guidelines
The Proposed Advisory Guidelines for Tender Offer Process where the Singapore Code of Take-Overs and Mergers Applies

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STATEMENT OF INTEREST

Pacific Internet Limited (“PacNet”) is a Facilities-based Operator (“FBO”) Licensee and its shares are listed on the Nasdaq National Market in the United States.

PacNet welcomes IDA’s efforts to solicit feedback and comments on the proposed Revised Section 9 of the Code, the revised IDA’s Proposed Telecom Consolidation Guidelines and the Proposed Tender Offer Guidelines. We agree that the public as well as the industry would benefit from further clarification regarding the standards applicable to IDA’s Consolidation reviews as well as a more formalized procedure for such reviews.

SUMMARY OF MAJOR POINTS

Our key comments on the three IDA consultation documents relating to mergers & acquisition in the telecommunications market in Singapore are as follows:-

- The Licensee may not be the most appropriate party to seek approval from the IDA for an acquisition of Ownership Interest or a Consolidation. The divesting owner(s), in most instances, deal directly with the Acquiring Party and it would be more appropriate for the negotiating parties to seek the necessary approval from the IDA.
- The indirect imposition of disclosure and other requirements on the Acquiring Party by the IDA through its regulatory authority over the Licensee does not adequately address the possible inability of the Licensee to obtain adequate co-operation from the Acquiring Party. This is especially so when the Licensee is not a party to or directly involved in the acquisition process. The proposed guidelines should clearly provide that the Licensee shall not be penalized in any manner by reason of any possible default or non-compliance of the Acquiring Party.
- The requirement for Licensees to constantly monitor changes in its Ownership Interest for the purpose of notifying IDA when an Acquiring Party owns 5% but less than 12% of the Licensee is onerous especially since it does not confer benefits in terms of safeguarding against anti-competitive behaviour. The Acquiring Party will not be able to restrict competition given its small Ownership Interest, an assumption which the IDA adopts. The requirement should be removed accordingly.
- We are of the view that the presumption that a Non-Horizontal Consolidations “do not generally restrict competition” is not generally true. We propose that all language in the Revised Proposed Section Nine of the Telecom Competition Code and the Proposed Telecom Consolidation Guidelines relating to or resulting from the presumption be removed.
- The terms “Public Interest” and “Market Share” as currently provided for in the Revised Proposed Section Nine of the Telecom Competition Code and the Proposed Telecom Consolidation Guidelines may be subject to many different interpretations. We are of the view that the regulator is the best party to make an assessment of “Public Interest”. It is also important for the regulator to provide and ensure transparency in its methodology for determining market share.

GENERAL COMMENTS

The Licensee may not be the Most Appropriate Party to Seek Approval from the IDA

We submit that in most instances the Licensee being acquired may not be the most appropriate party to seek IDA's approval for an acquisition of Ownership Interest or a Consolidation Application. As mentioned in our comments on the first draft of the Proposed Telecom Consolidation Guidelines issued in 2001, more often than not, the divesting owners of the Licensee negotiates with the Acquiring Party directly on matters relating to the acquisition of Ownership Interest or Consolidation. The affected Licensee is usually not substantially involved in the negotiations.

Another concern with involving the Licensee in the acquisition process as a result of its duty to seek approval from the IDA is that it may expose the Licensee to more onerous obligations under the relevant securities laws applicable to it (e.g. US securities laws), such as increased disclosure and filing requirements.

While we note that the Proposed Tender Offer Guidelines sought to address the situation where the Singapore Take-Over Code may be applicable, they merely seek to clarify that the IDA's approval would still need to be sought in the event the Singapore Take-Over Code applies. These guidelines do not address the concerns expressed in the preceding paragraph nor the concern that the affected Licensee may be subject to other tender offer rules and securities laws requirements in addition to those under the Singapore Take-Over Code.

In addition, in an acquisition of Ownership Interest or a Consolidation by other means (i.e. through means other than privately negotiated agreements between the Licensee and the Acquiring Party), the position of a Licensee and/or its owners who are opposed to the acquisition or Consolidation may be compromised by the requirement for the Licensee to seek approval from IDA.

In such cases, it would be more appropriate for the divesting owners and the Acquiring Party to directly seek the approval of the IDA for the acquisition or Consolidation instead.

The Duty to Monitor Changes in Ownership Interest May Not be Necessary for the 5% but Less than 12% Ownership Interest Range

In regard to the requirement for Licensees to notify IDA of changes in Ownership Interest resulting in an Acquiring Party holding Ownership Interest in the Licensee of at least 5% but less than 12% as set out in the proposed Subsections 9.3.3 and 9.3.5 of the Revised Section 9 of the Telecom Competition Code, we are of the view that the requirement is unnecessary given that such an Acquiring Party is not likely to be able to restrict competition or act against public interest as assumed by the IDA. In view that the requirement imposes additional costs on the Licensees without conferring benefits in terms of safeguarding against anti-competitive behaviour, we propose that the requirement be removed.

COMMENTS ON SPECIFIC PROVISIONS IN THE PROPOSED REVISED SECTION 9 OF THE TELECOM COMPETITION CODE AND THE PROPOSED TELECOM CONSOLIDATION GUIDELINES

Subsection 9.3.3 of Section 9 – General Duty to Monitor

As mentioned in our general comments, we are of the view that it is onerous for the Licensees to constantly monitor changes in their ownership, especially changes in their indirect ownership, for the purposes of notifying IDA of changes of ownership in the range of at least 5% but less than 12%. This is especially so as there are little benefits in terms of safeguarding against anti-competitive behaviour since a party who holds less than 12% of Ownership Interest is unlikely to be able to restrict competition, an assumption which the IDA adopts too. We propose that the requirement be removed or modified e.g. semiannual reporting of the Ownership changes be used instead.

In regard to the requirement for Licensees to adopt effective, on-going procedures for monitoring changes in Ownership Interests in the Licensee, we would like to request the IDA to provide guidance as to what would constitute an “effective” measure, taking into consideration that the ability of a Licensee to fulfil the duty to notify the IDA largely depends upon the Acquiring Party notifying the Licensee of the transaction (especially in the lower Ownership Interest range).

Subsection 9.3.5 of Section 9 – Procedures in Connection with the Acquisition of an Ownership Interest in a Licensee Resulting in the Holding of an Ownership Interest in the Licensee of At Least 5 Percent, But Less than 12 Percent.

We note that the 5% threshold is based on the concept of a “substantial shareholder” in the Companies Act (Cap. 50). However, the rationale for determining that ownership of 5% would result in one being regarded as a substantial shareholder under the Companies Act may not be applicable in the case of a regulatory notification, the purpose of which is to facilitate the IDA’s monitoring of potential anti-competitive behavior of firms arising from mergers and acquisitions in the telecommunications market in Singapore. We propose to do away with the 5% threshold and to replace it with the 12% threshold.

Subsection 9.3.5.1 of Section 9 – Duty to Notify IDA

Without prejudice to our comments on subsection 9.3.3, we are of the view that it may not be possible for a Licensee to provide IDA with written notification with the information required within 2 working days of becoming aware that an Acquiring Party has acquired an Ownership Interest resulting in the Acquiring Party holding an Ownership interest of at least 5 %, but less than 12%, especially if the Licensee has no prior dealings with or prior knowledge about the Acquiring Party. We propose to change the notification period to “within 5 working days” instead.

In addition, where the Licensee is listed on foreign exchanges, the form of notification provided by the Acquiring Party may not contain sufficient information to allow the Licensee to determine the percentage of Ownership Interest that the Acquiring Party owned prior to the

acquisition without a certain amount of computation and deduction being carried out by the Licensee.

Subsection 9.3.6 of Section 9 – Procedures in Connection with the Acquisition of an Ownership Interest in a Licensee Resulting in the Holding of an Ownership Interest in the Licensee of At Least 12 Percent, But Less than 30%

**Subsection 9.4 of Section 9– Procedures in Connection with a Connection
Section 3 of Consolidation Guidelines – Consolidation Application**

In most instances, the Licensee being acquired may not be the most appropriate party to seek IDA's approval for an acquisition of Ownership Interest or a Consolidation Application - See General Comments

**Subsection 9.5.4.2 of Section 9– Length of Consolidation Review Period
Section 4.2 of Consolidation Guidelines – Length of Consolidation Review Period**

As mentioned in our comments on the first draft of the proposed Telecom Consolidation Guidelines, the maximum review period of 120 days is too long. Potential Consolidations are typically very time sensitive. More importantly if any of the entities involved (be it the Licensee or its owners) are listed entities, a protracted review period may introduce further volatility or uncertainty to the stock price of such entities as such potential Consolidations are material and extremely price-sensitive transactions. This is not taking into account the take-over regimes that may potentially apply to the entities involved.

It should be further stressed that the review period represents a period of uncertainty not only for the stock price of the entities involved but also for their respective businesses and operations. A protracted review period will undoubtedly have an adverse impact on the Licensees' dealings with its business and joint venture partners, customers, suppliers, creditors and other third parties. Internally, the Licensees are also likely to face increased human resources issues given the uncertainty brought forth by a protracted review period.

Finally, a protracted review period might also in itself bring about a material change in circumstances and could lead to our concerns as expressed on Section 3.6 of the revised proposed Telecom Consolidation Guidelines. While we appreciate the arduous nature of the review involved, given the potential difficulties the Applicants will face and the certainty that all businesses require, we strongly propose that the maximum review period be reduced to the absolute minimum possible, such as 60 days. In addition, where it is very clear that there are no anti-competitive issues involved, the review period should be significantly reduced, for example, to 1-2 weeks where possible.

Subsection 9.6 of Section 9 - Information Gathering Procedures Applicable to Requests and Applications

Information submitted by an Applicant to the IDA in seeking for approval for changes in Ownership Interest or a Consolidation to a large extent involves commercially sensitive information which could have an adverse impact on the marketplace if inadvertently disclosed to any third party. It would be assuring to the Applicants if IDA could provide

assurance in the Telecom Competition Code that IDA would implement internal controls to safeguard and restrict access to the information submitted by Applicants.

Section 3.1.3.1 of Consolidation Guidelines – Consolidations Via Privately Negotiated Agreements to Which the Licensee is a Party

Subsection 9.3.6.5 of Section 9 – Acquisition of Ownership Interest in a Licensee Resulting in the Holding of an Ownership Interest in the Licensee of At Least 12 Per Cent, But Less Than 30 Percent, With Effective Control

In Section 3.1.3.1 and where relevant in Subsection 9.3.6.5, the Applicants are required to enter into a Consolidation Agreement prior to submitting the Consolidation Application. As mentioned in our comments on the first draft of the proposed Telecom Consolidation Guidelines, we propose that the Applicants be allowed to submit the proposed key terms and mechanics of the potential Consolidation rather than submit a Consolidation Agreement. In addition, we propose that other documents such as Letters of Intention (LOIs), which may already be binding on the parties, may be submitted in lieu of the Consolidation Agreement and could be deemed to suffice in the absence of further indications from IDA on its proposed direction with regards to the proposed Consolidation. The Consolidation Agreement may subsequently incorporate any conditions or guidance that IDA may have on the Consolidation Application and be submitted to IDA for final clearance should the approval of IDA be provisionally granted.

The concern for the above proposal is that for the proposed transaction to proceed to a point where the parties have entered into a Consolidation Agreement requires the commitment of considerable resources which would be wasted should the Consolidation Application be subsequently rejected.

Furthermore, a large part of such an agreement would be dealing with the protection of the interests of the respective parties involved from a legal and commercial perspective and would not be relevant for the determination of whether the proposed Consolidation would unreasonably restrict competition. More importantly, the other information needed to satisfy the Minimum Information Requirement is already fairly exhaustive and would provide IDA with sufficient information to decide whether the proposed Consolidation would unreasonably restrict competition. The Consolidation Agreement would have little probative value and thus would not justify the level of expenditure the parties would have to make in order to produce one for the purposes of the review.

Subsection 9.5.1.4 of Section 9 - Description, Competitive Impact and Public Interest Statement

Section 3.2.1.4 of Consolidation Guidelines – Description, Competitive Impact and Public Interest Statement

Under Subsection 9.5.1.4/Section 3.2.1.4, the Applicants are required to submit a good-faith assessment of the likely impact on the proposed Consolidation on competition and a statement on why the proposed consolidation would serve the “*public interest*”.

“*Public interest*” is a concept that is both wide and ambiguous. It is subject to many possible interpretations. It is instructive to note that there is a detailed elaboration on the competitive

assessment in the same Section but no further guidance on this term. We are of the view that the assessment of public interest is one that is best made by the regulator after having regard to all the relevant concerns, rather than the Applicants.

Subsection 9.5.3 of Section 9 - Consolidation Application Processing Fee
Sections 3.3/3.6 of Consolidation Guidelines - Consolidation Application Processing Fee

We are of the view that the processing fee of S\$10,000 for a Long Form Consolidation Application is too high.

This is compounded by the fact that under Section 3.6, if there is any new or different fact that is reasonably likely to have a material impact on the application, IDA may require the Applicants to withdraw the existing Consolidation Application Form and submit a fresh one thereby presumably incurring another payment of the processing fee. Such payment would still be required despite the fact that the change in circumstances may have occurred through no fault of either Applicant.

We appeal to the IDA to exercise flexibility and consider waiving such processing fees in special circumstances.

Subsection 9.6.4 of Section 9 – Request for Confidential Treatment
Section 5.4.4 of Consolidation Guidelines - Notification of Denial of Confidential Treatment

Under Subsection 9.6.4 and Section 5.4.4, if the Applicant's request for confidential treatment is rejected, the information will not be used in IDA's review of the application. The Applicant would have to either relinquish confidentiality of the information or have the information excluded from the review process. This may operate unfairly against the Applicant who has to evaluate the risk of relinquishing confidentiality, having such information possibly released in a public consultation and yet face the prospects of a rejection of the Consolidation Application. On the other hand, should the Applicant decide not to relinquish confidentiality, they assume the risk that the Consolidation Application might be rejected because IDA did not use such information in its review.

Subsection 9.6.5 of Section 9 – Duty to Provide Responsive, Complete and Accurate Information

Where a Licensee is not a party to or directly involved in the acquisition process and/or where the Licensee is unable to obtain the co-operation of the Acquiring Party in obtaining the required information, the Licensee may not be able to fully comply with this subsection. The proposed guidelines should clearly provide that the Licensee shall not be penalized in any manner by reason of any possible default or non-compliance of the Acquiring Party.

Section 2.2.2 of Consolidation Guidelines – Non-Horizontal Consolidations
Section 6.3 of Consolidation Guidelines – Non-Horizontal Consolidations
Section 6.4.2 – Efficiencies

We are of the view that the presumption that a Non-Horizontal Consolidations “do not generally restrict competition” is not generally true. Section 2.2.2.1 – 2.2.2.3 clearly show that there are many circumstances in which Non-Horizontal Consolidations would raise significant anti-competitive concerns. We propose that all language in the Revised Proposed Section Nine of the Telecom Competition Code and the Proposed Telecom Consolidation Guidelines relating to or resulting from the presumption that Non-Horizontal Consolidations do not generally restrict competition be removed.

Section 3.2.2.1 of the Consolidation Guidelines – Situations in Which a Short Form Consolidation Application May be Submitted

As mentioned in our comments on Section of 2.2.2, we do not agree with the presumption that Non-Horizontal Consolidations generally do not restrict competition. In this regard, we propose that the 15 percent benchmark applicable in a Horizontal Consolidation be also applied to a Non-Horizontal Consolidation.

Market Share

Various Subsections in Section 9

Various Sections in the Consolidation Guidelines (Including Section 6.1.2, Section 6.2.1–6.2.2.2 and Section 6.3 – 6.3.2.3)

The determination of market shares by its nature is a complex and somewhat subjective process. Among other things, including different service or product markets, market participants or unit of measurements in the determination of market share will result in different outcomes. The proposed Revised Section 9 of the Telecom Code and the proposed Telecom Consolidation Guidelines give the IDA broad powers in determining market shares in a Consolidation review. In view of the complexity and the subjective nature of market share computation, it is important for transparency that the IDA seek the Applicant’s feedback before finalizing the determination of market shares to give the Applicants’ an opportunity to comment or explain why a certain factor/element should or should not be included in the market share determination. The IDA should also provide transparency on its methodology for determination market share in its public consultation paper on proposed Consolidations.