

SUBMISSION OF SINGAPORE TELECOMMUNICATIONS LIMITED

**PROPOSED REPLACEMENT OF SECTION 9 OF THE CODE OF PRACTICE FOR
COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES**

**PROPOSED FURTHER REVISIONS TO PROPOSED TELECOMMUNICATIONS
CONSOLIDATION REVIEW GUIDELINES**

**PROPOSED ISSUANCE OF PROPOSED ADVISORY GUIDELINES FOR TENDER
OFFER PROCESS WHERE THE SINGAPORE CODE ON TAKE-OVERS AND
MERGERS APPLIES**

13 JUNE 2003

1 INTRODUCTION AND STATEMENT OF INTEREST

Singapore Telecommunications Limited (**SingTel**) is pleased to be given the opportunity to comment on the following proposals, issued by the Info-communications Development Authority of Singapore (**IDA**) for comment on 7 May 2003:

- the proposed replacement of section nine (**Revised Section Nine**) of the Code of Practice for Competition in the Provision of Telecommunications Services (**Code**);
- the proposed further revisions to proposed Telecommunications Consolidation Review Guidelines (**Guidelines**); and
- the proposed issuance of Advisory Guidelines for Tender Offer Process where the Singapore Code on Take-overs and Mergers Applies (**Proposed Tender Offer Guidelines**).

SingTel is licensed to provide telecommunications services in Singapore. It was corporatised on 1 April 1992. SingTel is committed to the provision of state-of-the-art telecommunications technologies and services in Singapore. SingTel has a comprehensive portfolio of services that include voice and data services over fixed, wireless and Internet platforms. Servicing both corporate and residential consumers, SingTel is committed to bring the best of global communications to its customers in the Asia Pacific and beyond.

As a leading provider of telecommunications services and a leading proponent of innovation and competition, SingTel has a strong interest in effective pro-competition regulation of Singapore's telecommunications industry.

This Submission is structured as follows:

- this Section 1 describes the commenting party and its interest in this proceeding;
- Section 2 sets out SingTel's general views on the appropriate approach to consolidation policy in the telecommunications sector;
- Section 3 summarises SingTel's major points on (a) Revised Section Nine of the Code; (b) proposed further revisions to the proposed Guidelines; and (c) proposed Tender Offer Guidelines; and
- Section 4 sets out in detail SingTel's comments on (a) Revised Section Nine of the Code; (b) proposed further revisions to the proposed Guidelines; and (c) proposed Tender Offer Guidelines.

2 SINGTEL'S GENERAL VIEWS ON CONSOLIDATION POLICY

In general terms, SingTel supports an approach to consolidation policy which is consistent across a range of industries and which is consistently applied to all operators in those industries. SingTel supports an approach to consolidation policy in the telecommunications sector:

- that supports a market based approach, recognising that markets are best placed to deliver competitive outcomes which will maximise society's welfare;
- where intervention is narrowly focused on preventing significantly anti-competitive outcomes;
- where the public interest inquiry is only used to determine whether there are sufficient public benefits to balance against anti-competitive effects to test whether a consolidation should be permitted to proceed, and is not used as a mechanism to block a consolidation which would not otherwise have any significant anti-competitive effects;
- where due regard is had to the important features of the telecommunications industry such as globalisation, dynamism and rate of change;
- where any regulation of consolidation outcomes (eg the imposition of conditions) is proportionate to the anti-competitive risk;
- where due regard is had to international factors and precedents;
- that is not presumptive about outcomes;
- where consolidation enquiries are transparent and open to public comment; and
- where regulatory decision making is impartial, efficient and delays are minimised.

SingTel believes that overall objectives reflecting the above dot points should be explicitly stated as objectives under the Code and the Guidelines.

3 SUMMARY OF SINGTEL'S VIEWS ON PROPOSALS

SingTel welcomes a large number of the proposed revisions to the Code and the Guidelines, however SingTel believes that some of the proposed provisions remain overly interventionist, and will impose unnecessary regulatory and compliance costs on the telecommunications industry in Singapore. SingTel therefore considers that a number of changes should be made to improve the effectiveness and reduce the cost of regulation, and that these changes will not substantially affect the object of the regulation, being to prevent significantly anti-competitive outcomes. SingTel sets out below a summary of those recommended changes.

Definition of Affiliate, Effective Control and Indirect Ownership Interest (9.1.2 Code)

- SingTel submits that the definition of “Affiliate” should be amended so that an entity is only considered to be an Affiliate of a Licensee or Acquiring Party if the entity has an attributable interest in a Licensee or Acquiring Party of 30% or more, or is an entity in which a Licensee or Acquiring Party has an attributable interest of 30% or more. SingTel also does not consider it to be appropriate to apply the “sum-the-percentages” methodology in order to determine whether an entity is an Affiliate of the Licensee or the Acquiring Party.
- SingTel submits that IDA should only presume that an Acquiring Party has the ability to exercise “Effective Control” of the Licensee if the Acquiring Party holds an Ownership Interest of at least 50 per cent in the Licensee.
- SingTel submits that the definition of “Ownership Interest” should be amended so that a Licensee’s or Acquiring Party’s “Indirect Ownership Interest” in a Licensee will only be determined using the “sum the percentages” methodology applied successively at each level of the ownership chain where there is a 100% interest, and up to a maximum of 3 layers down where there is less than a 100% interest.

Designation of SBOs (9.2 Code)

- SingTel does not support the broadening of the current framework of section 9 of the Code to include transactions involving certain SBOs.
- If IDA considers that certain SBOs should be subject to section 9 of the Code, then SingTel submits that the test for a significant SBO participation in a concentrated market needs to be amended because the proposed test sets too low a threshold.

Monitoring of Indirect Ownership Interests (9.3 Code)

- SingTel submits that it is too onerous to require Licensees to monitor entities who have Indirect Ownership Interests in Licensees.
- SingTel also submits that it may be more appropriate for the Acquiring Party, not the Licensee to monitor Ownership Interests in the Licensee.

Duty to Notify IDA (9.3 Code)

- SingTel does not consider that post-acquisition notification should be required for the acquisition of a 5% to 12% Ownership Interest in a Licensee. SingTel submits that there should not be any compulsory notifications for acquisitions that would result in the Acquiring Party having an Ownership Interest of less than 30%.
- SingTel also submits that the time allowed to notify IDA should be extended to 5 working days rather than the proposed 2 working days.

Acquisitions requiring IDA approval (9.4.1 Code)

SingTel considers that the approval by IDA of a proposed acquisition of an Ownership Interest in a Licensee should only be required where the proposed acquisition would result in:

- the Acquiring Party gaining Effective Control of the Licensee; and
- the post consolidation market share of the Consolidated Entity in a relevant telecommunication market in which the Licensee operates is over 15% and the largest four participants have a combined share of 75% or greater, or the Consolidated Entity would have over 40% share of the relevant market in which the Licensee operates, regardless of the combined share of the largest four participants; and
- the pre-Consolidation turnover or assets of the target are more than certain amounts.

Privately negotiated agreements (9.3.6.2 and 9.4.2 Code)

- SingTel submits that there is no reason why requirements for approval in relation to privately negotiated agreements should differ from filing requirements in relation to Consolidations.

Acquisition without provision of advance notice (9.3.6.2 Code)

- SingTel submits that the information requirements for the Licensee's Request should be amended to cover a situation where the Acquiring Party has acquired an Ownership Interest without advance notice to the Licensee.

Pro forma change in Ownership (9.4.4 Code)

- SingTel submits that the Acquiring Party and the Licensee, not just the Acquiring Party, should be able to demonstrate the acquisition was a pro forma change in ownership.

Standard for Approval of a Consolidation Application (9.4.5 Code and 6 Guidelines)

- SingTel submits that it not appropriate for the analytical framework within which IDA considers Consolidations to distinguish between Horizontal Consolidations and Non-Consolidation Consolidations.
- SingTel notes that the inclusion specifically of the impact of the Consolidation on "future competition" may give undue weight to one of many factors that should be taken into account in an analysis of this nature.
- SingTel submits that the "substantially" lessening competition test might be preferable to proposed "significant and unjustifiable reduction in existing competition" test.
- If the status of an Applicant as a Dominant Licensee is to remain one of the relevant factors in determining whether a Consolidation is likely to increase the risk of unilateral anti-competitive conduct, SingTel submits that it should only be relevant if an Applicant is a Dominant Licensee in the relevant market in which the Licensee operates.
- SingTel considers that public interest factors should only be considered if an initial determination has been made that the Consolidation will, or is likely to, significantly lessen competition.
- SingTel submits that the benefits of efficiencies should be given greater emphasis, its analysis should not be limited to "close cases", and the weight it is given should not depend on whether the consolidation is horizontal or non-horizontal.

- SingTel supports IDA's inclusion of a failing undertaking and division defence in the Guidelines.
- SingTel submits that the Guidelines should recognise the dynamism that characterises the telecommunications industry.

Statements and Supporting Documentation

- Applicants should only be required to set out the telecommunications markets in which the Applicants participate, and telecommunications markets in which entities that have Effective Control of an Applicant, or entities in which an Application has Effective Control, participate.
- Applicants should only have to submit a chart indicating entities that have Effective Control of an Applicant or entities in which an Applicant has Effective Control.

Short and Long form Consolidation Applications (9.5 Code)

- SingTel does not consider that it is appropriate for eligibility to submit a Short Form Consolidation Application to differ depending on whether the proposed Consolidation is Horizontal or Non-Horizontal.
- SingTel submits that Licensees should be able to file a Short Form Consolidation Application if post-consolidation, the Consolidated Entity's market share in the relevant market in which the Licensee operates would be less than 40%.

Joint filing of Consolidation Applications (9.5 Code)

- SingTel does not support amendments to section 9 of the Code which would require the Acquiring Party and the Licensee to jointly file a Consolidation Application.
- If the joint Consolidation Application requirement is to remain, SingTel seeks clarification on how it will operate.

Exemption from submission obligations (3.5 Guidelines)

- SingTel seeks clarification about the exemption from submission obligations.

Provision of informal guidance (3.8 Guidelines)

- SingTel does not support the inclusion of informal guidance provisions in the Guidelines.

Tender Offers (9.8 Code)

- SingTel considers that it is not necessary for IDA to require that its prior written approval be obtained where an Acquiring Party proposes to acquire a Direct Ownership Interest in a Licensee by a Tender Offer, which would result in that Acquiring Party holding an Ownership Interest in the Licensee of 12 Percent or more.
- SingTel considers that its recommendations in relation to notification and requirements for approval of the acquisition of Ownership Interests in Licensees should also apply to tender offers, as set out in sections 4.4 (Duty to Notify IDA) and 4.6 (prior approval of acquisitions of certain Ownership Interests) of this submission.
- SingTel considers that it is sufficient for IDA's written approval to be included as a condition precedent to completion of the Acquiring Party's acquisition of an Ownership Interest in the Licensee that would exceed the thresholds as set out in SingTel's suggested amendments to section 9.4.1 of the Code.

4 SINGTEL'S DETAILED COMMENTS ON THE PROPOSALS

4.1 Definition of Affiliate (sub-section 9.1.2 Code)

Sub-section 9.1.2(b) of the Code defines an "Affiliate" of the Licensee or Acquiring Party as an entity:

- (i) *that has an attributable interest in any Licensee or Acquiring Party of 5 percent or more ("Parent")*
- (ii) *in which a Licensee or Acquiring Party has an attributable interest of 5 percent or more ("Subsidiary"); or*
- (iii) *which is a subsidiary of any Parent of the Licensee or Acquiring Party ("Sibling").*

In determining a Licensee's or Acquiring Party's attributable interest, IDA will use the "sum-the-percentages" methodology. This methodology will be applied successively at each level of the "ownership chain"...

SingTel considers the definition of Affiliate to be too broad and the "sum the percentages" methodology to be inappropriate in this context.

SingTel submits that the percentage share at which an entity is defined as an Affiliate of the Licensee or Acquiring Party be increased from 5% to 30% and that only Direct Ownership Interests should be considered by the IDA in determining whether an entity is an Affiliate of the Licensee or Acquiring Party.

The 5% threshold at which an entity is considered to be an Affiliate is too low, and makes the requirement in sub-section 9.5.1.5 that Applicants include with a Consolidation Application a chart indicating the relationship between each Applicant and its Affiliates and the relevant ownership interests, too onerous for Applicants.

SingTel submits that whether an entity has an attributable interest in any Licensee or Acquiring Party of between 5% and 30%, or an entity in which a Licensee or Acquiring Party has an attributable interest of between 5% and 30% is not relevant to IDA's consideration of whether a Consolidation would unreasonably restrict competition in any telecommunication market within Singapore or harm the public interest.

SingTel submits sub-section 9.1.2 be amended as follows:

An “Affiliate” of the Licensee or Acquiring Party means an entity:

- (i) that has an attributable interest in any Licensee or Acquiring Party of ~~5~~30 percent or more (“Parent”); or
- (ii) in which a Licensee or Acquiring Party has an attributable interest of ~~5~~30 percent or more (“Subsidiary”).
- ~~(iii) which is a subsidiary of any Parent of the Licensee or Acquiring Party (“Sibling”).~~

In determining a Licensee’s or Acquiring Party’s attributable interest, IDA will only consider an entity’s Direct Ownership interests. ~~use the “sum-the-percentages” methodology. This methodology will be applied successively at each level of the “ownership chain”...~~

SingTel submits that the definition of “Affiliate” should be amended so that an entity is only considered to be an Affiliate of a Licensee or Acquiring Party if the entity has an attributable interest in any Licensee or Acquiring Party of 30% or more, or is an entity in which a Licensee or Acquiring Party has an attributable interest of 30% or more. SingTel also does not consider it to be appropriate to apply the “sum-the-percentages” methodology in order to determine whether an entity is an Affiliate of the Licensee or the Acquiring Party.

4.2 Definition of Effective Control (sub-section 9.1.2 Code)

Sub-section 9.1.2(f) of the Code defines Effective Control as:

the ability to cause the Licensee to take, or prevent the Licensee from taking, a decision regarding the management and operating decisions of the Licensee. IDA will presume that an Acquiring Party that holds an Ownership Interest of at least 30 per cent in a Licensee has the ability to exercise Effective Control of the Licensee.

SingTel agrees with IDA that the ability to cause the Licensee to take, or prevent the Licensee from taking, a decision regarding the management and operating decisions of the Licensee is an indicator of Effective Control. However SingTel does not consider that it is appropriate for IDA to presume that an Acquiring Party that holds an Ownership Interest of 30 per cent in a Licensee has the ability to exercise Effective Control of the Licensee.

SingTel submits that it is only appropriate for IDA to presume that an Acquiring Party has the ability to exercise Effective Control of the Licensee if the Acquiring Party holds an Ownership Interest of at least 50 per cent in the Licensee.

SingTel submits that the definition of Effective Control should be amended as follows:

the ability to cause the Licensee to take, or prevent the Licensee from taking, a decision regarding the management and operating decisions of the Licensee. IDA will presume that an Acquiring Party that holds an Ownership Interest of at least ~~30~~ 50 per cent in a Licensee has the ability to exercise Effective Control of the Licensee.

SingTel submits that IDA should only presume that an Acquiring Party has the ability to exercise Effective Control of the Licensee if the Acquiring Party holds an Ownership Interest of at least 50 per cent in the Licensee.

4.3 Definition of Indirect Ownership (sub-section 9.1.2 Code)

SingTel supports revising section 9 of the Code as proposed to provide that an Acquiring Party's Direct Ownership Interest in a Licensee will equal the percentage of the Licensee's voting shares in which the Acquiring Party has a legal or equitable interest.

However, SingTel does not support the proposal that an Acquiring Party's Indirect Ownership Interest in a Licensee be determined using the "sum-the-percentages" methodology, applied successively at each level of the 'ownership chain'.

SingTel agrees with IDA that it may be appropriate to trace any interests that an Acquiring Party has in a Licensee through one of its wholly owned subsidiaries. However, SingTel does not consider that an Acquiring Party could have Effective Control of an entity in which a subsidiary of one of its subsidiaries holds less than a 100% interest. SingTel considers that it would be inappropriate to apply the sum the percentages approach more than 3 layers down, unless the entities are all wholly owned.

eg 1 If one entity (A) holds 49% of an entity (B) (and the other 51% of B is owned by another entity (X)), and B in turn owns 49% of a further entity (C) (and the other 51% of C is owned by another entity (Y)). In reality, A has no control over C, since A is merely a minority shareholder in a company (B) over which X, not A has control. In turn, B is a minority shareholder in C, over which Y not B has control. Even though A is a 49% shareholder in B, and B is a 49% shareholder in C, A does not have control

of C. Using the sum the percentages methodology A would be found to have a 24% interest in C, even though it has no control over C.

eg 2 If one entity (A) holds 49% of an entity (B) (and the other 51% of B is owned by another entity (X)), and B in turn owns 60% of a further entity (C). In reality, A has no control over C, since A is merely a minority shareholder in a company (B) over which X, not A has Effective Control. Even though B is a majority shareholder in C, A does not have control of B and therefore A could not exercise control over C. Yet using the sum the percentages methodology A would be found to have a 32% interest in C, and therefore would be assumed to have Effective Control of C pursuant to section 9.1.2(f) of the Code.

SingTel submits that the definition of “Ownership Interest” be amended so that a Licensee’s or Acquiring Party’s “Indirect Ownership Interest” in a Licensee will only be determined using the “sum the percentages” methodology applied successively at each level of the ownership chain where there is a 100% interest, and up to a maximum of 3 layers down where there is less than a 100% interest.

4.4 Application of Revised Section Nine to certain Services-Based Licensees

Designation of certain SBOs (sub-section 9.2 Code)

SingTel does not consider it necessary for the current framework of section 9 of the Code to be broadened to include transactions involving certain Services-based Licensees (**SBOs**). SingTel considers that only Facilities Based Licensees (**FBOs**) should be designated by IDA as Designated Telecommunication Licensees.

There has been a history of entry and expansion by SBOs in the Singapore telecommunications industry, and there are minimal impediments to the future entry or expansion of SBOs. In these circumstances, SingTel does not believe that the inclusion of any SBOs in the scope section of Revised Section Nine is necessary to preserve competition in any relevant telecommunication market. Given the additional regulatory costs and burden involved in including certain SBOs, SingTel does not consider this proposed amendment justified. This is especially the case where IDA is proposing to designate SBOs who have as little as a 10% share of the market in which they are operating. Such SBOs may well not be large companies, and the additional regulatory burden associated with designation by IDA will be significant.

SBOs have low impediments to entry and expansion. For example, SBOs have limited start up costs as they lease the required telecommunications network elements (i.e. transmission capacity, switching services, ducts, fibre etc). In relation to regulatory restrictions, while there are no theoretical limitations on the number of FBO or SBO licences to be issued by IDA, there are practical limitations on the issue of FBO licences. As IDA states in relation to FBOs, “there may however be frequency spectrum or other resources and physical constraints that will limit the number of licences available for certain networks and/or services.”¹ These limitations do not apply to SBOs. SBOs do not bear substantial regulatory costs. SBOs’ annual licence fee is only S\$5,000, and other SBO fees are minimal, at around S\$200 ‘every three-yearly.’

As SBOs and potential SBOs face fewer financial and regulatory impediments to entry or expansion, SingTel considers that SBOs require a lower level of regulatory protection, and SingTel does not consider that the framework for section 9 of the Code needs to be broadened to include consolidations involving SBOs as is proposed in Revised Section Nine.

SingTel submits that given the low barriers to entry for potential SBOs, there is no significant difference between acquiring an SBO and commencing an SBO business. Therefore, there should be no difference in the regulatory application to SBO related activities where, under the current draft, merging with an SBO would be regulated whereas starting-up a new SBO would not be regulated.

SingTel does not support the broadening of the current framework of section 9 of the Code to include transactions involving certain SBOs.

Definition of concentrated markets (sub-section 9.2.1 Code)

If, despite the views expressed above, IDA determines that the Revised Section Nine should provide for the designation of certain SBOs, then SingTel submits that the thresholds for presuming that a SBO is “significant participant in a consolidated market” require amendment.

Under proposed sub-section 9.2.1 of the Code, IDA will presume that an SBO is a significant participant in a concentrated market if it has a market share of at least 10% in a market, and if the three largest participants in that market collectively have market share in excess of 75%.

SingTel considers that the test proposed by IDA for a significant SBO in a concentrated market sets too low a threshold, both in terms of the share of the SBO, and the level of concentration in the market. SingTel considers that an SBO should only be considered to be

¹ IDA “Guidelines on Submission of Application for Facilities-Based Operator Licence”, para 3.2

a significant participant in a concentrated market if it has greater than 15% share and the four largest participants have in excess of 75% share of the relevant market. The test proposed by SingTel (SBOs > 15% share and top 4 firms combined > 75%) better reflects whether an SBO is a significant participant in a concentrated market, and is used in a different context by the Australian Competition and Consumer Commission as a concentration threshold to review mergers.

Therefore, if sub-section 9.2 of the Code is not amended to provide that only FBOs will be designated, SingTel considers that the criteria for determining whether a SBO is a significant participant in a concentrated market pursuant to sub-section 9.2.1 of the Code should be amended as follows:

IDA will designate a Services-based Licensee as a Designated Telecommunication Licensee, in those cases in which IDA determines that the Services-based Licensee is a significant participant in a concentrated market.

IDA will presume that a Services-based Licensee is a significant participant in a concentrated market if the Licensee has a market share of at least ~~10-15~~ percent in the market for any service which IDA has licensed it to provide, and if the ~~3-4~~ largest participants in that market collectively have a market share in excess of 75 percent.

If IDA considers that certain SBOs should be subject to section 9 of the Code, then SingTel submits that the test for a significant SBO participation in a concentrated market needs to be amended because the proposed test sets too low a threshold.

4.5 Manner of Acquisition of Ownership Interest by Acquiring Party (sub-section 9.3.3 Code)

Sub-section 9.3.3 provides:

Every Licensee must adopt effective, on-going procedures for monitoring changes in Ownership Interests in the Licensee. Licensees must comply with this obligation regardless of whether the changes in Ownership Interests in the Licensee are effected through:

...

- (c) *an agreement with an entity that has an Indirect Ownership Interest in a Licensee;*

- (d) *an Open Market Transaction that results in the acquisition of shares in a Licensee, by an entity that has a Direct Ownership Interest in a Licensee or an entity that has an Indirect Ownership Interest in Licensee; or*
- (e) *any other transaction.*

SingTel submits that it is too onerous to require Licensees to monitor entities who have Indirect Ownership Interests in Licensees. It is not reasonable for IDA to expect Licensees to be aware of all entities who gain Ownership Interests in any entity that has an Ownership Interest in the Licensee.

SingTel also submits that it may be more appropriate for the Acquiring Party, not the Licensee to monitor Ownership Interests in the Licensee.

SingTel submits that it is too onerous to require Licensees to monitor entities who have Indirect Ownership Interests in Licensees. SingTel also submits that it may be more appropriate for the Acquiring Party, not the Licensee to monitor Ownership Interests in the Licensee.

4.6 Duty to Notify IDA (sub-section 9.3 Code)

SingTel agrees with IDA that the acquisition of an Ownership Interest in a Licensee resulting in the Acquiring Party holding an Ownership Interest of less than 12% is unlikely to raise competitive or public interest concerns, and that IDA's approval should no longer be required. SingTel therefore supports IDA's presumption as set out in subsection 9.3.5.2 of the Code, but considers that IDA should go further.

Because the possibility of a competitive or public interest concern arising out of the acquisition of an Ownership Interest between this range of 5% to 12% is so remote, SingTel does not consider that post-acquisition notification of such an acquisition as required by subsection 9.3.5.2 is necessary.

SingTel understands that the 5% notification threshold in Revised Section Nine is based on the concept of "substantial shareholder" in Section 81 of the Companies Act (Cap. 50), and the 12% threshold is consistent with the thresholds levels adopted in the Banking Act (Cap. 19) and the Newspaper & Printing Presses Act (Cap. 206), where the Minister's prior approval for any ownership change at or above that level is required. However, SingTel submits that the requirement for a person to obtain the approval of the Minister pursuant to section 15B of the Banking Act and section 12 of the Newspaper & Printing Presses Act

before becoming a 12% “controller” of a designated financial institution or a newspaper company respectively, reflect policy considerations specific to those industries, and that these policy considerations are not relevant to the telecommunications sector.

Section 81 of the Companies Act defines a substantial shareholder as having not less than 5% of the voting shares of a company for the purpose of identifying a level at which shareholders have certain duties to notify companies of the level, and any changes to that level, of shareholding. The policy considerations behind requiring disclosure of shareholding interests to companies pursuant to sections 82 to 84 of the Companies Act are very different to those behind a competition analysis of any proposed acquisition of an Ownership Interest in a Licensee by an Acquiring Party.

Pursuant to section 15B of the Banking Act, no person shall become a “12% controller” of a bank incorporated in Singapore or a financial holding company without first obtaining the approval of the Minister. SingTel submits that government policy of maintaining very close supervision of financial institutions that underlies this requirement is not relevant in a telecommunications context.

SingTel does not consider that post-acquisition notification should be required simply because the acquisition of a 5% to 12% Ownership Interest might be the ‘first step’ in an Acquiring Party’s effort to acquire a more significant Ownership Interest that may ultimately raise competitive or public interest concerns. The logical extension of this argument would require parties to notify IDA of any acquisition of an ownership interest (even <1%) on the basis that it might be the first step on a path that could lead to the acquisition of a significant Ownership Interest that may ultimately raise competition concerns.

SingTel believes that notification requirements should only be imposed on parties where they are demonstrably necessary. Where a proposed transaction results in an Acquiring Party having an Ownership Interest of less than 30% Ownership Interest in a Licensee, it is unlikely to give rise to any competitive or public interest concern, and in those cases SingTel submits that there is simply no need to impose a compulsory notification burden on Licensees. SingTel submits that notification of IDA should only be required at the point where there is realistic possibility of the acquisition of the Ownership Interest giving rise to a competitive or public interest concern, ie when the interest is 30% or greater. Up until that point, SingTel considers that notification of IDA should be voluntary, not compulsory.

SingTel also believes that the IDA proposal does not give companies sufficient time to notify IDA of the acquisition of a relevant Ownership Interest. SingTel considers that the 2 working days timeframe proposed is simply too short, and should be extended to 5 working days.

Therefore, SingTel submits that sub-section 9.3.1(a) of the Code should provide:

Every Licensee:

- (a) *must notify IDA in connection with the acquisition of an Ownership Interest in the Licensee that would result in the Acquiring Party holding an Ownership Interest in the Licensee of at least ~~5-30~~ percent; and*
- (b) *may notify IDA in connection with the acquisition of an Ownership Interest in the Licensee that would result in the Acquiring Party holding an Ownership interest in the Licensee of less than 30 percent.*

SingTel submits that sub-section 9.3.5.1 of the Code should also be amended as follows:

Within ~~2-5~~ working days of becoming aware that an Acquiring Party has acquired an Ownership Interest resulting in the Acquiring Party holding an Ownership Interest in the Licensee of at least ~~5 percent, but less than 12-30~~ percent, the Licensee must provide written notification to IDA. The notification must include the name (and, if known, the address and contact information) of the Acquiring Party, the percentage of the Ownership Interest that the Acquiring Party owned prior to the acquisition, and the percentage of the Ownership Interest that the Acquiring Party has acquired. Unless requested by IDA, the Licensee need not provide further notification of any increase in that Acquiring Party's Ownership Interest, provided that the Acquiring Party's Ownership Interest in the Licensee does not equal or exceed ~~12-30~~ percent.

The Licensee may notify IDA in connection with the acquisition of an Ownership Interest in the Licensee that would result in the Acquiring Party holding an Ownership interest in the Licensee of less than 30 percent.

That is, a voluntary notification procedure should be available for a Licensee where an acquisition resulted in the Acquiring Party having an Ownership Interest of less than 30%.

SingTel does not consider that post-acquisition notification should be required for the acquisition of a 5% to 12% Ownership Interest in a Licensee. SingTel submits that there should not be any compulsory notifications for acquisitions that would result in the Acquiring Party having an Ownership Interest of less than 30%. SingTel also submits that the time allowed to notify IDA should be extended to 5 working days rather than the proposed 2 working days.

4.7 Prior approval of acquisitions of certain Ownership Interests (sub-section 9.4.1 Code)

IDA proposes that sub-section 9.4.1 provide:

- (a) *IDA's approval must be obtained in connection with any Consolidation, whether effected through:*
 - (i) *the acquisition of an Ownership Interest in a Licensee, whether by a series of transactions over a period of time or not, that would result in the Acquiring Party holding an Ownership Interest in the Licensee of at least 30 percent;*
 - (ii) *the acquisition of the **ability to exercise Effective Control of a Licensee** with the acquisition of an Ownership Interest in the Licensee, that would result in the Acquiring Party holding an Ownership Interest of at least 12 percent, but less than 30 percent; or*
 - (iii) *the acquisition of the business of a Licensee as a going concern.*

SingTel is of the view that the only acquisitions of Ownership Interests that should cause IDA any cause for concern (and in many cases this concern should not be lasting) are those in which there is a real change in Effective Control between competitors, in concentrated markets where the pre-Consolidation turnover or assets of the target are more than certain amounts. Utilising preventative regulatory measures for other transactions is over-interventionist and disincentivises commercial activity.

SingTel considers that the approval by IDA of a proposed acquisition of an Ownership Interest in a Licensee should only be required where the proposed acquisition would result in:

- (a) the Acquiring Party gaining Effective Control of the Licensee; and
- (b) the post consolidation market share of the Consolidated Entity in a relevant telecommunication market in which the Licensee operates is over 15% and the largest four participants have a combined share of 75% or greater, or the Consolidated Entity would have over 40% share of the relevant market in which the Licensee operates, regardless of the combined share of the largest four participants; and
- (c) the pre-Consolidation turnover or assets of the target are more than certain amounts.

In relation to (a) above, Effective Control should be defined as SingTel submits in section 4.1 of this submission to mean that IDA should only presume that a party has an ability to exercise Effective Control if it has Ownership Interest in excess of 50%. SingTel submits that, where there is no change in Effective Control, there should be no requirement to request approval from IDA. Where the Effective Control of an entity has not changed, it is difficult to see how its competitive position in the relevant market will change. It is the entity's competitive position in the relevant market that should be the focus of IDA's concern, not the (rapidly changing) positions of minority shareholders in the entity.

The thresholds outlined in (b) above are consistent with the safe harbours outside of which the Australian Competition and Consumer Commission (ACCC) is likely to take further interest in a merger. The ACCC's Guidelines provide:

If the merger will result in a post-merger combined market share of the four (or fewer) largest firms (CR4) of 75 per cent or more and the merged firm will supply at least 15 per cent of the relevant market, the Commission will want to give further consideration to a merger proposal before being satisfied that it will not result in a substantial lessening of competition...²

In relation to (c) above, what these "certain amounts" should be, the FTC and the Department of Justice in the United States follow a "size of party" and "size of transaction" test before requiring any notification of a consolidation.³ A similar approach has been adopted in the United Kingdom. Pursuant to section 23(b) of the Enterprise Act 2002 (UK) where the value of the turnover of the enterprise being taken over is less than £70 million, the merger is exempt from investigation. Clearly, these numbers need adjusting for the Singapore environment but are provided as a guide.

This approach also gives parties to negotiations a much clearer indication of the extent to which their proposed transaction might be subject to scrutiny, and the risk of it being prevented by IDA. It also gives IDA an indication of the greatest possible risk of potentially anti-competitive transactions that could be done by any of the players in the market at a given point in time.⁴

These changes would not strip IDA of any substantive powers to prevent anti-competitive outcomes. In cases where parties did not seek approval and investigation by IDA in cases

² Australian Competition and Consumer Commission Merger Guidelines, June 1999, paras 5.95 – 5.96

³ See Chapter 3 of the International Competition Policy Advisory Committee Final Report at <http://www.usdoj.gov/atr/icpac/finalreport.htm>.

⁴ This approach also raises the question whether telecommunications sector specific intervention in consolidations is required at all. This is probably the subject matter of a separate consultative process.

where thresholds in question might have been exceeded, then IDA will have the power to review the consolidation and where appropriate penalise relevant parties.

SingTel submits that sub-section 9.4.1(a) should be amended as follows:

- (a) *IDA's approval must be obtained in connection with any Consolidation, whether effected through:*
- (i) *the acquisition of an Ownership Interest in a Licensee, ~~whether by a series of transactions over a period of time or not,~~ that would result in the Acquiring Party gaining Effective Control of the Licensee or the acquisition of the business of a Licensee as a going concern; ~~and holding an Ownership Interest in the Licensee of at least 30 percent;~~*
 - ~~(ii) the acquisition of the ability to exercise Effective Control of a Licensee with the acquisition of an Ownership Interest in the Licensee, that would result in the Acquiring Party holding an Ownership Interest of at least 12 percent, but less than 30 percent; or~~
 - ~~(ii) the post consolidation market share of the Consolidated Entity in the relevant telecommunication market in which the Licensee operates is over 15% and the largest four participants have a combined share of 75% or greater; or the Consolidated Entity would have over 40% share of the relevant market in which the Licensee operates, regardless of the combined share of the largest four participants or the acquisition of the business of a Licensee as a going concern; and~~
 - ~~(iii) the acquisition of the business of a Licensee as a going concern.~~
 - ~~(iii) the pre-Consolidation turnover or assets of the Licensee are more than [S\$insert]~~

SingTel submits that the threshold at which IDA approval for Consolidations must be sought should be raised.

4.8 Requests where acquisition via Privately negotiated agreement and Consolidation Applications (sub-section 9.3.6.2 and 9.4.2 Code)

SingTel submits that there is no reason why requirements for approval in relation to privately negotiated agreements should differ from filing requirements in relation to Consolidations.

SingTel submits that IDA approval need only be sought where a proposed transaction would breach section 9.4.1 as set out above. However, if IDA is to retain the requirements for approval as set out for example in proposed section 9.3.6.2 of the Code, SingTel submits that there is no reason why this sub-section relating to the filing of a Request where acquisition of Ownership Interest is via a privately negotiated agreement, should differ from sub-section 9.4.2 of the Code relating to the filing of a Consolidation Application.

While subsection 9.4.1 states that a Consolidation Application must be filed within 30 days after the parties enter into an agreement, sub-section 9.3.6.2 of the Code provides that where an Acquiring Party acquires a 12% to 30% Ownership Interest in the Licensee via entry into a privately negotiated agreement, the Licensee must file a request for approval (**Request**) after it has entered into the agreement but 30 days before completion of the acquisition of the Ownership Interest. The agreement must state that IDA's approval must be obtained before the Acquiring Party can acquire the Ownership Interest.

In any event, since IDA's prior approval is a condition precedent to the Acquiring Party's acquisition in both cases, SingTel submits that there is in fact no need for a timeline to be stipulated within which the Application must be filed.

SingTel also considers that the requirement that the privately negotiated agreement be entered into before the Request or Application can be filed should be removed, so that the Request or Consolidation Application may be filed before the agreement is entered into.

<p>SingTel submits that requirements for approval in relation to privately negotiated agreements should not differ from filing requirements in relation to Consolidations.</p>
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4.9 Acquisition without provision of advance notice (sub-section 9.3.6.2 Code)

Sub-section 9.3.6.3.2 of the Code on acquisition without provision of advance notice by an Acquiring Party provides that the Licensee's Request must contain the information specified in sub-section 9.3.6.2 of the Code. SingTel submits that the information that must be provided to IDA pursuant to sub-section 9.3.6.2 (b) should also be amended as follows:

(b) *the percentage of Ownership Interest that the Acquiring Party:*

(i) *holds (if any) prior to the proposed acquisition; and*

(ii) *proposes to acquire (or has acquired)...*

SingTel considers that these words are necessary to cover a situation where the Acquiring Party has acquired an Ownership Interest without advance notice to the Licensee.

SingTel submits that the information requirements for the Licensee's Request should be amended to cover a situation where the Acquiring Party has acquired an Ownership Interest without advance notice to the Licensee.

4.10 Situations in which Consolidation Application Need Not be Filed (sub-section 9.4.4)

Pursuant to sub-section 9.4.4(a)(ii) of the Code, it is unnecessary to file a Consolidation Application if the Acquiring Party demonstrates that the acquisition was a pro forma change (ie a change undertaken in order to effect an internal corporate reorganisation and does not result in a substantial change in ultimate owners of a Licensee).

SingTel requests clarification on what is to occur if the Licensee holds the view that these conditions are fulfilled but the Acquiring Party does not agree or simply does not take action to so demonstrate to IDA that the acquisition was a pro forma change. SingTel submits that the Licensee, and not just the Acquiring Party should be able to demonstrate the acquisition was a pro forma change, to remove the need for such an Application.

SingTel submits that sub-section 9.4.4(a) be amended as follows:

(a) *IDA will not find that a transaction constitutes a Consolidation in any case in which the Acquiring Party or the Licensee demonstrates that:*

(i) *it cannot exercise Effective Control over the Licensee; or*

(ii) *the acquisition was a pro forma change (i.e., a change undertaken in order to effect an internal corporate reorganisation and does not result in a substantial change in the ultimate owners of a Licensee).*

SingTel submits that the Acquiring Party and the Licensee, not just the Acquiring Party, should be able to demonstrate the acquisition was a pro forma change in ownership.

Sub-section 9.4.4(b) of the Code provides that if IDA is convinced that a transaction does not constitute a Consolidation, and therefore the Licensee and Acquiring Party do not need to file a Consolidation Application, the Licensee must comply with the procedures specified in sub-section 9.3.6.2 of the Code. SingTel submits that a separate provision should be drafted to cover any reporting required of the Licensee where it has been demonstrated that the acquisition does not amount to a Consolidation instead of referring to sub-section 9.3.6.2 since that sub-section deals with the reporting obligations where an agreement has been signed. It is unclear what is to occur if an acquisition via an Open Market Transaction is found not to constitute a Consolidation.

As for the requirement to comply with the provision of its licence, that is a continual obligation of any licensee and SingTel submits that this obligation need not be reiterated here.

SingTel submits that a separate provision should be drafted to cover any reporting required of the Licensee where it has been demonstrated that the acquisition does not amount to a Consolidation.

4.11 Standard for Approval of a Consolidation Application (sub-section 6.1.1 Guidelines and 9.4.5 Code)

Sub-section 9.4.5 of the Code provides that IDA will not approve a Consolidation Application where IDA determines that the Consolidation is likely to “unreasonably restrict competition in any telecommunications market within Singapore or harm the public interest”. Section 6 of the Guidelines outlines the analytical framework within which IDA will determine whether a proposed consolidation is likely to unreasonably restrict competition in any telecommunication market within Singapore or harm public interest.

Differentiation between Horizontal and Non-Horizontal Consolidations

For the reasons outlined in section 4.15 of this submission below in relation to Short Form Consolidation Applications, SingTel does not consider it appropriate for the analytical framework within which IDA considers Consolidations to distinguish between Horizontal Consolidations and Non-Consolidation Consolidations.

Unreasonably restrict competition standard (sub-section 6.1.1 Guidelines)

Sub-section 6.1.1 of the Guidelines provides that IDA will only find that a Consolidation unreasonably restricts competition where the Consolidation would be likely either to:

- (a) Result in a significant and unjustifiable reduction in existing competition in the Singapore telecommunication market; or
- (b) Significantly impede the development of future competition in the Singapore telecommunication market.

SingTel notes that the inclusion specifically of the impact of the Consolidation on “future competition” may give undue weight to one of many factors that should be taken into account in an analysis of this nature. SingTel submits that the “substantially” lessening competition test might be preferable in order to remove the risk that theoretical or economically insignificant cases are rejected. Alternatively, the term “significant” should be given a meaning consistent with the word “substantial”, that is, the effect on competition should be real, and not nominal or theoretical.

Factors likely to increase risk of unilateral anti-competitive conduct (6.2.2.1 Guidelines) and Determination of Market Power and Market Concentration (6.3.1 Guidelines)

Sub-section 6.2.2.1 and sub-section 6.3.1 of the Guidelines outline some of the relevant factors IDA will consider when determining whether following a Horizontal or Non-Horizontal Consolidation, the Post-Consolidation Entity will have Market Power.

Sub-sections 6.2.2.1(a) and 6.3.1(a) of the Guidelines provide that whether or not one of the Applicants is classified as a Dominant Licensee is relevant to determining the risk that if Consolidation Application is approved, the Post-Consolidation Entity will have Market Power. In relation to Non-Horizontal Consolidations, the Guidelines state that IDA will presume an Applicant has Market Power if it is a Dominant Licensee. In addition, in relation to Non-Horizontal Consolidations, an Applicant will be presumed to have market power if it has more than 40 per cent share in any telecommunication market.

SingTel is concerned that, because of the wide language used to define the market to be scrutinised, “any Telecommunication market”, the Guidelines may prevent a party who happens - in the estimation of IDA - to be dominant in one market from engaging in legitimate commercial activity in another market. The UK Department of Trade and Industry

study suggests that such an approach will result in over-targeting and result in unnecessary cost to applicants.⁵

Dominance in facilities does not automatically lead to dominance in downstream delivery of services over those facilities. The speed of market transition and the rise of alternative operators negate assumptions of upstream dominance leading to downstream dominance. Any concerns about dominance in downstream markets should be addressed through a test applicable to those downstream markets, not a test based on upstream dominance. The Code and Guidelines should apply a separate test for dominance in downstream markets based on an assessment of market power in that downstream market, the substitutes available, and existing and potential competition in downstream markets.

In addition, the dominance of any operator in a fast-developing, high-technology industry such as telecommunications can only be properly viewed as transient in nature. Dominance in one aspect of the industry, such as control of facilities, no longer automatically means that this dominance is transferable to the delivery of services which use those facilities, particularly when access to those facilities is mandated. The Guidelines should focus on examining actual conduct, and whether it has as its purpose and effect, of being unfair and ultimately impacting detrimentally on the consumer.

Any Guidelines must also be conscious of contemporary notions of how dominance is defined. In this regard, especially within the context of the dynamism of the telecommunications market, account should be had, amongst others, of how durable the alleged dominance is, what the range of the products of competitors is, and how strong the customer bases of the players under consideration are, the technology and research and development available to players, the degree of innovation to which the market is subjected, time and cost to enter the market. All of these factors are present in the approach taken in the EU. Factors affecting dominance must be taken together, no one factor can be determinative.

If the status of an Applicant as a Dominant Licensee is to remain one of the relevant factors in determining whether a Consolidation is likely to increase the risk of unilateral anti-competitive conduct, SingTel submits that it should only be relevant if an Applicant is a Dominant Licensee in the relevant market in which the Licensee operates. Therefore, subsection 6.2.2.1(a) of the Guidelines should be amended to provide that some of the factors that IDA may consider include:

(a) one the Applicants is currently classified as a Dominant Licensee in the market in which the proposed acquisition will alter concentration levels

⁵ See Chapter 5 of the White Paper, "Productivity and Enterprise: A World Class Competition Regime", 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

In SingTel's view, the default position should be that a Consolidation will be approved unless a clear case is made out why it should be rejected. This approach is supported in other jurisdictions. For example, The Department of Trade and Industry has put it this way: "A consolidation will be cleared unless the authorities expect it would result in a substantial lessening of competition in any UK market."⁶

4.12 The Public Interest element (sub-section 9.4.5 Code and sub-section 6.4.5 Guidelines)

Sub-section 9.4.5 of the Code provides that IDA will not approve a Consolidation Application where IDA determines that the Consolidation is likely to:

unreasonably restrict competition in any telecommunications market within Singapore or harm the public interest.

Sub-section 6.4.5 of the Guidelines provides that, notwithstanding the result of its analysis of the likely competitive impact of a Consolidation, IDA may approve a Consolidation Application subject to Conditions or deny the Consolidation Application if IDA concludes that doing so will serve the public interest. In any case in which IDA does so, the Guidelines state that it will provide an explanation of the basis for its decision.

SingTel supports a public interest test, but only as a balance against anti-competitive conduct. SingTel considers that public interest factors should only be considered if an initial determination has been made that the Consolidation will, or is likely to, significantly lessen competition. That is, the public interest test should not be used to block a Consolidation which is not otherwise anti-competitive.

SingTel also believes that some guidance could be given to the breadth of public interest. In other jurisdictions public interest factors are more clearly defined (whether inclusively or exclusively) and are only considered if an initial determination has been made that the Consolidation will or is likely to lessen competition. For example, the ACCC has identified the following which could constitute public benefits:

- economic development, eg in natural resources, through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;

⁶ See Chapter 5 of the White Paper, "Productivity and Enterprise: A World Class Competition Regime", 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

- industrial rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
- industrial harmony;
- assistance to efficient small businesses, such as guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvement in the quality and safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and businesses to permit informed choices in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- development of import replacements;
- growth in export markets; and
- steps to protect the environment.

SingTel considers that public interest factors should only be considered if an initial determination has been made that the Consolidation will, or is likely to, significantly lessen competition.

4.13 Efficiencies (sub-section 6.4.2 Guidelines)

SingTel supports an examination of the efficiencies likely to be achieved by a Consolidation, but considers that such efficiencies should not only be considered in ‘close cases’, and should not be given more weight when IDA is reviewing Non-Horizontal consolidation applications.

Sub-section 6.4.2 of the Guidelines provides:

In a close case, in which a Consolidation may have some anti-competitive effect, IDA will generally approve the Consolidation Application if it concludes, with reasonable certainty, that: (a) the transaction will result in significant efficiencies... and (b) the Post-Consolidation Entity is likely to pass on a reasonable portion of these efficiencies to its customers.

However the Guidelines go on to state:

Given that most Non-Horizontal Consolidations increase efficiency, and are less likely to restrict competition, IDA may place more weight on claimed efficiencies when reviewing a proposed Non-Horizontal consolidation than it will in reviewing a proposed Horizontal Consolidation.

The efficiencies likely to be achieved by a consolidation is a clear factor which should be considered as part of the considering any Consolidation. SingTel submits that the benefits of efficiencies should be given greater emphasis (as in other jurisdictions), its analysis should not be limited to “close cases”, and the weight it is given should not depend on whether the consolidation is horizontal or non-horizontal.

SingTel submits that the benefits of efficiencies should be given greater emphasis, its analysis should not be limited to “close cases”, and the weight it is given should not depend on whether the consolidation is horizontal or non-horizontal.

4.14 Failing Undertakings and Failing Divisions (6.4.3 Guidelines)

SingTel recognises that in the current telecommunications market significant acquisition activity is likely to surround failing firms. Customers can be significantly disrupted when an operator ceases operation suddenly as a result of the appointment of an administrator or liquidator or the like. In such cases, allowing the consolidation of the failing firm with another entity will in most cases be more consumer friendly than allowing the firm to fail altogether.

SingTel supports IDA’s inclusion of a failing firm defence as contained in other jurisdictions. This is particularly so in the telecommunications industry when customers can be severely inconvenienced by an insolvent telecommunications provider.

SingTel supports IDA’s inclusion of a failing firm defence in the Guidelines.

4.15 Other Features of the Telecommunications Market that should be taken into consideration when considering a consolidation application

Telecommunication markets are characterised by their dynamism. This is evidenced for example by the ease with which suppliers of services who might not in the ordinary course be described as (or licensed as) telecommunications companies, eg: cable TV operators, might enter the market and offer services more typically associated with common carriers such as residential telephony services. The notion of “convergence” implies that the type of infrastructure used by a supplier of services no longer necessarily places barriers to that supplier competing with operators who use infrastructure typically associated with telecommunications services.

This dynamism is also important when assessing anti-competitive risk in the telecommunications market. As the ACCC Merger Guidelines point out:

“Markets which are growing rapidly are more likely to see new entry and the erosion of market share over time. Markets which are characterised by rapid product innovation may see market leaders rapidly replaced.”

Equally, the pace with which new delivery mechanisms are introduced requires service providers to continuously re-assess the effectiveness of their strategies and the nature of their offerings to consumers. Consumer choice is greatly expanded in terms of the means by which they can have access to services. This dynamism means that service providers have to be “on their toes” responding to changing market conditions and competitors as quickly as possible in order to keep pace and satisfy consumer expectations. Inflexible approaches to market definition might fail to take account of the context of the telecommunications sector and have a negative impact on the development of services and consumer benefit if consolidation activity is over-regulated. SingTel suggests the Guidelines should include a reference to this dynamism.

SingTel submits that the Guidelines should recognise the dynamism that characterises the telecommunications industry.

4.16 Description, Competitive Impact and Public Interest Statement (9.5.1.4 Code)

Subsection 9.5.1.4 of the Code requires that Applicants submit a statement which includes information regarding the telecommunication markets in which the Applicants “and their Affiliates participate.” SingTel submits that Applicants should only be required to set out the telecommunications markets in which the Applicants participate, and telecommunications

markets in which entities that have Effective Control of an Applicant, or entities in which an Application has Effective Control, participate.

Applicants should only be required to set out the telecommunications markets in which the Applicants participate, and telecommunications markets in which entities that have Effective Control of an Applicant, or entities in which an Application has Effective Control, participate.

4.17 Supporting Documentation (9.5.1.5 Code)

Sub-section 9.5.1.5 of the Code provides that Applicants should submit a copy of any supporting document that would assist IDA in assessing the likely competitive effect of the Consolidation. At the minimum, sub-section 9.5.1.5 provides that this must include:

...(d) a chart indicating the relationship between each Applicant and its Affiliates and the relevant ownership interests.

SingTel submits that the requirements for charts indicating the relationship between each Applicant and its Affiliates to be too onerous, and that Applicants should only have to submit with Consolidation Applications a chart indicating entities that have Effective Control of an Applicant or entities in which an Applicant has Effective Control..

4.18 Short and long form Consolidation Applications (sub-section 9.5 Code)

SingTel is pleased that IDA has adopted a “two-track” procedure to be used in those cases in which a Consolidation Application must be filed, including a Short Form Consolidation Application procedure which is intended to be less burdensome for Applicants than the Long Form Consolidation Application procedure. However, SingTel considers that:

- (a) eligibility to submit a Short Form Consolidation Application should not differ depending on whether the proposed Consolidation is Horizontal or Non-Horizontal; and
- (b) the Short Form Consolidation Application should be available for all acquisitions where post-consolidation, the Acquiring Party would have less than a 40% share in the relevant telecommunication market in Singapore in which the Target Licensee operates .

These objections to the proposed Consolidation Application Procedure is addressed in more detail below.

(a) Horizontal and Non-Horizontal Consolidations (sub-section 9.5.2.1 Code)

SingTel does not consider that it is appropriate for eligibility to submit a Short Form Consolidation Application to differ depending on whether the proposed Consolidation is Horizontal or Non-Horizontal. By having different thresholds, IDA automatically assumes that Horizontal Consolidations are always more likely to raise competitive concerns than Non-Horizontal Consolidations. SingTel disagrees with sub-section 6.2 of the Guidelines, which provides that “Horizontal Consolidations pose the greatest threat to competition.” Given the dynamic nature of the market structure in the telecommunications sector, it may not be appropriate to label Horizontal Consolidations as posing the greatest threat to competition.

Identifying a potential anti-competitive effect in the dynamic telecommunications market is rapidly becoming a more complex task. It is inappropriate to pre-empt any analysis by adopting assumptions that transactions between parties at different levels will automatically have certain competitive effects. IDA should be conscious to treat each application on its merits within the particular context of the relevant market.

The telecommunications industry is impacted strongly by convergence. Convergence means that players in other sectors of the economy (eg cable system operators, electricity providers, television operators) are capable of using their networks to provide telecommunications services. Accordingly, there is no reason to presume that the potential for abuse of market power in a non-horizontal consolidation will have any greater or lesser impact than in a horizontal consolidation.

SingTel does not consider that it is appropriate for eligibility to submit a Short Form Consolidation Application to differ depending on whether the proposed Consolidation is Horizontal or Non-Horizontal.

(b) Short Form Consolidation Application should be available for all acquisitions where Post-Consolidation the Consolidated Entity would have less than 40% share in the relevant market in Singapore in which the Licensee operates

SingTel considers that the relevant market in which to consider any competitive effect is the market in which the proposed consolidation would alter the level of competition.

Pursuant to Revised Section Nine, SingTel would not ever be able to file a Short Form Consolidation Application, no matter how small or inconsequential the likely change in concentration in the relevant market because:

- SingTel already has share of sales of telecommunications in excess of 25%, and therefore would not be able to file a Short Form Consolidation Application if it made an acquisition that resulted in a Horizontal Consolidation; and
- SingTel currently has a share of sales in excess of 15% in telecommunication markets in Singapore, and therefore would not be able to file a Short Form Consolidation Application if it made an acquisition that resulted in a Non-Horizontal Consolidation.

SingTel considers that eligibility to file a Short Form Consolidation Application should depend on the impact of the proposed acquisition on the Consolidated Entity's market share in the relevant market in which the Licensee operates.

SingTel submits that Licensees should be able to file a Short Form Consolidation Application if post-consolidation, the Consolidated Entity's market share in the relevant market in which the Licensee operates would be less than 40%.

4.19 Joint application (clause 9.5.1.1 Code)

Pursuant to the current section 9 of the Code, only a Licensee must file a Consolidation Application. Revised Section Nine would require the Licensee and the Acquiring Party to jointly file a Consolidation Application. SingTel does not consider that both the Acquiring Party and the Licensee should be required to jointly file a Consolidation Application. IDA has noted that joint applications will give it more comprehensive and reliable information. SingTel does not believe that this is a compelling reason to require a joint application. In any case, the Licensee should not need to obtain IDA's approval before the Acquiring Party makes the offer since the Licensee is not initiating the acquisition.

SingTel does not support amendments to section 9 of the Code which would require the Acquiring Party and the Licensee to jointly file a Consolidation Application.

If the joint Consolidation Application requirement is to remain, SingTel seeks clarification on how it is to operate.

Sub-section 9.4.3.2 of the Code provides that where an acquisition takes place without advance notice to the Licensee, the Licensee must, within 2 working days of becoming aware that the Acquiring Party has acquired an Ownership Interest, notify the Acquiring Party of its obligation to file a Consolidation Application. Thereafter, the parties must jointly file the Consolidation Application within 30 days of the day on which the Licensee becomes aware of the acquisition of the Ownership Interest by the Acquiring Party.

SingTel requests clarification on what is to occur if the Acquiring Party refuses to jointly file the Consolidation Application with the Licensee. Is the Licensee still obliged to file an Application on its own? Further, is the Licensee obliged to inform IDA so that IDA may enforce its powers under sub-section 9.9 of the Revised Section Nine?

SingTel also requests clarification on whether a party would be able to petition IDA for permission to file a separate Consolidation Application not only where the Acquiring Party reasonably believes that the Licensee is likely to be opposed to the Consolidation, or either Party reasonably believes that the filing of a joint Consolidation Application would be unreasonably burdensome or infeasible, but also where a Party does not wish to disclose confidential information to the other Party.

If the joint Consolidation Application requirement is to remain, SingTel seeks clarification on how it will operate.

4.20 Exemption from Submission Obligations (sub-section 3.5 Guidelines)

Sub-section 3.5 of the Guidelines provides: “Any Applicant may request that IDA exempts it from any or all of the requirements contained in Sub-sections [3.1] to [3.3] of these Guidelines” and that “An exemption request should be submitted prior to the date on which the Applicants submit the Consolidation Application.”

Please confirm that the exemption in sub-section 3.5 of the Guidelines may only be sought from submission obligations, not from the obligation of filing a Consolidation Application.

SingTel seeks clarification about the exemption from submission obligations.

4.21 Informal Guidance (sub-section 3.8 Guidelines)

Sub-section 3.8 of the Guidelines provides that any Applicant considering entering into a Consolidation may ask IDA to provide informal guidance prior to the time at which a Consolidation Application must be submitted. Sub-section 3.8.1 provides:

IDA will treat all information submitted as confidential. In addition, IDA will not disclose the fact that the Applicant has requested for informal guidance, and will treat any guidance provided as confidential...

SingTel does not support a process of informal guidance where confidentiality is maintained. In reality, a party granted informal guidance allowing the Consolidation will consider the Consolidation to be approved, irrespective of statements clarifying the position in the Guidelines that such approval is not final.

SingTel believes that any request for guidance, whether formal or informal, should only be met with a response where there is public consultation. If guidance is sought confidentially, then no guidance should be given.

This approach is used by the ACCC in Australia which states in its Merger Guidelines that:

“If the requirements of the parties are that the proposed acquisition is confidential, the Commission is unlikely to be in a position to provide the parties with its finalised view about the acquisition. The Commission’s position is that it requires the views of market participants prior to providing a final response to parties whether it considers that a proposed acquisition of shares or assets may or may not contravene the Act ...

...

The Commission is concerned to ensure that it does not give inappropriate comfort to parties and then, upon undertaking market inquiries, come to the view that the merger would be likely to substantially lessen competition. This will be of particular concern to the Commission for proposals which affect markets in which it has little, or little recent, experience.”

SingTel notes that as the assessment is not binding upon IDA, there is thus an undesirable element of uncertainty as to whether IDA’s approval will be obtained. In any case, in light of the Short Form Consolidation Application process, the need for inclusion of informal guidance falls away.

SingTel does not support the inclusion of informal guidance provisions in the Guidelines.

4.22 Special Provisions Applicable to Tender Offers (sub-section 9.8 of Code and Proposed Tender Offer Guidelines)

SingTel does not consider the requirement in proposed sub-section 9.8(a) of the Code that IDA's prior written approval be obtained where an Acquiring Party proposes to acquire a Direct Ownership Interest in a Licensee by a Tender Offer, which would result in that Acquiring Party holding an Ownership Interest in the Licensee of 12 % or more, should be included in Revised Section Nine.

SingTel considers that its recommendations in relation to notification and requirements for approval of the acquisition of Ownership Interests in Licensees should also apply to tender offers, as set out in sections 4.4 (Duty to Notify IDA) and 4.6 (prior approval of acquisitions of certain Ownership Interests) of this submission .

SingTel considers that it is sufficient for IDA's written approval to be included as a condition precedent to completion of the Acquiring Party's acquisition of an Ownership Interest in the Licensee that would exceed the thresholds as set out in SingTel's suggested amendments to section 9.4.1 of the Code.

In any event, if the Acquiring Party does not comply with such a condition precedent, IDA may enforce its powers under sub-section 9.9 of Revised Section Nine of the Code.

SingTel considers that it is not necessary for IDA to require that its prior written approval be obtained where an Acquiring Party proposes to acquire a Direct Ownership Interest in a Licensee by a Tender Offer, which would result in that Acquiring Party holding an Ownership Interest in the Licensee of 12% or more.