INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY OF SINGAPORE

TELECOMMUNICATION ACT

(CHAPTER 323)

ADVISORY GUIDELINES GOVERNING ABUSE OF DOMINANT POSITION, UNFAIR METHODS OF COMPETITION AND AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION UNDER SECTIONS 8 AND 9 OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES 2005

DATE OF ISSUE: 30 SEPTEMBER 2005

1. INTRODUCTION

2. OVERVIEW

3. UNILATERAL CONDUCT: ABUSE OF DOMINANT POSITION, RECEIPT OF ANTI-COMPETITIVE PREFERENCES AND UNFAIR METHODS OF COMPETITION

4. AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION

ADVISORY GUIDELINES GOVERNING ABUSE OF DOMINANT POSITION, UNFAIR METHODS OF COMPETITION AND AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION UNDER SECTIONS 8 AND 9 OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES 2005

30 SEPTEMBER 2005

The Info-communications Development Authority of Singapore ("IDA"), pursuant to Section 28 of the Telecommunication Act (Cap. 323) ("Act"), hereby issues these Advisory Guidelines Governing Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition under Sections 8 and 9 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005 ("Code").

1. INTRODUCTION

1.1 Scope of These Guidelines

(a) These Guidelines set out the framework that IDA will use to determine whether a Licensee has contravened any of the prohibitions contained in Sections 8 and 9 of the Code.

(b) Sections 8 and 9 of the Code prohibit:

(i) a Dominant Licensee from abusing its dominant position (Sub-section 8.2 of the Code);

(ii) a Licensee from accepting anti-competitive preferences (Sub-section 8.3 of the Code);

(iii) a Licensee from engaging in unfair methods of competition (Sub-section 8.4 of the Code); and

(iv) a Licensee from entering into agreements that unreasonably restrict, or are likely to unreasonably restrict, competition (Section 9 of the Code).

1.2 Guidelines are Advisory

The provisions in these Guidelines are advisory. They do not impose any binding legal obligation on IDA. Neither do they seek to provide definitive answers as to whether any particular conduct may fall within the prohibitions contained in Sections 8 and 9 of the Code. Rather, these Guidelines are intended to describe the procedures that IDA will generally use, and the standards that IDA will generally apply, in implementing those provisions. While these Guidelines are not legally binding, IDA will not depart from them without good cause. In order to provide a single

document addressing all issues relevant to the implementation of these provisions, certain sections of the Code have been summarised or repeated in these Guidelines. In the event of any conflict between the Code and these Guidelines, the provisions of the Code will prevail.

1.3 Rule of Construction

Capitalised terms used in these Guidelines have the same meaning as in the Code.

1.4 Effective Date of these Guidelines

These Guidelines will take effect on the date of issue of these Guidelines.

1.5 Short Title

These Guidelines may be referred to as the "Telecom Competition Guidelines".

2. OVERVIEW

2.1 Relationship of Competition Rules to *Ex Ante* Regulation

While Sections 3 through 7 of the Code impose *ex ante* regulatory obligations on Licensees, Sections 8 and 9 of the Code provide a basis for IDA to take enforcement action if a Licensee has engaged in conduct that unreasonably restricts, or is likely to unreasonably restrict, competition (*ex post* enforcement). As competition develops, IDA anticipates that it will be able to reduce the level of *ex ante* regulation, and place greater reliance on *ex post* enforcement.

2.2 Flexible Implementation

In order to determine whether any particular conduct contravenes these prohibitions, IDA will consider the specific facts of each case. In making such a determination, IDA will implement Sections 8 and 9 of the Code flexibly, especially when it addresses complex and novel issues. In all cases, IDA will seek to ensure that Licensees do not engage in conduct that unreasonably restricts, or is likely to unreasonably restrict, competition. At the same time, however, IDA will strive to ensure that it applies these provisions in a manner that does not deter the vigorous competition that the Code is intended to foster – even if such competition may sometimes have an adverse impact on an individual Licensee.

2.3 Burden and Standard of Proof

In any enforcement action taken under Section 11 of the Code for alleged contraventions of Sections 8 and 9 of the Code, IDA will apply the "balance of probabilities" standard. Thus, in order for IDA to find that a

contravention of Section 8 or 9 has occurred and to take enforcement measures, IDA must conclude, based on the totality of the evidence, that it is more likely than not that the Licensee has engaged in conduct that constitutes a contravention of Sections 8 and 9 of the Code.

2.4 Relevance of Practices by Competition Authorities and Other Sectoral Regulators

Sections 8 and 9 of the Code are grounded in well-established principles of competition law, and are consistent with "best practices" in other jurisdictions. Therefore, in applying these provisions, IDA will give appropriate consideration to practices in other jurisdictions, as well as practices of the Competition Commission of Singapore. However, IDA may adopt standards or methodologies that are designed to address the unique conditions of Singapore's telecommunication market.

2.5 The "Unreasonably Restricts Competition" Standard

Sections 8 and 9 of the Code prohibit Licensees from engaging in conduct that unreasonably restricts, or is likely to unreasonably restrict, competition in any telecommunication market in Singapore.

(a) There is no single "test" for assessing whether a Licensee has engaged in conduct that has, or is likely to, unreasonably restrict competition. Rather, the specific approaches that IDA will use to apply the "unreasonably restricts competition" standard to different types of conduct are described in Paragraphs 3 and 4 of these Guidelines. Generally, however, IDA will conduct a fact-specific assessment of the Licensee's conduct and the structure of the relevant market.

(b) Not every action that restricts competition constitutes an *unreasonable* restriction. For example, conduct that has a minimal or insignificant impact on competition generally does not contravene the Code. Similarly, conduct that restricts certain types of competition in a market, but ultimately increases over-all competition in the same market, is not prohibited. For example, an agreement between a manufacturer and two of its distributors, which allocates geographical territory between the distributors, may limit "intra-brand" competition, but may benefit End Users by facilitating "inter-brand" competition between the Licensee's service and the service provided by a competing Licensee.

(c) IDA does not need to wait until a Licensee's conduct has caused *actual* competitive injury. Rather, IDA can take enforcement action if it determines that a Licensee has engaged in conduct that is *likely* to unreasonably restrict competition.

(d) In seeking to determine whether a Licensee's conduct contravenes Sections 8 or 9 of the Code, IDA generally will focus on the actual or likely competitive effects of a Licensee's actions, rather than the Licensee's subjective intent (*i.e.*, what the Licensee hoped to accomplish). Most market participants want to increase their market share at the expense of their rivals. So long as a Licensee seeks to do so by meeting End Users' needs more efficiently and effectively than its rivals, its subjective intent does not contravene the Code. IDA will only consider evidence regarding a Licensee's subjective intent to the extent that it assists IDA in assessing the likely effect of the Licensee's conduct. For example, if the evidence indicates that a Licensee undertook an action in order to force a competing Licensee from the market, IDA might consider this evidence as relevant to its assessment of the likely competitive *effect* of the Licensee's action. However, the mere fact that the Licensee *intended* to force the competing Licensee from the market would not, in itself, provide a basis on which to find that the Licensee had contravened the Code.

(e) The "unreasonably restricts competition" standard differs from the standard used in Section 10 of the Code, which provides that IDA will only reject a Consolidation Application if IDA concludes that it is "likely to *substantially lessen* competition." IDA believes that it generally should have to satisfy a "higher" standard before rejecting a Consolidation Application. In assessing the likely competitive impact of a proposed Consolidation, IDA necessarily will have to make a predictive judgment. Because most Consolidations are either competitively neutral or pro-competitive, IDA will not reject a Consolidation Application unless the evidence demonstrates that it is likely to substantially lessen competition.

3. UNILATERAL CONDUCT: ABUSE OF DOMINANT POSITION, RECEIPT OF ANTI-COMPETITIVE PREFERENCES AND UNFAIR METHODS OF COMPETITION (SECTION 8 OF THE CODE)

3.1 Introduction

Generally, once a Licensee has complied with the obligations contained in its licence and in the Code, it is free to act independently. However, Section 8 of the Code prohibits the following three types of unilateral conduct by a Licensee (*i.e.,* conduct that the Licensee engages in independently):

(a) action by a Dominant Licensee that unreasonably restricts, or is likely to unreasonably restrict, competition (Sub-section 8.2 of the Code);

(b) the receipt of an anti-competitive preference by a Licensee that is affiliated with an entity that has Significant Market Power (Sub-section 8.3 of the Code); and

(c) action by a Licensee that constitutes an unfair method of competition (Sub-section 8.4 of the Code).

3.2 Abuse of Dominant Position in the Singapore Market (Sub-section 8.2 of the Code)

(a) A Dominant Licensee must not engage in unilateral conduct that unreasonably restricts, or is likely to unreasonably restrict, competition. Such conduct is referred to as an abuse of dominant position.

(b) Sub-section 8.2 of the Code contains a general prohibition against the abuse of a dominant position. Thus, Sub-section 8.2 provides a basis for IDA to undertake enforcement action in any case in which it determines that a Dominant Licensee has engaged in a type of conduct – other than the specific practices addressed in Sub-sections 8.2.1 through 8.2.2 of the Code – that constitutes an abuse of dominant position.

(c) IDA will find that a Dominant Licensee has contravened the general prohibition against abusing its dominant position where IDA determines that:

(i) the Dominant Licensee has Significant Market Power in the telecommunication market in which the alleged abuse occurred; and

(ii) the Dominant Licensee has unilaterally used its Significant Market Power in a manner that has unreasonably restricted, or is likely to unreasonably restrict, competition in any telecommunication market in Singapore.

(d) IDA will presume, absent evidence to the contrary, that a Dominant Licensee has Significant Market Power in every telecommunication market in which it provides telecommunication service pursuant to its licence.

(e) The Dominant Licensee may rebut this presumption for a specific telecommunication market by:

(i) showing that, prior to the time at which the alleged abuse occurred, IDA had granted it an exemption based on a finding that the Dominant Licensee did not have Significant Market Power in the market in which the alleged abuse occurred; or

(ii) demonstrating – using the methodology specified in Paragraphs 2.4.1 and 2.4.2 of IDA's Reclassification and Exemption Guidelines – that, at the time the alleged abuse occurred, it no longer had Significant Market Power in the market in which the alleged abuse occurred.

The Dominant Licensee bears the burden of demonstrating that it did not have Significant Market Power in the telecommunication market in which the alleged abuse occurred.

(f) If, after IDA initiates an enforcement proceeding alleging that a Dominant Licensee has abused its dominant position in a telecommunication market, the Dominant Licensee provides credible evidence that it did not have Significant Market Power in that market at the time of the alleged abuse, IDA may:

(i) dismiss the enforcement proceeding, if it finds the Dominant Licensee has conclusively demonstrated that it did not have Significant Market Power in that market;

(ii) seek additional relevant information from the Dominant Licensee and/or other market participants; or

(iii) conduct a public consultation.

(g) IDA will find that a Dominant Licensee's unilateral use of its Significant Market Power has unreasonably restricted competition, or is likely to unreasonably restrict competition, in a Singapore telecommunication market where the Dominant Licensee has engaged in conduct that has, or is likely to:

(i) significantly restrict output below the competitive level, increases prices above cost, reduce quality below the level that End Users seek, reduce End Users' choice or deter innovation; or

(ii) preserve or enhance its dominant position by engaging in conduct that deters or precludes efficient companies from participating in the market by means other than competing against other Licensees based on service availability, price and quality.

3.2.1 Pricing Abuses (Sub-section 8.2.1 of the Code)

Section 4 of the Code addresses a Dominant Licensee's obligation to file and comply with tariffs. As Sub-section 4.7 of the Code makes clear, IDA's decision to allow a tariff to go into effect creates a *presumption* that the prices are just, reasonable and non-discriminatory. However, even if IDA has allowed a tariff to go into effect, IDA may subsequently determine

that the Dominant Licensee has priced its services in a manner that constitutes an abuse of its dominant position. Sub-section 8.2.1 of the Code specifically addresses three types of pricing abuses – predatory pricing, price squeezes and cross-subsidisation – that constitute abuses of a dominant position. IDA will assess allegations that a Dominant Licensee has engaged in any of such practices using the specific standards described below.

3.2.1.1 Predatory Pricing (Sub-section 8.2.1.1 of the Code)

(a) Licensees – including Dominant Licensees – are expected to engage in vigorous price competition. Such competition plainly benefits End Users. There are many potentially pro-competitive and efficiency-enhancing motivations for lowering prices. For example, a Licensee may reduce price as a result of excess supply, decreased demand, increased competition, or as part of a short-term promotion designed to increase its market share. In some cases, this may drive less efficient participants from the market. However, a Dominant Licensee must not sell its service below its cost for a sustained period in order to drive efficient rivals from the market, so that it can charge prices that are well above its cost following the exit of one or more of its rivals. Such conduct, which is often referred to as predatory pricing, does not benefit End Users in the long-term. While IDA will seek to ensure that it does not inadvertently deny End Users the benefit of low prices that result from vigorous price competition, IDA will not permit a Dominant Licensee to engage in predatory pricing.

(b) IDA will find that a Dominant Licensee has engaged in predatory pricing and, therefore, has unreasonably restricted competition, or is likely to unreasonably restrict competition, in the Singapore telecommunication market by abusing its dominant position, if the evidence demonstrates that:

(i) the Dominant Licensee is selling a telecommunication service at a price that is less than the average incremental cost of the service;

(ii) the Dominant Licensee's sales at prices below average incremental cost have driven, or are likely to drive, efficient rivals from the market or deter future efficient rivals from entering the market; and

(iii) entry barriers are so significant that, after driving rivals from the market or deterring entry, the Dominant Licensee could impose an increase in prices sufficient (in amount and duration) to enable the Dominant Licensee to recoup the full amount of the loss that it incurred during the period of price cutting.

(c) In seeking to determine whether a Dominant Licensee is selling its service at less than average incremental cost, IDA will determine the average cost that the Dominant Licensee would have avoided if it had not produced the allegedly predatory increment of sales over the period during which the sales occurred. For the purpose of identifying predatory pricing, the relevant increment is defined as the additional volume of service produced by a Dominant Licensee over the period during which the Dominant Licensee is alleged to have engaged in predatory pricing. For example, if predatory pricing is alleged to have occurred over a 6 month period, then the average incremental cost is the cost incurred by the Dominant Licensee in producing the incremental level of service over that 6 month period divided by the volume of service. The average incremental cost standard (which is also referred to as the avoidable cost standard) is a short-run measure, and differs from two other standards that are sometimes used in other jurisdictions: Average Variable Cost ("AVC") and Long Run Incremental Cost ("LRIC").

(i) Under the AVC standard, the Licensee's "cost" includes only those costs that vary with output. Because telecommunication operators typically have significant common costs, which are fixed over a large range and volume of services, IDA believes that AVC sets too low a cost "floor," thereby allowing anti-competitive price cutting in certain cases.

(ii) Under the LRIC standard, the Licensee's "costs" include the long run forward looking cost of the Licensee's networks assets. IDA believes that the use of the LRIC standard would be too restrictive and, therefore, could deter efficient price cutting in certain cases. There are a number of situations in which pricing below LRIC can be efficient. For example, when a Licensee is seeking to enter a new market, or has significant excess network capacity, sales below LRIC (but above average incremental cost) are appropriate in order to stimulate demand.

IDA believes that use of the average incremental cost standard will ensure that IDA's implementation of the predatory pricing prohibition will prohibit anti-competitive conduct, while allowing competitive price cutting.

(d) In seeking to determine whether the Dominant Licensee's pricing is likely to drive efficient rivals out of the market or deter future efficient rivals from entering the market, IDA will consider all relevant factors, including:

(i) the duration of the Dominant Licensee's sales at prices below its average incremental cost;

(ii) the ability of other Licensees to provide service at an average incremental cost that is comparable to the Dominant Licensee's average incremental cost; and

(iii) the effect of any comparable prior price cutting in the market.

(e) In seeking to determine whether entry barriers are significant, IDA will consider the history of entry into the relevant market and the extent to which market conditions are likely to impede the entry (or re-entry) of competitors. IDA will have regard to all relevant factors including:

(i) technical barriers (such as the need to use specialised or proprietary technology);

(ii) access barriers (such as the need to obtain access to another entity's infrastructure in order to provide service, and any difficulty in doing so, or significant economies of scale and scope);

(iii) financial barriers (such as the need to incur significant "sunk costs" in order to enter the market);

(iv) commercial barriers (such as high advertising and retail distribution costs or high consumer switching costs); and

(v) regulatory barriers (such as limitations on the number of licences or on the entities eligible to provide a service).

A further discussion of IDA's assessment of barriers to entry is set forth in Appendix 1.

3.2.1.2 Price Squeezes (Sub-section 8.2.1.2 of the Code)

(a) A Dominant Licensee will often control facilities, and provide services, that are required inputs into "downstream" services that the Dominant Licensee (or its Affiliate) provides to End Users. In many cases, other Licensees have no practical alternative to accessing the Dominant Licensee's facilities, or using the Dominant Licensee's service, in order to provide a competing downstream service to their End Users. If the Dominant Licensee has Significant Market Power in the market for the input product, the Dominant Licensee could unreasonably restrict competition by charging a price well in excess of its cost for the input. The Dominant Licensee's downstream business or Affiliate would only need to recover the Dominant Licensee's actual cost through its

charges to End Users. By contrast, competing downstream Licensees would have no choice but to pass on the full purchase price to their End Users, thereby impeding the downstream Licensee's ability to compete.

(b) IDA will find that a Dominant Licensee has engaged in a price squeeze and, therefore, has unreasonably restricted competition in the Singapore telecommunication market by abusing its dominant position, if the evidence demonstrates that:

(i) the Dominant Licensee provides a telecommunication service or facility that is required for a downstream Licensee to provide a telecommunication service; and

(ii) the price that the Dominant Licensee charges for the telecommunication service or facility is so high that the Dominant Licensee's downstream business or Affiliate could not profitably sell its product if it were required to recover the full purchase price of the input through its charges to its Customers.

(c) IDA will find that a telecommunication service or facility is required to provide a downstream service when, as a practical matter, Licensees could not participate in a downstream telecommunication market without access to the service or facility and cannot obtain access to a service or facility that is a reasonable substitute for the Dominant Licensee's service or facility. In making this determination, IDA will consider the ability of Licensees to:

(i) self-provision comparable services or facilities at a cost that would enable an efficient Licensee to provide a competitive telecommunication service; or

(ii) obtain comparable services or facilities from providers other than the Dominant Licensee on prices, terms and conditions that would enable it to provide a competitive telecommunication service.

(d) IDA will conclude that a service or facility performs the same (or comparable) function, regardless of the technology used, as the Licensee's service or facility if a Customer would view the service or facility as a reasonable substitute for the Licensee's service or facility, given both price and non-price factors.

(e) IDA generally will assess whether the Dominant Licensee's input price is so high that the Dominant Licensee's downstream business or Affiliate could not profitably sell its product by using one of the following methodologies:

(i) IDA may impute to the Dominant Licensee's downstream business or Affiliate the price that the Dominant Licensee charges downstream competitors for the input, to determine if such downstream business or Affiliate is able to make a commercially reasonable profit if it were required to recover the full purchase price of the input through its charges to its Customers; or

(ii) IDA may assess whether the price that the Dominant Licensee charges downstream competitors for the input allows a reasonably efficient non-affiliated service provider in the downstream market to obtain a commercially reasonable profit for such activity.

(f) IDA will not find that a price squeeze has occurred based solely on evidence that the Dominant Licensee's downstream business or Affiliate has sold a service at a price that results in it realising a profit that is below competitive levels, provided that the price is not predatory. So long as the price that the Dominant Licensee charges for the input product is not significantly above cost, the Dominant Licensee and its Affiliates, like all Licensees, are free to accept a low rate of profit in the retail market.

3.2.1.3 Cross-subsidisation (Sub-section 8.2.1.3 of the Code)

(a) As competition develops, a Dominant Licensee may be subject to competition in some markets, even though it continues to have Significant Market Power in other markets. As a result, the Dominant Licensee can charge prices that are substantially in excess of cost for services that it provides in markets in which it has Significant Market Power, and can then use these revenues to reduce the prices of services and equipment that it provides in markets that are subject to a greater degree of competition. Such conduct, which is referred to as cross-subsidisation, can have several distinct effects:

(i) cross-subsidisation plainly harms End Users who purchase the service that is not subject to effective competition because they are required to pay above-cost prices;

(ii) cross-subsidisation also harms Licensees that compete against the Dominant Licensee in the market for the service that is subject to greater competition because they often cannot profitably reduce prices to the level charged by the Dominant Licensee; and

(iii) where the Dominant Licensee's pricing in the market that is subject to greater competition constitutes predatory pricing, cross-subsidisation also unreasonably restricts competition in the market for the service that is subject to greater competition.

(b) IDA will find that a Dominant Licensee has engaged in cross-subsidisation and, therefore, has abused its dominant position, where the evidence demonstrates that the Dominant Licensee:

(i) has used revenues from the provision of a telecommunication service that is not subject to effective competition to cross-subsidise the price of any telecommunication service and equipment that is subject to a greater degree of competition; and

(ii) the Dominant Licensee's conduct has unreasonably restricted, or is likely to unreasonably restrict, competition in any telecommunication market in Singapore.

(c) IDA may conduct cost allocation studies in order to determine whether cross-subsidisation has occurred. IDA will find that cross-subsidisation has occurred where:

(i) the Dominant Licensee offers multiple services, some of which are not subject to effective competition, that use common facilities or have other common costs; and

(ii) the Dominant Licensee has improperly allocated costs to, or used revenues from, those facilities and services that are not subject to effective competition.

(d) IDA will find that a Dominant Licensee's conduct has unreasonably restricted, or is likely to unreasonably restrict, competition where:

(i) the Dominant Licensee is selling the telecommunication service that is subject to competition at a price that is less than the average incremental cost of the service;

(ii) the Dominant Licensee's sales of the service at prices below average incremental cost are likely to drive efficient rivals from the market or deter future efficient rivals from entering the market; and

(iii) entry barriers are so significant that, after driving rivals from the market or deterring entry, the Dominant Licensee could

impose an increase in the price of the service sufficient (in amount and duration) to enable the Dominant Licensee to recoup the full amount of the loss that it incurred during the period of price cutting.

3.2.2 Other Abuses (Sub-section 8.2.2 of the Code)

Sub-section 8.2.2 of the Code specifically addresses two other types of unilateral conduct by a Dominant Licensee that can unreasonably restrict competition in the Singapore telecommunication market and, therefore, constitute an abuse of a dominant position. IDA will assess allegations that a Dominant Licensee engaged in any of such practices using the specific standards described below.

3.2.2.1 Discrimination (Sub-section 8.2.2.1 of the Code)

(a) A Dominant Licensee may control inputs that, as a practical matter, other Licensees must use in order to provide "downstream" services. These inputs include infrastructure, systems, services, or information. A Dominant Licensee can unreasonably restrict competition in the downstream market by providing access to these inputs to its downstream Affiliate on discriminatory prices, terms and conditions.

(b) IDA will find that a Dominant Licensee has engaged in discrimination and, therefore, has unreasonably restricted competition, or is likely to unreasonably restrict competition, in the Singapore telecommunication market by abusing its dominant position, if the evidence demonstrates that:

(i) the Dominant Licensee has provided its Affiliate with access to infrastructure, systems, services or information;

(ii) access to the Dominant Licensee's infrastructure, systems, services or information is necessary to enable a non-affiliated Licensee to provide telecommunication services; and

(iii) the Dominant Licensee provided its Affiliate with access to the infrastructure, systems, services or information, on prices, terms or conditions that are more favourable than the prices, terms and conditions on which the Dominant Licensee provides those infrastructure, systems, services or information to Licensees that are not Affiliates without any objective justification, such as a verifiable difference in the cost of providing access.

(c) In determining whether access to infrastructure, systems, services or information is necessary, IDA will consider the ability of an efficient Licensee to:

(i) self-provision comparable infrastructure, systems, services or information at a cost that would enable it to provide a competitive telecommunication service; and

(ii) obtain comparable infrastructure, systems, services or information from providers other than the Dominant Licensee on prices, terms and conditions that would enable it to provide a competitive telecommunication service.

(d) A Dominant Licensee's refusal to provide a non-affiliated Licensee with access to infrastructure, systems, services or information that is necessary to enable the non-affiliated Licensee to provide telecommunication services on *any* terms, when the Dominant Licensee provides access to such infrastructure, systems, services, or information to any Affiliate, but has no objective and reasonable justification for refusing to do so, also constitutes discrimination.

3.2.2.2 Predatory Network Alteration (Sub-section 8.2.2.2 of the Code)

(a) Non-dominant Licensees will often need to physically and logically interconnect their networks with a Dominant Licensee's network. While a Dominant Licensee may often have a legitimate reason for altering its network interfaces, a Dominant Licensee could unreasonably restrict competition by altering its network interface in a manner which has the primary effect of imposing costs on other Licensees and/or impeding other Licensees' ability to interconnect and interoperate. This is commonly referred to as predatory network alteration.

(b) IDA will find that a Dominant Licensee has engaged in predatory network alteration and, therefore, has unreasonably restricted competition, or is likely to unreasonably restrict competition, in the Singapore telecommunication market, by abusing its dominant position, if the evidence demonstrates that the Dominant Licensee:

(i) has altered the physical or logical interfaces of its network in a manner that imposes significant costs on any interconnected Licensee; and

(ii) has no legitimate business, operational or technical justification for doing so.

(c) IDA will find that a Dominant Licensee has no legitimate business, operational or technical reason for altering its network interface when:

(i) the alteration was not a commercially reasonable means for the Dominant Licensee to reduce its costs, offer a new service, improve service quality or otherwise benefit its End Users; and

(ii) the adverse impact of the Dominant Licensee's actions on interconnected Licensees was grossly disproportionate to the benefit to the Dominant Licensee and its End Users.

3.2.3 Other Types of Conduct That May Constitute an Abuse of Dominant Position

Additional unilateral actions by a Dominant Licensee, not specifically listed in Section 8 of the Code, may raise competitive or policy concerns. Certain types of conduct are prohibited by IDA's ex ante regulatory regime, contained in Sections 4 and 6 of the Code. In addition, a Dominant Licensee's conduct may constitute an abuse of aominant position and, therefore, fall within the general prohibition contained in Sub-section 8.2 of the Code. A Dominant Licensee that contravenes any of these provisions is subject to enforcement action, pursuant to Section 11 of the Code.

(a) *Refusal to supply*. A Licensee generally is not required to deal with its competitors. Indeed, allowing a Licensee to decline to offer a service to a competitor may often be necessary to provide it with incentives to offer new services.

The Code, however, contains provisions that require a Dominant Licensee to provide its competitors with access to telecommunication facilities and services in certain circumstances. Specifically, under Sub-sections 6.3.2(a) and 6.3.2(c) of the Code, a Dominant Licensee must provide specific Interconnection Related Services, pursuant to its Reference Interconnection Offer and Mandatory Wholesale Services designated by IDA.

In addition, in some circumstances, a Dominant Licensee's refusal to supply a service to a competing Licensee may constitute an abuse of dominant position. This may occur, for example, where a Dominant Licensee controls an input that is required to provide a competing service and the competing Licensees have no feasible alternatives to obtaining the service from the Dominant Licensee.

(b) *Anti-competitive discounts.* Discounts are a legitimate form of price competition and are generally encouraged. In many cases, discounts reflect objective cost savings resulting from lower input costs, greater efficiencies or other savings arising from the size or duration of a Customer's commitment.

However, Section 4 of the Code contains several provisions, including the prohibition on discrimination, that restrict the ability of a Dominant Licensee to provide discounts. In addition, in some circumstances, a Dominant Licensee's offer of a discount may constitute an abuse of dominant position. Typically, this will occur where a Dominant Licensee offers a significant discount, not justified by any objective factor, which has the effect of foreclosing competing Licensees from a significant portion of the market. Certain types of discounts may raise competitive concerns, these include:

(i) loyalty discounts, in which a Dominant Licensee offers a discount on the condition that the Customer not purchase service from competing Licensees;

(ii) volume discounts that are based on a Customer's total expenditure, but that are applied only to charges for telecommunication services that are subject to effective competition; and

(iii) discounts that are available only to Customers that have the greatest ability to switch to alternate suppliers.

The permissibility of any discount will depend on the specific facts, especially the extent to which they result in significant market foreclosure.

(c) *Tying.* Licensees may provide Customers with the option of purchasing separate telecommunication services and equipment in a single package. Such packages, which may be offered at a reasonable discount, often benefit Customers.

However, Sub-section 4.2.1.3 of the Code provides that a Dominant Licensee must not require a Customer to purchase any other service of equipment as a condition for purchasing a specific telecommunication service. In addition, a Dominant Licensee may abuse its dominant position where it requires a Customer that purchases a telecommunication service that is not subject to effective competition to purchase other services or equipment, especially if those services or equipment are subject to a greater degree of competition. Such requirements, even if offered as an option, may foreclose competition in a significant portion of an otherwise competitive market.

3.3 Anti-competitive Preferences (Sub-section 8.3 of the Code)

A Licensee may have Significant Market Power in a non-telecommunication market. A Licensee may also have an Affiliate that has Significant Market Power (whether in the provision of a telecommunication

service or a non-telecommunication service). For example, a Licensee may be owned by a foreign parent company that enjoys monopoly rights in its home market. The Affiliate may seek to assist the Licensee by using its market position to provide the Licensee with an anti-competitive preference that enables the Licensee to unreasonably restrict competition in a telecommunication market in Singapore. For example, an Affiliate with Significant Market Power in Country X may charge the Licensee a lower rate for terminating international traffic in Country X, thereby preventing other Licensees from providing a competitively priced telecommunication service on the route between Singapore and Country X.

3.3.1 General Prohibition (Sub-section 8.3(a) of the Code)

(a) Sub-section 8.3(a) of the Code contains a general prohibition against a Licensee using the Significant Market Power of an Affiliate, or its Significant Market Power in a non-telecommunication market, to unreasonably restrict competition in the Singapore telecommunication market. Thus, Sub-section 8.3(a) provides a basis for IDA to undertake enforcement action in any case in which it determines that a Licensee has engaged in a type of conduct – other than the specific practices addressed in Sub-section 8.3(b) of the Code – that constitutes receipt of an anti-competitive preference.

(b) IDA will find that a Licensee has contravened the general prohibition against using the Significant Market Power of an Affiliate, or of itself in a non-telecommunication market, to unreasonably restrict competition in the Singapore telecommunication market if the evidence demonstrates that:

(i) the Licensee has an Affiliate that has Significant Market Power in any telecommunication or a non-telecommunication market; or

(ii) the Licensee has Significant Market Power in a non-telecommunication market; and

(iii) the Licensee has accepted an anti-competitive preference from the Affiliate, or has used its market position in the non-telecommunication market in a manner that has enabled, or is likely to enable, the Licensee to unreasonably restrict competition in any telecommunication market in Singapore.

(c) Entities with Significant Market Power may include:

(i) Licensees;

(ii) Non-licensed entities within Singapore; and

(iii) Non-licensed entities located outside Singapore.

(d) IDA will use the following approach to determine if an entity has Significant Market Power:

(i) if the entity is a Licensee, IDA will use the methodology specified in Paragraphs 2.4.1 and 2.4.2 of IDA's Reclassification and Exemption Guidelines; or

(ii) if the entity is not a Licensee, IDA will use the best available information. In appropriate cases, IDA may rely on the determination by a competition authority or another sectoral regulator that the entity has Significant Market Power.

(e) IDA will find that a Licensee has accepted an anti-competitive preference that has unreasonably restricted, or is likely to unreasonably restrict, competition in any Singapore telecommunication market if the Licensee has benefited from any action by an Affiliate, or by its non-telecommunication business to:

(i) significantly restrict output below the competitive level, increase prices above cost, reduce quality below the level that End Users seek, reduce End Users' choice or deter innovation; or

(ii) deter or preclude efficient companies from participating in the market by means other than competing against other Licensees based on service availability, price and quality.

3.3.2 Specific Practices (Sub-section 8.3(b) of the Code)

Sub-section 8.3(b) of the Code prohibits a Licensee from accepting specific types of discriminatory preferences from an Affiliate that has Significant Market Power. IDA will assess allegations that a Licensee has accepted such a preference using the specific standards described below.

3.3.3 Price Squeeze (Sub-section 8.3(b)(i) of the Code)

(a) A Licensee that has an Affiliate with Significant Market Power must not benefit from conduct by the Affiliate that constitutes a price squeeze.

(b) IDA will find that a Licensee has contravened the Code by benefiting from a price squeeze when the evidence demonstrates that:

(i) the Licensee has an Affiliate that has Significant Market Power in the market for an input that is required for Licensees to provide a telecommunication service;

(ii) the Licensee used the input to provide its telecommunication service; and

(iii) the Licensee obtained the input from the Affiliate at a price that is so high that efficient competing non–affiliated Licensees could not profitably sell their end–product if they were required to purchase the input at the same price as the Licensee.

(c) IDA will determine whether an input is required using the methodology specified in Paragraphs 3.2.1.2(c) and (d) of these Guidelines.

(d) IDA will determine whether the price is so high that efficient competing non–affiliated Licensees could not profitably sell their end–product if they were required to purchase the input at the same price as the Licensee using one of the following methodologies:

(i) IDA may impute to the Licensee the price that the Affiliate charges downstream competitors for the input, to determine if the Licensee is able to make a commercially reasonable profit if it were required to recover the full purchase price of the input through its charges to its Customers; or

(ii) IDA may assess whether the price that the Affiliate charges downstream competitors for the input allows a reasonably efficient non-affiliated service provider in the downstream market to obtain a commercially reasonable profit for such activity.

(e) IDA will not find that a price squeeze has occurred based solely on evidence that the Licensee has sold a service at a price that results in it realising a profit that is below competitive levels, provided that the price is not predatory. So long as the price that the Affiliate charges for the input product is not significantly above cost, the Licensee is free to accept a low rate of profit in the retail market.

3.3.4 Cross-subsidisation (Sub-section 8.3(b)(ii) of the Code)

(a) A Licensee that has an Affiliate that has Significant Market Power must not benefit from conduct by the Affiliate that constitutes anti-competitive cross-subsidisation.

(b) IDA will find that a Licensee has contravened the Code by benefiting from anti-competitive cross-subsidisation when the evidence demonstrates that:

(i) the Licensee has an Affiliate that has Significant Market Power in any market;

(ii) the Licensee accepted a subsidy from the Affiliate; and

(iii) the subsidy enabled the Licensee to provide a telecommunication service at a price that has unreasonably restricted, or is likely to unreasonably restrict, competition in any telecommunication market in Singapore.

(c) IDA will conclude that a Licensee accepted a subsidy in any case in which the Licensee:

(i) received revenue from the Affiliate;

(ii) accepted any goods or service from the Affiliate at less than market value; or

(iii) did not assume a reasonable share of any common cost incurred by the Affiliate and the Licensee.

(d) IDA will find that the Licensee's receipt of a cross-subsidy has unreasonably restricted, or is likely to unreasonably restrict, competition in any telecommunication market in Singapore where:

(i) the Licensee is selling the telecommunication service at a price that is less than the average incremental cost of the service;

(ii) the Licensee's sales of the service at prices below average incremental cost are likely to drive efficient rivals from the market or deter future efficient rivals from entering the market; and

(iii) entry barriers are so significant that, after driving rivals from the market or deterring entry, the Licensee could impose an increase in the price of the service sufficient (in amount and duration) to enable the Licensee to recoup the full amount of the loss that it incurred during the period of price cutting.

3.3.5 Discrimination (Sub-section 8.3(b)(iii) of the Code)

(a) A Licensee that has an Affiliate that has Significant Market Power must not benefit from conduct by the Affiliate that constitutes discrimination.

(b) IDA will find that a Licensee has contravened the Code by benefiting from discrimination when the evidence demonstrates that:

(i) the Licensee has an Affiliate that has Significant Market Power in any market for infrastructure, systems, services, or information that is necessary to provide telecommunication services; and

(ii) the Licensee accepted access to the infrastructure, systems, services, or information on prices, terms or conditions that are more favourable than the prices, terms and conditions on which the Affiliate provides those infrastructure, systems, services or information to non-affiliated Licensees.

(c) IDA will determine whether infrastructure, systems, services, or information is necessary to provide telecommunication services using the methodology specified in Paragraph 3.2.2.1(c) of these Guidelines.

(d) A Licensee's acceptance from its Affiliate of access to infrastructure, systems, services or information that is necessary to provide telecommunication services, when the Affiliate refuses to provide access to such infrastructure, systems, services, or information to non-Affiliated Licensees on *any* terms, also constitutes discrimination.

3.4 Unfair Methods of Competition (Sub-section 8.4 of the Code)

The Code prohibits Licensees from engaging in unilateral conduct that constitutes an unfair method of competition.

3.4.1 General Prohibition (Sub-section 8.4.1 of the Code)

Sub-section 8.4.1 of the Code contains a general prohibition against a Licensee engaging in an unfair method of competition. This provision is applicable to allegations that a Licensee engaged in unilateral conduct – other than the specific practices addressed in Sub-sections 8.4.2.1 through 8.4.2.3 of the Code – that constitutes an unfair method of competition. IDA will find that a Licensee has engaged in an unfair method of competition if the evidence demonstrates that the Licensee has engaged in an improper practice by which that Licensee seeks to obtain a competitive advantage for itself or an Affiliate in the telecommunication market in Singapore, for reasons unrelated to the availability, price or quality of the service that the Licensee or its Affiliate offers.

3.4.2 Specific Prohibited Practices (Sub-section 8.4.2 of the Code)

The following practices constitute unfair methods of competition and are specifically prohibited:

(a) A Licensee must not take any action, or induce any other party to take any action, that has the effect of degrading the availability or quality of another Licensee's telecommunication service or equipment, or raising the other Licensee's costs, without a legitimate business, operational or technical justification. IDA will find that a Licensee has no legitimate business, operational or technical reasons for taking an action when:

  (i) the action was not a commercially reasonable means for the Licensee to reduce its costs, offer a new service, improve service quality or otherwise benefit its End Users; and

  (ii) the adverse impact of the Licensee's actions on other Licensees was grossly disproportionate to the benefit to the Licensee and its End Users.

(b) A Licensee must not provide information to other Licensees that is false or misleading.

(c) A Licensee that receives information from another Licensee about the other Licensee's Customers in order to fulfill any duty under this Code must not use that information for any purpose other than the purpose for which it was provided. In particular, the Licensee must not use the information that it receives to market services to the other Licensee's Customers or otherwise interfere in the other Licensee's existing relationship with its Customers.

4. AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION (SECTION 9 OF THE CODE)

4.1 Introduction

(a) In competitive markets, concerted conduct generally raises more significant competitive concerns than unilateral conduct. Therefore, in assessing a claim that a Licensee has acted anti-competitively, IDA will first determine whether a Licensee has entered into an agreement.

(b) In those cases in which IDA concludes that a Licensee has engaged in concerted conduct, IDA will next seek to determine whether the conduct involved an agreement with:

(i) any other Licensee that provides competing telecommunication services and equipment ("horizontal agreement"); or

(ii) any other entity that does not provide a competing telecommunication service or equipment ("non-horizontal agreement").

(c) In general, agreements between two Licensees that are (or potentially are) providing competing telecommunication services and equipment ("Competing Licensees") are far more likely to unreasonably restrict competition than agreements between Non-Competing Licensees. For example, an agreement between two Competing Licensees in which one Licensee agrees to offer its service only in one geographical area, and the other Licensee agrees to offer its service only in another area, would reduce the competitive choices open to End Users in both areas. By contrast, an agreement in which a Licensee grants one reseller the exclusive right to sell the Licensee's service to End Users in one geographical area, and grants another reseller the right to resell the Licensee's service to End Users in another geographical area, may promote competition by giving each reseller an increased incentive to try to sell the Licensee's service to End Users in its respective service area.

(d) The Code prohibits Licensees from entering into any agreement that unreasonably restricts, or is likely to unreasonably restrict, competition. If IDA determines that a Licensee has entered into an agreement that contravenes the Code, IDA may:

(i) direct the Licensee to revise the agreement to eliminate the contravening terms or prospectively terminate the agreement; and/or

(ii) take appropriate enforcement action as prescribed under the Code.

4.2 Determining the Existence of an Agreement (Sub-section 9.2 of the Code)

(a) The prohibitions contained in Section 9 of the Code apply only to "agreements" involving Licensees.

(b) The concept of an "agreement," as used in Section 9 of the Code, differs from the concept of a "contract," as used in commercial law. In commercial law, a contract is a legally binding agreement between two separate legal entities. By contrast, for purposes of Section 9 of the Code, an agreement is an arrangement by which two or more independent economic entities coordinate their market

conduct, rather than act independently. In some cases, arrangements that do not constitute legally binding contracts may be found to be agreements for purposes of Section 9 of the Code.

(c) In implementing Section 9 of the Code, IDA will find that a Licensee has entered into an agreement where the Licensee has coordinated its activities with another entity that would otherwise act as an *independent economic entity*. Such agreements may be express or tacit. An express agreement is one in which the parties expressly agree to engage in certain activities. A tacit agreement, by contrast, is one in which the parties intentionally coordinate their conduct, without expressly agreeing to do so.

(d) Arrangements between a Licensee and an Affiliate over which it can exercise Effective Control (*i.e.*, the ability to cause the Affiliate to take, or prevent the Affiliate from taking, decisions regarding the Affiliate's management and major operating decisions) do not constitute agreements for purposes of Section 9. In such cases, the Licensee and the Affiliate do not constitute independent economic entities. The Licensee's actions should not be subject to heightened scrutiny simply because it has chosen to separate its operations into more than one legal entity.

(e) In seeking to determine whether a Licensee has entered into an agreement, IDA will consider the following:

(i) IDA will consider whether there is direct evidence that the Licensee has entered into an express agreement. Direct evidence is evidence that directly supports the conclusion that the Licensee entered into an agreement. This could include documents setting forth the terms of the agreement or a statement by a party to the agreement;

(ii) IDA will consider circumstantial evidence that the Licensee has entered into an express agreement. Circumstantial evidence is evidence that a Licensee has engaged in certain conduct that provides a reasonable basis to infer that the Licensee entered into an agreement. For example, IDA may consider evidence that, following a meeting, two Licensees stopped competing in certain geographical areas. This circumstantial evidence may provide a reasonable basis for IDA to conclude that, at the meeting, the Licensees expressly entered into an agreement not to compete; and

(iii) IDA will consider whether the Licensee has entered into a tacit agreement. A tacit agreement does not involve an actual agreement between Licensees. Rather, a tacit agreement occurs when a Licensee coordinates its conduct with other Licensees, even in the absence of an agreement

to do so. IDA will not find that a Licensee has entered into a tacit agreement based solely on the fact that the Licensee is making the same (or similar) output and pricing decisions as another Licensee. Such conduct could reflect each Licensee's unilateral response to changing market conditions. For example, if the price of an input used by Competing Licensees increases, each Licensee is likely to increase its prices. Rather, IDA will only find that a Licensee has entered into a tacit agreement where Licensees have taken actions, such as sharing price or supply information that could facilitate concerted conduct.

4.3 Agreements Between Licensees Providing Competing Telecommunication Services and Equipment (Horizontal Agreements) (Sub-section 9.3 of the Code)

(a) As noted above, horizontal agreements can raise significant competitive concerns. In some cases, however, agreements between competitors – such as voluntary standards-setting agreements – may promote competition. Therefore, the Code does not prohibit Competing Licensees from entering into all horizontal agreements. Rather, under the general prohibition specified in Sub-section 9.3.1 of the Code, Competing Licensees are only prohibited from entering into horizontal agreements that unreasonably restrict, or are likely to unreasonably restrict, competition.

(b) However, there are certain horizontal agreements that IDA recognises that are so likely to cause anti-competitive harm, and/or are so devoid of legitimate business, operational or technical justification, that these agreements should be presumed to unreasonably restrict competition without an individualised determination of their actual or likely competitive effects ("*per se*" prohibitions). For example, IDA will find that agreements between Competing Licensees to fix prices contravene the Code without any assessment of the actual or likely competitive effect of such agreements. In all other cases, however, IDA will make an individualised assessment of the actual or likely competitive effect of the horizontal agreement. This approach provides business certainty, while conserving administrative resources.

4.3.1 Specific Prohibited Agreements (Sub-section 9.3.2 of the Code)

(a) The Code identifies four categories of agreements between and amongst Competing Licensees that are always presumed to unreasonably restrict competition in the Singapore telecommunication market and therefore are specifically prohibited, even in the absence of evidence of likely or actual anti-competitive effect:

(i) agreements to fix prices or restrict output ("price fixing agreements");

(ii) agreements to co-ordinate separate bids ("bid rigging agreements");

(iii) agreements to allocate Customers or geographic markets ("Customer allocation agreements"); and

(iv) agreements not to do business with a specific supplier, Licensee or Customer ("group boycott agreements").

(b) IDA will find that a Licensee has contravened the Code if the evidence demonstrates that the Licensee has entered into any horizontal agreement that falls within one of these categories. IDA will not undertake any assessment of the actual or likely competitive effect of such an agreement.

4.3.1.1 Price Fixing/Output Restrictions (Sub-section 9.3.2.1 of the Code)

(a) Price fixing agreements, also called cartel agreements, are one of the most serious forms of anti-competitive conduct. Such agreements provide no competitive benefits, while potentially leading to artificial reductions in supply and artificial increases in price.

(b) IDA will find that a Licensee has contravened the Code by entering into a price fixing agreement in any case in which the evidence demonstrates that the Licensee has entered into an agreement with one or more Competing Licensees to:

(i) set the price that one or more Licensees will charge for any telecommunication service or equipment; and/or

(ii) restrict the total quantity of telecommunication services or equipment that one or more Licensees will offer.

(c) IDA will find that a Licensee has agreed to set the price for a service or equipment if the Licensee enters into an agreement setting minimum prices, setting maximum prices, or establishing a range within which prices may fluctuate.

(d) IDA will find that such agreements contravene the Code regardless of the price level or output level to which the Licensee agrees.

4.3.1.2 Bid Rigging (Sub-section 9.3.2.2 of the Code)

(a) Competitive bidding is an efficient, objective and transparent means to allocate resources. Bid rigging agreements provide no

competitive benefits, but have the potential to distort the market by artificially increasing or reducing the price at which services are bought and sold.

(b) IDA will find that a Licensee has contravened the Code by entering into a bid rigging agreement in any case in which the evidence demonstrates that:

(i) the Licensee has entered into an agreement with one or more Competing Licensees to co-ordinate separate bids for:

(1) assets, resources or rights auctioned by IDA;

(2) any input into the Licensees' services; or

(3) the provision by the Licensee of any telecommunication service or equipment; and

(ii) the Licensee has agreed not to bid, to bid at specific prices or to bid within a specific price range.

(c) IDA will find that such agreements contravene the Code regardless of the price level to which the Licensee agrees.

(d) Notwithstanding the above, a Licensee is not always prohibited from submitting a joint bid with one or more other Licensees, if the Licensees disclose the fact that they are bidding jointly. The permissibility of such joint purchasing arrangements will be assessed pursuant to the methodology described in Paragraph 4.4 of these Guidelines.

4.3.1.3 Market and Customer Divisions (Sub-section 9.3.2.3 of the Code)

(a) Customer allocation agreements provide no competitive benefits, but have the potential to deprive Customers of the benefits of being able to choose among different service providers.

(b) IDA will find that a Licensee has contravened the Code by entering into a Customer allocation agreement in any case in which the evidence demonstrates that the Licensee has entered into an agreement with one or more Competing Licensees not to compete to provide telecommunication services or equipment:

(i) to specific Customers;

(ii) to any class of Customers; or

(iii) to Customers in specific geographical areas.

(c) IDA will find that such agreements contravene the Code regardless of the terms and conditions to which the Licensee agrees.

4.3.1.4 Group Boycotts (Sub-section 9.3.2.4 of the Code)

(a) Group boycott agreements provide no competitive benefits, but have the potential to artificially exclude specific buyers and sellers from the market, thereby reducing competition.

(b) IDA will find that a Licensee has contravened the Code by entering into a group boycott agreement in any case in which the evidence demonstrates that the Licensee has entered into an agreement with one or more Competing Licensees:

(i) not to provide telecommunication services or equipment to a specific supplier, Licensee or Customer; or

(ii) not to obtain an input from a specific supplier, Licensee or Customer.

(c) IDA will find that such agreements contravene the Code regardless of the justification for the boycott.

(d) Notwithstanding the above, except where required to provide telecommunication services or equipment, Licensees may make individual decisions not to do business with a specific supplier, Licensee or Customer.

4.3.2 Agreements Necessary for Legitimate Collaborative Ventures (Sub-section 9.3.3 of the Code)

IDA will not apply the *per se* prohibitions contained in Sub-sections 9.3.2.1 through 9.3.2.4 of the Code to agreements among Licensees that are ancillary to efficiency-enhancing integration of economic activity. Such integration of economic activity typically goes beyond simply co-ordinating actions; it involves combining capital, technology or other assets. Such arrangements may, but need not, take the form of a joint venture. For example, Licensees may agree to undertake joint marketing, purchasing or research. As part of the agreement, the Licensees may agree to certain "ancillary restrictions" on competition that are necessary to facilitate the undertaking. For example, Licensees could agree to establish a joint venture to develop and provision a service that none of the Licensees could offer on its own. As part of the agreement, the Licensees might establish the price at which each Licensee will offer the service. In such cases, IDA will not classify the ancillary restriction as an agreement to engage in price fixing, bid rigging, Customer allocation or a group boycott because doing so would not accurately reflect the actual or likely competitive effect of the practice and might result in the prohibition of conduct that could promote competition and benefit Customers. Rather, in

such cases, IDA will determine the permissibility of the ancillary restrictions based on an individualised assessment of the entire agreement's actual or likely effect on competition, using the standards specified in Sub-section 9.4 of the Code. Where IDA determines that such ancillary restrictions do not unreasonably restrict competition, IDA will permit the Licensees to impose the restrictions.

4.4 Agreements Between Competing Licensees That Will be Assessed Based on Their Actual or Likely Competitive Effects (Sub-section 9.4 of the Code)

(a) With the exception of the agreements specified in Paragraphs 4.3.1 through 4.3.1.4 of these Guidelines, IDA will assess all agreements between Competing Licensees based on their actual or likely effect on competition.

(b) Where there is evidence that the agreement actually has unreasonably restricted competition, IDA will find it to be in contravention of the Code. IDA will find that an agreement actually has unreasonably restricted competition if the evidence of its competitive effect, taken as a whole, demonstrates that the agreement has:

(i) restricted output below the level of demand, increased prices above cost, reduced quality below the level that Customers seek, reduced Customers' choice or deterred innovation; or

(ii) deterred or precluded efficient entities from participating in the market.

(c) Where there is no conclusive evidence of actual market effect because the agreement is relatively recent, IDA will determine the permissibility of the agreement by seeking to assess whether it is likely to unreasonably restrict competition. In conducting this assessment, IDA will use a 3-step process consisting of:

(i) a preliminary assessment;

(ii) where necessary, an assessment of the likelihood that the agreement will restrict competition; and

(iii) where necessary, an assessment of any offsetting, pro-competitive efficiencies that are likely to result from the agreement.

4.4.1 Preliminary Assessment (Sub-section 9.4.1 of the Code)

IDA will first conduct a preliminary review of the agreement. IDA is not likely to find that an agreement contravenes the Code, and therefore

generally will terminate its review, if both of the following conditions are met:

(a) first, the agreement involves a small number of Non-dominant Licensees. In general, IDA will find that an agreement involves a small number of Non-dominant Licensees if the Licensees collectively have a market share of less than 20 percent. Where necessary, IDA will define the relevant market and assess the participants' collective market share using the methodology described in Paragraphs 2.4.1 and 2.4.2(a) of IDA's Reclassification and Exemption Guidelines; and

(b) second, the agreement is the type of agreement that is likely to benefit Customers by increasing supply, reducing price or providing other pro-competitive benefits.

4.4.2 Likelihood of Competitive Harm (Sub-section 9.4.2 of the Code)

(a) IDA will conduct a more detailed assessment in any case in which any of the following conditions are met:

  (i) the agreement involves a significant number of Non-dominant Licensees;

  (ii) the agreement involves a Dominant Licensee; or

  (iii) the agreement is the type of agreement that has the potential to reduce supply, increase price or otherwise deprive Customers of the benefits of competition.

(b) In conducting its assessment of whether the agreement has the potential to deprive Customers of the benefits of competition, IDA will consider:

  (i) whether (and, if so, to what extent) the Licensees that have entered into the agreement retain the ability to act independently;

  (ii) the duration of the agreement;

  (iii) whether, in the event the Licensees acted anti-competitively, new entry into the market would be likely, sufficient and timely enough to counteract any competitive harm; and

  (iv) any other factors that help predict the likely competitive effect of the agreement.

(c) If, after assessing these factors, IDA concludes that the agreement is not likely to result in a restriction of output or an increase in prices

of telecommunication services and equipment, or otherwise adversely affect Customers, IDA will conclude that the agreement does not contravene the Code.

4.4.3 Efficiencies (Sub-section 9.4.3 of the Code)

(a) If IDA's review demonstrates that the agreement has the potential to result in a restriction of output or an increase in prices of telecommunication services and equipment, or otherwise adversely affect Customers, IDA will consider whether the agreement is likely to achieve any off-setting efficiencies.

(b) IDA will find that an agreement is likely to result in efficiencies if the Licensee demonstrates, with reasonable specificity, that the agreement is likely to result in reductions in the cost of developing, producing, marketing and delivering telecommunication services or equipment. IDA will not consider any cost reductions that result from reductions in output or service.

(c) IDA will conclude that the agreement does not contravene the Code if the efficiencies that it identifies:

(i) are large enough to offset any potential anti-competitive effect;

(ii) could not reasonably be achieved through measures that reduce competition to a lesser extent; and

(iii) are likely to be passed on to Customers.

4.5 Agreements Between Licensees and Entities That are Not Direct Competitors (Non-Horizontal Agreements) (Sub-section 9.5 of the Code)

(a) Agreements between a Licensee and another entity that is not a Competing Licensee ("non-horizontal agreements") generally do not adversely affect competition. Indeed, in many cases, non-horizontal agreements may promote competition. However, because telecommunication markets are often characterised by both significant concentration and vertical integration, agreements that involve entities that are at different levels in the "supply chain", such as agreements between a Licensee and a supplier or a distributor, may sometimes raise competitive concerns – especially where one of the parties to the agreement has Significant Market Power. Such agreements are often referred to as "vertical agreements".

(b) Vertical agreements can restrict competition in at least three different ways.

(i) Vertical agreements can reduce or eliminate "intra-brand" competition, such as competition between two resellers of the same Licensee's service. For example, an agreement in which a Licensee grants Reseller A the exclusive right to resell the Licensee's service in one geographical area, and Reseller B the right to resell the Licensee's service in another geographical area, will eliminate competition among providers of the Licensee's service in both geographical areas. If the Licensee has Significant Market Power, this could significantly reduce the competitive choices available to End Users in both geographical areas.

(ii) Vertical agreements can also facilitate a horizontal Customer allocation agreement between two distributors, which would also raise competitive concerns (s*ee* Paragraph 4.3.1.3 of these Guidelines).

(iii) Vertical agreements may also deter new entry by foreclosing significant sources of supply or distribution. For example, an agreement between an equipment dealer and an equipment manufacturer that has Significant Market Power, in which the manufacturer gives the dealer the exclusive right to distribute its equipment in Singapore, could foreclose competition in the equipment market.

(c) At the same time, vertical agreements can provide significant pro-competitive benefits.

(i) Vertical agreements may promote "inter-brand" competition between two Licensees' services. For example, where a Licensee does not have Significant Market Power, an agreement in which the Licensee grants Reseller A the exclusive right to resell the Licensee's service in one geographical area, and another agreement in which the Licensee grants Reseller B the right to resell the Licensee's service in another geographical area will reduce intra-brand competition. However, the two agreements may facilitate inter-brand competition in both geographical areas by giving each reseller an increased incentive to try to resell the Licensee's service to End Users in its respective service area.

(ii) Vertical agreements may also benefit End Users by eliminating market failures, such as the "free rider" problem. For example, telecommunication equipment Dealer A may provide a high level of customer service (such as provision of detailed product information) and, as a result, must charge a higher price for the equipment. At the same time, competing

telecommunication equipment dealers may provide little or no customer service, but charge lower prices. However, if too many End Users obtain information from Dealer A, but make their purchase from one of the other dealers, then Dealer A will eventually stop providing customer service, thereby depriving End Users of a valued service. By granting Dealer A an exclusive dealership, a telecommunication equipment manufacturer may provide Dealer A with an incentive to continue to provide this service.

4.5.1 General Prohibition (Sub-section 9.5.1 of the Code)

(a) Sub-section 9.5.1 of the Code contains a general prohibition against a Licensee entering into a non-horizontal agreement that unreasonably restricts competition.

(b) IDA will assess the permissibility of any non-horizontal agreement based on its actual, or likely, effect on competition. In assessing whether a vertical agreement unreasonably restricts competition, or is likely to unreasonably restrict competition, in the Singapore telecommunication market, IDA will consider both the pro-competitive and anti-competitive effects of the agreement. IDA will only find that a vertical agreement unreasonably restricts competition, or is likely to unreasonably restrict competition, in the Singapore telecommunication market, if IDA concludes that the actual or likely anti-competitive effects of the agreement outweigh the actual or likely pro-competitive effects of the agreement.

(c) IDA will consider whether the agreement has benefited, or is likely to benefit, Customers by fostering competition. In particular, IDA will consider whether the agreement:

(i) has increased, or is likely to increase, inter-brand competition;

(ii) has reduced, or is likely to reduce, market failures, such as “free riding”;

(iii) has facilitated, or is likely to facilitate, new entry; or

(iv) has provided, or is likely to provide, other pro-competitive benefits.

(d) IDA also will consider whether the agreement has harmed, or is likely to harm, Customers by reducing competition. In particular, IDA will consider whether the agreement:

(i) has substantially eliminated, or is likely to substantially eliminate, intra-brand competition;

(ii) has facilitated, or is likely to facilitate, collusion among competitors;

(iii) has foreclosed, or is likely to foreclose, other Licensees from being able to access a significant source of supply or a significant channel of distribution, thereby impeding its ability to compete against other Licensees; or

(iv) has had, or is likely to have, any other anti-competitive effect.

(e) IDA will be more likely to find that a vertical agreement contravenes the Code if IDA determines that the agreement involves an entity, whether or not a Licensee, that has Significant Market Power.

4.5.2 Agreements That Will be Assessed Based on Competitive Effects (Sub-section 9.5.2 of the Code)

Paragraphs 4.5.2.1 through 4.5.2.3 of these Guidelines describe three common types of vertical agreements, and their potential pro-competitive and anti-competitive effects. In determining whether these types of agreements have unreasonably restricted competition, or are likely to unreasonably restrict competition, IDA will use the methodology described in Paragraph 4.5.1 of these Guidelines.

4.5.2.1 Resale Price Maintenance (Sub-section 9.5.2.1 of the Code)

(a) A resale price maintenance agreement is an agreement in which one entity agrees with another entity that distributes its product on the price that the second entity will charge Customers for the product. For example, an equipment manufacturer could agree with an equipment dealer as to the price that the dealer will charge for the equipment. Similarly, a Licensee could agree with a reseller as to the price at which the reseller will resell the Licensee's telecommunication service.

(b) There is increasing economic evidence that resale price maintenance agreements often are competitively neutral and, in some cases, may enhance competition. For example, such agreements may allow dealers to provide significant customer services, without incurring the risk that competing dealers will "free ride" (s*ee* Paragraph 4.5(c)(ii) of these Guidelines). Nonetheless, resale price maintenance agreements may raise competitive concerns when they foreclose price competition in a significant portion of the market. For example, where an entity has Significant Market Power in a given product market, price competition among distributors of the product may provide a significant source of price competition in the market, which would be eliminated if the distributor entered into a resale price maintenance agreement.

(c) IDA will find that a Licensee that has entered into a resale price maintenance agreement has contravened the Code, where the evidence demonstrates that the agreement has, or is likely to, unreasonably restrict competition in any telecommunication market in Singapore.

4.5.2.2 Vertical Market Allocation (Sub-section 9.5.2.2 of the Code)

(a) A vertical market allocation agreement is an agreement in which an entity that produces a product, and distributes that product through more than one distributor, allocates different Customers or markets to different distributors. For example, an equipment manufacturer could agree with one equipment dealer that the dealer will sell the manufacturer's products only to business Customers, and could agree with another dealer that the dealer will sell the manufacturer's products only to residential Customers. Similarly, a Licensee could agree with one reseller that the reseller will resell the Licensee's telecommunication service to End Users in one geographical area, and could agree with another reseller that the reseller will resell the Licensee's telecommunication service to End Users in another geographical area.

(b) Vertical market allocation can promote competition by providing a distributor with a strong incentive to market a specific Licensee's telecommunication service or a specific manufacturer's telecommunication equipment. Doing so may help a new entrant establish itself in the market. However, vertical market allocation agreements can raise competitive concerns where they foreclose competition in a significant portion of the market. For example, where an entity has Significant Market Power in a given product market, competition among distributors of the entity's product may provide a significant source of competition in the market, which would be eliminated if the distributor entered into a vertical market allocation agreement.

(c) IDA will find that a Licensee that has entered into a vertical market allocation agreement has contravened the Code, where the evidence demonstrates that the agreement has, or is likely to, unreasonably restrict competition in any telecommunication market in Singapore.

4.5.2.3 Exclusive Dealing (Sub-section 9.5.2.3 of the Code)

(a) An exclusive dealing agreement is an agreement in which one entity agrees with another entity to:

(i) supply goods or services to the other entity;

(ii) purchase goods or services from the other entity; or

(iii) distribute goods or services produced by the other entity.

For example, an equipment manufacturer could designate an entity that holds an equipment dealer licence as its exclusive distributor in Singapore. Similarly, a Licensee could designate another Licensee as its exclusive reseller.

(b) Exclusive dealing agreements can promote competition by providing an assured supply and by creating strong incentive for a distributor to promote a product. However, exclusive dealing agreements can raise competitive concerns where they foreclose a substantial portion of the supply, or a substantial portion of the distribution outlets, for a product. For example, if an entity has Significant Market Power in the telecommunication equipment market, an exclusive agreement with one distributor could preclude other distributors from participating in that market.

(c) IDA will find that a Licensee that has entered into an exclusive dealing agreement has contravened the Code, where the evidence demonstrates that the agreement has, or is likely to, unreasonably restrict competition in any telecommunication market in Singapore.

Appendix 1 – Entry Barriers

1. IDA's Competition Guidelines specify a number of situations in which IDA must make an assessment regarding the existence, and significance, of barriers to entry. In general, the more significant the barriers to entry, the more likely it is that IDA will need to intervene in a market or find that an anti-competitive action has occurred.

2. In assessing barriers to entry, IDA will seek to identify those factors that could preclude an efficient Licensee from being able to market or provide a service.

3. In conducting its assessment, IDA may seek information regarding the cost of, and barriers to, entry from: Licensees that are currently in the market; Licensees or other entities that have sought to enter the market; and Licensees or other entities that may seek to enter the market. Where appropriate, IDA will consider whether changes over time have increased or decreased the difficulty of entry.

4. IDA has identified five broad, but non-exclusive, categories of barriers to entry:

   (a) technical barriers;

   (b) access barriers;

   (c) financial barriers;

   (d) commercial barriers; and

   (e) regulatory barriers.

5. Technical barriers exist when a new entrant must use technology that is costly or difficult to develop or obtain from third parties. This may occur, for example, where a new entrant must obtain a licence to use proprietary technology, especially where the rights are controlled by a competitor. In assessing the existence of technical barriers, IDA will consider the extent to which new entrants must use such technology, and the cost and difficulty of doing so.

6. Access barriers exist when a new entrant must access a competitor's infrastructure in order to provide service to End Users, and doing so is costly or difficult. For example, where a competitor controls a facility that constitutes a "bottleneck" or "essential" facility, its refusal to provide access to this facility may create an absolute barrier to entry. Access barriers are potentially significant in the telecommunication market, which is characterised by both economies of scale and network effects. Economies of scale refers to the situation in which the average cost of providing services decreases as the volume of services increases.

Network effects arise when the value a consumer places on connecting to a network depends on the number of others already connected to it. A new entrant into the telecommunication market typically must be able to provide End Users with the ability to communicate with all other End Users. Once an entrant has done so, the cost of serving any individual Customer is relatively low. However, due to the high cost of infrastructure deployment, it is often not economically feasible for a new entrant to deploy a ubiquitous infrastructure. Therefore, in order to provide service, the new entrant may need to access infrastructure controlled by a competing operator that is currently in the market. In assessing the existence of access barriers, IDA will consider the extent to which existing regulation ensures that new entrants have access to infrastructure that is required to provide a competitive telecommunication service on just, reasonable and non-discriminatory prices, terms and conditions.

7. Financial barriers exist when a new entrant must incur significant costs in order to enter the market. For instance, new entrants into the telecommunication market may often have to incur significant costs to roll-out their network. Such costs cannot be recovered quickly. Neither can the entrant readily recoup these costs if it decides to exit the market within a short period. Such barriers will be especially significant if there are high "sunk costs". Sunk costs refer to the cost of acquiring capital and other assets that are incurred in order to enter the market and supply services, where the costs cannot be recovered and assets cannot be redeployed in another market when the service provider exits the market or ceases service supply. Therefore, in assessing financial barriers, IDA will consider the costs that a new entrant must incur, as well as the extent to which such costs constitute sunk costs.

8. Commercial barriers exist when a new entrant must incur significant costs to obtain, retain, and serve End Users. For example, a new entrant to a market may need to incur significant costs including: advertising costs in order to obtain brand recognition; additional costs to get individual End Users to switch from their current service provider; and high ongoing “customer care” costs in order to retain the End User’s “brand loyalty”. In assessing the existence of commercial barriers, IDA will consider the need for, and cost of, such expenditures.

9. Regulatory barriers exist when a new entrant must obtain regulatory approval to enter, or participate in, a market. Such barriers may be especially significant in markets in which resource constraints – such as limited amounts of spectrum – require regulatory authorities to impose an absolute numeric limit on the number of entrants.

10. IDA will consider any other barrier to entry that is identified by a party. Parties seeking to do so should provide verifiable data about the nature of the barriers, the costs that a new entrant would have to incur, and the other obstacles a new entrant would have to overcome in order to surmount the barrier.