

Draft for Consultation

INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY OF SINGAPORE

TELECOMMUNICATIONS ACT

(CHAPTER 323)

**ADVISORY GUIDELINES GOVERNING PETITIONS FOR RECLASSIFICATION
AND REQUESTS FOR EXEMPTION UNDER SUB-SECTIONS 2.3 AND 2.5 OF
THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF
TELECOMMUNICATION SERVICES 2005**

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1. INTRODUCTION
2. EXEMPTION FROM APPLICATION OF SPECIAL DOMINANT LICENSEE PROVISIONS
3. RECLASSIFICATION OF LICENSEES
4. IDA'S PROCEDURES FOR REVIEW OF REQUESTS FOR EXEMPTION AND PETITIONS FOR RECLASSIFICATION
5. REVIEW OF IDA'S DECISION

**ADVISORY GUIDELINES GOVERNING PETITIONS FOR RECLASSIFICATION
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11 March 2005

The Info-communications Development Authority of Singapore (“IDA”), pursuant to Section 28 of the Telecommunications Act (Cap. 323) (“Act”), hereby issues these Advisory Guidelines Governing Petitions for Reclassification and Requests for Exemption under Sub-sections 2.3 and 2.5 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005 (“Code”).

1. INTRODUCTION

1.1 Obligations of Dominant Licensees

- (a) The Code provides that IDA will classify a Licensee as Dominant if the Licensee meets certain specified criteria. All other Licensees are presumed to be Non-dominant.
- (b) A Dominant Licensee must comply with special provisions governing Dominant Licensees, which are set forth in the Code. These provisions address: the duty to provide telecommunication services on just, reasonable and non-discriminatory terms; the duty to provide Interconnection Related Services and Mandated Wholesale Services to other Licensees; and prohibitions against abuse of dominant position.
- (c) The Code uses a “licensed entity” approach. Under this approach, once a Licensee has been classified as Dominant, it must comply with all of the special provisions applicable to Dominant Licensees when it provides any telecommunication service, or when it operates any telecommunication facility, pursuant to its licence.

1.2 Exemption and Reclassification

- (a) As competition develops, it may no longer be necessary to apply each of the special provisions applicable to Dominant Licensees to each telecommunication service provided, and each telecommunication facility operated, by a Dominant Licensee. Sub-section 2.5 of the Code therefore provides a procedure by which a Dominant Licensee may request IDA to exempt it from any of the special provisions applicable to Dominant Licensees. This procedure is referred to as a request for exemption (“Request”).

Reclassification and Exemption Guidelines (Draft for Consultation)

- (b) Similarly, as market conditions change, it may be appropriate to reclassify a Dominant Licensee as Non-dominant or, conversely, a Non-dominant Licensee as Dominant. Sub-section 2.3 of the Code therefore provides a procedure by which a Licensee or any other interested party may petition IDA to reclassify a Licensee. This procedure is referred to as a petition for reclassification (“Petition”). IDA may also initiate a proceeding on its own accord to reclassify a Licensee.

1.3 Guidelines are Advisory

These Guidelines set out the framework that IDA will use to assess Petitions and Requests. The provisions in these Guidelines are advisory. They do not impose any binding legal obligation on IDA. In order to provide a single document addressing all issues relevant to the framework, certain provisions of the Code have been summarised or repeated in these Guidelines. For the avoidance of doubt, in the event of any conflict between the Code and these Guidelines, the provisions of the Code will prevail.

1.4 Rules of Construction

Unless otherwise defined in these Guidelines, capitalised terms used in these Guidelines have the same meaning as in the Code.

1.5 Effective Date of these Guidelines

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

1.6 Short Title

These Guidelines may be referred to as the “Reclassification and Exemption Guidelines”.

2. EXEMPTION FROM APPLICATION OF SPECIAL DOMINANT LICENSEE PROVISIONS

2.1 Requests for Exemption

- (a) A Dominant Licensee that seeks an exemption from any of the special provisions applicable to Dominant Licensees must submit a Request that demonstrates that the continued application of the provision to the facility or service for which the exemption is sought is not necessary to protect End Users or to promote or preserve effective competition amongst Licensees. The Request must include verifiable data.

Reclassification and Exemption Guidelines (Draft for Consultation)

- (b) The Request must identify:
 - (i) the specific services and/or facilities for which the Dominant Licensee seeks an exemption; and
 - (ii) the specific provisions of the Code from which the Dominant Licensee seeks an exemption.
- (c) Where the Dominant Licensee seeks to be exempted from the application of a particular provision to more than one service or facility, the Dominant Licensee must satisfy the standard specified in Paragraph 2.1(a) of these Guidelines for each service or facility.
- (d) Where multiple services are reasonable substitutes, or are subject to similar competitive conditions, the Dominant Licensee may group the services together and make a single showing as to why the application of a special provision in relation to these services is no longer necessary. The Dominant Licensee may refer to these services as forming a specific market. If the Dominant Licensee groups any services together, it must provide verifiable data that demonstrates that the services are reasonable substitutes or are subject to similar competitive conditions. This may include evidence regarding functional similarities among services, as well as evidence of actual switching by Customers. While IDA will consider the Dominant Licensee's market definition, it is not binding on IDA. If IDA does not agree with the Dominant Licensee's market definition, IDA may:
 - (i) consider separately each service for which the Dominant Licensee has sought an exemption and make an individual determination for each service;
 - (ii) group services together that IDA determines are reasonable substitutes, or are subject to similar competitive conditions, and make a determination for each service group; or
 - (iii) consider some services separately and group some services together.
- (e) Similarly, where multiple facilities perform the same function, or are subject to similar competitive conditions, the Dominant Licensee may group the facilities together and make a single showing as to why the application of a special provision in relation to these facilities is no longer necessary. While IDA will consider the Dominant Licensee's grouping, it is not binding on IDA. If IDA does not agree with the Dominant Licensee's grouping, IDA may:

Reclassification and Exemption Guidelines (Draft for Consultation)

- (i) consider separately each facility for which the Dominant Licensee has sought an exemption and make an individual determination for each facility;
 - (ii) group facilities together that IDA determines perform the same functions, or are subject to similar competitive conditions, and make a determination for each facilities group; or
 - (iii) consider some facilities separately and group some facilities together.
- (f) The Dominant Licensee may submit a narrow Request. For example, the Dominant Licensee may request exemption from the application of a special provision applicable to a specific telecommunication service when the Dominant Licensee provides that service to a particular class of customers or in a particular geographic area. If the Dominant Licensee chooses to make such a narrow Request, it must clearly identify the scope of the Request, and the basis on which the Dominant Licensee believes that application of the provision to that customer class, or geographic area, is no longer necessary.

2.2 Evidence to be Considered

A Dominant Licensee must provide evidence necessary to assess its Request.

2.2.1 Ability of Competitors to Replicate Facilities (For Requests for Exemption Applicable to Facilities)

- (a) Where a Dominant Licensee seeks to be exempted from the application of any special provision to a specific telecommunication facility, or group of telecommunication facilities, the Dominant Licensee should submit verifiable data regarding the ability of an efficient competitor to replicate those facilities.
- (b) Verifiable data regarding the ability of an efficient competitor to replicate a Licensee's facilities should include:
 - (i) the facilities that the Licensee has deployed to provide telecommunication services in Singapore;
 - (ii) the cost to a new entrant to deploy facilities that perform a comparable function;
 - (iii) the extent to which such facilities are commercially available;

Reclassification and Exemption Guidelines (Draft for Consultation)

- (iv) the extent to which there are technical, economic or regulatory obstacles to the competitive deployment of such facilities; and
- (v) the extent to which competitive deployment of these facilities has occurred and is likely to occur within the foreseeable future.

2.2.2 Ability of a Licensee to Exercise Significant Market Power (For Requests for Exemption Applicable to Services)

- (a) Where a Dominant Licensee seeks to be exempted from the application of any special provision to a specific telecommunication service, or group of telecommunication services, the Dominant Licensee should submit verifiable data regarding the Dominant Licensee's ability to exercise Significant Market Power in the market for that service.
- (b) Verifiable data regarding a Licensee's ability to exercise Significant Market Power in the market for a telecommunication service should include:
 - (i) the relevant market(s) for the telecommunication service that the Licensee provides (including the basis for the market definition);
 - (ii) the participants in the market;
 - (iii) the Licensee's market share (including the basis for the estimate);
 - (iv) the level of concentration in the market (including the estimated market shares of other major market participants);
 - (v) the barriers to entry into the market;
 - (vi) the likelihood of timely and sufficient increases in output (either through new entry or the provision of additional services by current market participants) in response to a significant and non-transitory price increase by the Licensee;
 - (vii) the likelihood that End Users would respond to a significant and non-transitory price increase by the Licensee by switching to a competing service provider;
 - (viii) evidence of actual market competition (including new entry, changes in market share over time, price changes, introduction of new services and non-price competition); and

Reclassification and Exemption Guidelines (Draft for Consultation)

- (ix) any other relevant factors that could enhance or diminish the Licensee's ability to act anti-competitively.
- (c) The Dominant Licensee must provide any relevant information that is in its possession or that, with reasonable effort, it can obtain or develop. Where the Dominant Licensee is unable to provide complete information, it should make a good faith estimate. In such cases, the Dominant Licensee should explain the basis on which it is providing any estimate.
- (d) The Dominant Licensee may request confidential treatment for information that it provides to support its Request in accordance with Sub-section 11.7 of the Code.

2.3 Analytic Framework for Assessing Requests for Exemption Applicable to Facilities

- (a) In considering a request to exempt a Dominant Licensee from any special provision applicable to a telecommunication facility, IDA will seek to apply economic analysis to determine whether, as a result of changing market conditions, continued application of the special provision applicable to Dominant Licensees to the facility continues to be necessary. In general, IDA will grant an exemption if it finds that the facilities for which the Dominant Licensee seeks an exemption are not sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor.
- (b) In order to determine whether a Licensee's facility is sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor, IDA will consider whether an efficient competitor could:
 - (i) construct a facility that performs the same (or comparable) function as the Licensee's facility at a cost that would enable it to provide a competitive telecommunication service; or
 - (ii) obtain such a facility from third parties on prices, terms and conditions that would enable it to provide a competitive telecommunication service.

2.4 Analytic Framework for Assessing Requests for Exemption Applicable to Services

In considering a request to exempt a Dominant Licensee from any special provision applicable to a telecommunication service, IDA will seek to apply economic analysis to determine whether, as a result of changing market conditions, continued application of the special provision applicable to Dominant Licensees to the service continues to be necessary. In general, IDA will grant an exemption if it finds that the Dominant Licensee lacks Significant Market Power in the market or markets in which it provides the service for which it seeks the exemption. "Significant Market Power" means the ability to unilaterally restrict output, raise prices, reduce quality or otherwise act, to a significant extent, independently of competitive market forces. In some cases in which a market is increasingly competitive, but not yet effectively competitive, IDA may grant an exemption from some special provisions, while retaining those that remain necessary.

2.4.1 Market Definition

In order to determine if a Licensee has Significant Market Power in the market for a service, IDA will first determine the relevant service, geographic and functional markets in which the Licensee provides the service.

- (a) The relevant market for a telecommunication service provided by a Licensee consists of both the specific telecommunication service for which the Licensee seeks an exemption and any additional telecommunication service that buyers regard as interchangeable with, or a substitute for, the Licensee's telecommunication service. IDA will consider which other product offerings customers would switch to if the prices charged by the Licensee for the exempted telecommunication service increased by a small but significant, non-transitory amount.
 - (i) To do so, IDA may apply the so-called "hypothetical monopolist" test. If IDA does so, it will consider whether a hypothetical monopoly operator controlling the entire supply of the service provided by the Licensee would be constrained from profitably imposing a small but significant, non-transitory increase in price above the competitive level (typically 5 to 10 percent for a year or more) because a sufficient number of customers of the service would switch to another service, thereby rendering the price increase unprofitable. If the hypothetical monopolist would be constrained, IDA will include the second service in the market definition. IDA will repeat this process until no additional services could constrain the profitability of a price increase by the hypothetical monopoly.

Reclassification and Exemption Guidelines (Draft for Consultation)

- (ii) IDA may also consider whether other telecommunication product offerings have a similar function, characteristic or customer base as the Licensee's telecommunication product offerings.
- (b) IDA will also identify the relevant geographic markets. The relevant geographic market for a telecommunication service provided by a Licensee consists of the geographic area in which the Licensee (and other Licensees that provide substitutable telecommunication services) provides telecommunication services and any additional geographic locations from which customers would obtain those services if prices charged by the Licensee increased by a small but significant, non-transitory amount. In practice, IDA will consider those areas that have similar competitive conditions to be in the same geographic market.
- (c) IDA will also determine whether a service is provided at the wholesale level (i.e., whether the product is provided to other Licensees), the retail level (i.e., whether the product is provided to End Users), or both levels. In some cases, there may be significant differences in the service that Licensees offer to wholesale and retail customers. For example, the wholesale service may be offered at a different price, or have different functionality, than the retail service. In some cases, this may reflect regulatory obligations, such as the imposition of a mandatory wholesale discount. In those cases in which there are material differences between the wholesale and retail services that preclude the two services from being demand substitutes, IDA will consider the wholesale and retail services to be in separate markets. By contrast, in many cases, Licensees will offer similar functionality, at similar prices, to both wholesale and retail customers. In such cases, IDA will consider the wholesale and retail services in to be in the same service market.
- (d) In some cases, IDA may conclude that, even though different product offerings may theoretically be in different markets, it is appropriate to assess the need for continued regulation of these product offerings together because they are subject to similar market conditions.

2.4.2 Assessing Competitiveness

After IDA has defined the relevant market, it will conduct a competitiveness assessment.

- (a) IDA will first determine the market participants and their market shares. In seeking to measure market share, IDA may look at revenues, capacity or any other relevant unit of measurement.

Reclassification and Exemption Guidelines (Draft for Consultation)

- (i) Where reliable information is available, IDA will seek to use the unit of measurement that best reflects the characteristics of the market. For example, in markets for “upstream” services that could be used as an input for other services, and in which self-supply accounts for a significant portion of the market, capacity may be a more reliable measure than revenue because it is often not feasible to assign revenues to self-supplied inputs.
 - (ii) All things being equal, a larger market share indicates a greater potential ability to act anti-competitively and, consequently, a greater need to retain regulation. Therefore, IDA will make an initial presumption that a Dominant Licensee that has a market share in excess of 40 percent has Significant Market Power.
- (b) IDA will next consider other factors that would increase or decrease the ability of the Licensee to act anti-competitively. This includes the extent to which:
- (i) the market is concentrated (i.e., the number, and size, of participants in the market besides the Licensee); and
 - (ii) there are impediments to other Licensees entering, or expanding their participation in, the market, including:
 - technical barriers (such as the need to use specialised or proprietary technology);
 - access barriers (such as the need to obtain access to another entity’s infrastructure in order to provide service or significant economies of scale and scope);
 - financial barriers (such as the proportion of the Dominant Licensee’s costs that are sunk and the scale of the sunk costs associated with the investments required to start-up or expand a business);
 - commercial barriers (such as high advertising and retail costs or high consumer switching costs); and
 - regulatory barriers (such as limitations on the number of licences or on the entities eligible to provide a service).

Reclassification and Exemption Guidelines (Draft for Consultation)

- (c) Finally, IDA will consider evidence of actual market performance. This includes evidence regarding:
 - (i) price and/or non-price competition in the market; and
 - (ii) any prior anti-competitive conduct by the Licensee.

2.5 Other Considerations

IDA will also consider whether granting the exemption will have any pro-competitive benefits, such as allowing the Dominant Licensee to introduce new services or respond more quickly to changing market conditions.

2.6 Special Considerations Applicable to Requests for Exemption From Provisions Prohibiting Abuse of Dominant Position

IDA will give special scrutiny to Requests by a Dominant Licensee that seek exemption from the prohibitions, contained in Section 8.2 of the Code, against abusing its dominant position. These prohibitions, which are derived from the general principles of competition law as developed in other jurisdictions, generally do not impose *ex ante* obligations on a Dominant Licensee. Rather, they provide an effective means of enforcement in the event a Dominant Licensee abuses its dominant position. Thus, to the extent that a Dominant Licensee retains, or has any reasonable possibility of regaining, Significant Market Power in a market, IDA generally will conclude that retaining these prohibitions is necessary to deter anti-competitive conduct.

3. RECLASSIFICATION OF LICENSEES

3.1 Reclassification Standard

- (a) Pursuant to Sub-sections 2.2.1(a) and 2.2.1(b) of the Code, a Licensee will be classified as Dominant if:
 - (i) it is licensed to operate facilities used for the provision of telecommunication services in Singapore that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor; or
 - (ii) it has the ability to exercise Significant Market Power in any market in which it provides telecommunication services pursuant to its licence.

Reclassification and Exemption Guidelines (Draft for Consultation)

- (b) Section 2.3(a) of the Code further provides that:
 - (i) IDA will reclassify a Dominant Licensee as Non-dominant if IDA concludes, based on relevant evidence, that the Licensee no longer satisfies the conditions for dominant classification specified in Sub-sections 2.2.1(a) and 2.2.1(b) of the Code.
 - (ii) IDA will reclassify a Non-dominant Licensee as Dominant if IDA concludes, based on relevant evidence, that the Licensee satisfies the conditions for dominant classification specified in either Sub-section 2.2.1(a) or 2.2.1(b) of the Code.
- (c) Thus, in order for IDA to reclassify a Dominant Licensee as Non-dominant, IDA must conclude that the Dominant Licensee does not satisfy the two criteria specified in Sub-section 2.2.1 of the Code. By contrast, in order for IDA to reclassify a Non-dominant Licensee as Dominant, IDA must conclude that the Licensee satisfies at least one of the two criteria.

3.2 Evidence to be Considered

- (a) A Dominant Licensee seeking to demonstrate that it should be reclassified as Non-dominant must make two separate showings:
 - (i) First, the Dominant Licensee must demonstrate that the facilities that it uses for the provision of telecommunication services in Singapore are not sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor. To do so, for each facility (or category of facilities) the Dominant Licensee generally should submit the verifiable data specified in Paragraph 2.2.1(b) of these Guidelines.
 - (ii) The Dominant Licensee also must demonstrate that it does not have Significant Market Power in any market in which it provides telecommunication services pursuant to its licence. To do so, for each market in which it participates, the Dominant Licensee generally should submit the verifiable data specified in Paragraph 2.2.2(b) of these Guidelines.
- (b) A party seeking to demonstrate that a Non-dominant Licensee should be reclassified as Dominant, on the grounds that the Licensee is licensed to operate facilities used for the provision of telecommunication services in Singapore that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would

Reclassification and Exemption Guidelines (Draft for Consultation)

create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor, must provide verifiable data. Specifically, for each facility that the party believes meets this standard, the party should submit the verifiable data specified in Paragraph 2.2.1(b) of these Guidelines.

- (c) A party seeking to demonstrate that a Non-dominant Licensee should be reclassified as Dominant, on the grounds that the Licensee has Significant Market Power in at least one market in which it provides telecommunication service pursuant to its licence, must provide verifiable data. Specifically, for each market in which the party believes that the Non-dominant Licensee has Significant Market Power, the party should submit the verifiable data specified in Paragraph 2.2.2(b) of these Guidelines.
- (d) A party seeking reclassification of a Licensee on any basis must provide any relevant information that is in its possession or that, with reasonable effort, it can obtain or develop. Where the party is unable to provide complete information, it should make a good faith estimate. In such cases, the party should explain the basis on which it is providing any estimate.
- (e) A party may request confidential treatment for information that it provides to support its Petition in accordance with Sub-section 11.7 of the Code.

3.3 Analytic Framework

- (a) In considering whether or not a Licensee is licensed to operate facilities used for the provision of telecommunication services in Singapore that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor, IDA will use the methodology specified in Paragraph 2.3(b) of these Guidelines.
- (b) In considering whether or not a Licensee has Significant Market Power in any market, IDA will use the methodology specified in Paragraphs 2.4.1 and 2.4.2 of these Guidelines.

4. IDA'S PROCEDURES FOR REVIEW OF REQUESTS FOR EXEMPTION AND PETITIONS FOR RECLASSIFICATION

4.1 IDA's Preliminary Review

- (a) Once IDA receives a Request, or a Petition, IDA generally will conduct a preliminary review. This process typically will take no more than 15 days.
- (b) If IDA concludes that the party that filed the Request or Petition has not provided all required information, IDA will not accept it for filing. In that case, IDA will notify the party filing the Request or Petition as to the additional information that it must provide before IDA will accept it for filing. If IDA concludes that the Request or Petition plainly lacks merit, IDA will dismiss it.
- (c) If IDA concludes that the party that filed the Request or Petition has provided all required information, and that the Request or Petition does not plainly lack merit, IDA will notify the party filing the Request or Petition of the date on which IDA accepts the filing.
- (d) At the time it conducts its preliminary review, IDA will consider any request for confidential treatment made by the party filing the Request or Petition. The party must comply with the procedures and IDA will assess the request in the manner as specified in Sub-section 11.7 of the Code.

4.2 Procedures to Obtain Additional Information

Once IDA has accepted the filing, it will seek to obtain additional information.

- (a) IDA generally will request public comment. Except to the extent that it includes confidential information, IDA will make public the Request or Petition and any comments filed.
- (b) IDA may request the party filing the Request or Petition to provide additional information at any time during the review process.
- (c) IDA may request other Licensees, suppliers or End Users to provide inputs, statistical data or any other relevant information that are necessary for IDA's assessment.
- (d) Where appropriate, IDA may also conduct confidential interviews with Licensees, suppliers and End Users.

4.3 Preliminary Decision

Prior to issuing its final decision, IDA will generally issue a draft or preliminary decision, and seek further public comments.

4.4 Timing

IDA will seek to issue its preliminary and final decision within 90 days from the close of the public consultation. Where appropriate, IDA may extend the time by which IDA will issue its preliminary or final decision by providing a written public notice before the end of each 90-day period.

4.5 Conditions

At the time IDA grants a Request or Petition, it may impose any condition or safeguard necessary to protect End Users or promote and preserve effective competition among Licensees.

5. REVIEW OF IDA'S DECISION

Any Licensee that is aggrieved by a decision rendered by IDA may seek reconsideration of IDA's decision, or may appeal to the Minister, pursuant to the procedures specified in Sub-section 11.9 of the Code.