REACH LTD.

(on behalf of Reach International Telecom (Singapore) Pte Limited

Company Registration Number 199605253M)

SUBMISSION IN RESPONSE TO IDA'S PUBLIC CONSULTATION

PROPOSED ADVISORY GUIDELINES GOVERNING (I) PETITIONS FOR RECLASSIFICATION AND REQUESTS FOR EXEMPTION AND (II) ABUSE OF DOMINANT POSITION, UNFAIR METHODS OF COMPETITION AND AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION UNDER THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES 2005

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EXECUTIVE SUMMARY

- REACH is pleased that IDA has responded to industry concerns by issuing Code Guidelines clarifying the Code.
- However, it is essential that the Code Guidelines effectively provide guidance and industry certainty, through detailed explanations of how the Code will be applied. Mere repetition or abbreviation of Code provisions does not achieve this.
- REACH believes that IDA could readily expand the detail in the current draft Code Guidelines by reference to overseas precedent. It is alarming that the current versions have no such reference given how new competition law is to Singapore.
- While IDA may not wish to bind itself, it should as a minimum express in the Code Guidelines an intention to follow the Code Guidelines to the extent possible. Where it needs to deviate in order to make an appropriate decision, IDA should commit in the Code Guidelines to providing reasons.
- In terms of market definition issues, the Reclassification and Exemption Guidelines ("**REG**") simply require SingTel to provide verifiable data on market definition and basis when they should elaborate the sort of information that this entails.
- REACH considers that the discussion of market definition in the REG lacks analytical rigour. For example, IDA should expand when it intends to use various market definition approaches and should also clarify that it will apply the requirement for real substitutability rather than just similarity of products.
- The REG should recognise that even where SingTel only offers a retail product, which other Licensees have to accept, there may still be a wholesale market subject to different competitive conditions.
- Similarity of competitive conditions does not put all services in the same market. It just means that the assessment of each market would lead to a similar result, such that the IDA's finding would apply across a broader market.
- IDA should elaborate in the REG how it will treat new services that may be affected by an exemption. In other words, there should be guidance as to which market a new service will be 'defined into'.

- In terms of dominance assessment, IDA should not overly focus on a theoretical potential for entry as showing entry barriers are low such that facilities can be replicated. That new entrants have not in fact built networks in Singapore indicates that it is not easy to replicate facilities in the Singapore context.

- The REG also requires fine-tuning in terms of the discussion of market shares, including the treatment of company group shares, the significance of shares below or well above IDA's threshold, and the need to check IDA estimates against licensee information.

- REACH believes that the REG reference to self-supply is inadequate in that it is just a reference, with no elaboration of IDA's understanding that self-supply should be part of a market share calculation.

- REACH is concerned to find no mention of vertical integration and ability to leverage across markets as relevant to assessing a dominant position.

- IDA should also consider including other dominance criteria and further explanations of criteria from other benchmark jurisdictions.

- IDA should set out its requirements for market trend information, including that price trends must be shown in a representative fashion eg. in terms of service types and over time. In this regard, the REG should make clear that price decreases must be sufficient and IDA must have regard to factors other than competition in Singapore that may have driven down prices.

- REACH is pleased to see the REG includes evidence of prior anti-competitive conduct as indicative of a dominant position. We would like to see this point further clarified.

- The REG should also indicate how IDA will deal with collective dominance.

- In terms of exemption from obligations, the REG should go through each Dominant Licensee obligation and discuss what factors would tend to indicate the obligation is or is not necessary. The test for exemption is not simply that a licensee is no longer dominant as is the case for reclassification.

- IDA should provide greater detail on the sort of pro-competitive benefits it will treat as relevant to an exemption request and the weight given to each.

- The IDA should strengthen its current statements in the REG and provide that, in most cases, it will retain the application of *ex post* Dominant Licensee obligations even if rolling back *ex ante* requirements.

- For clarity, REACH believes that the REG should list out the provisions from which SingTel may seek exemption and those which would no longer apply if SingTel was reclassified as non-dominant. Further, IDA should discuss the degree of seriousness with which it will treat exemption requests for various types of obligations. The REG should also clarify the inter-relationship between various provisions such as where an exemption may be granted for *ex ante* conduct that may also be caught by *ex post* provisions.

- In terms of process, the REG should clarify that IDA will reject exemption requests that do not contain verifiable data, for example, they adopt unreasonably broad market definitions. IDA should also discourage rather than encourage broad or overly narrow applications.

- The REG must clarify that public consultations must be held in relation to exemption and reclassification requests in accordance with the Code.

- Verifiable data provided in support of an application should generally be available for public comment and IDA should put a heavy onus on SingTel to prove that data is confidential.

- REACH is concerned that the REG appear supportive of allowing exemptions covering a narrow scope of service or exemptions covering a limited range of obligations, without clarifying that it will not allow SingTel to abuse this approach with creeping requests.

- The REG should mention IDA's approach to date that it will not review a market in which an exemption request has been rejected (in whole or in part) before a certain period of time. The REG should clarify that IDA will not look kindly on SingTel requests submitted during this period.

- The REG should clarify the different requirements for reclassification as compared to exemptions.

- The REG should provide that IDA will be cautious in granting exemptions subject to conditions. Where it is not proven that a market is effectively competitive, the IDA approach should generally be to reject the request rather than grant it subject to conditions.

- In terms of the Telecommunications Competition Guidelines ("**TCG**"), REACH submits that the test for Unreasonably Restrict Competition ("**URC**") requires further clarification.

- The TCG also needs to more clearly address conduct that is likely to URC.

- The TCG should clarify how IDA will treat a Dominant Licensee classification made on the basis of Significant Market Power ("**SMP**"), when determining SMP under section 8 of the Code.

- The TCG should emphasise that tariff approval does not evidence pro-competitive pricing.

- The discussion of predatory pricing in the TCG requires clarification, particularly in terms of the application of the AIC cost standard.

- Further explanations are needed in relation to price squeeze guidelines and IDA should also include discussion of important tests used elsewhere such as the imputation test.

- The TCG comments on cross-subsidisation need to be amended. One example is they need to talk in terms of services not subject to effective competition being used to cross-subsidise services subject to a "greater degree of competition", rather than just services that are effectively competitive.

- The IDA needs to expand its guidance on discrimination to provide detail on conduct that has the potential to be anti-competitive such as refusals to supply, discounts and discrimination between customers.

- The test for predatory network alteration should be simplified.

- Further clarification of anti-competitive preferences is required.

- A wide range of conduct may be caught as an abuse of dominance, not just the examples of practices that are set out in the Code. REACH submits that this point should be further elaborated in the TCG and that IDA should give some further examples of abuses that it may consider.

- In relation to anti-competitive agreements, IDA should provide much greater detail and more practical examples in the TCG of agreements typically found in telecommunications market that do not raise competition concerns.

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STATEMENT OF INTEREST

Reach Ltd. ("**REACH**") provides this submission in response to IDA's Public Consultation Document *Proposed Advisory Guidelines Governing (i) Petitions for Reclassification and Requests for Exemption And (ii) Abuse Of Dominant Position, Unfair Methods Of Competition And Agreements Involving Licensees That Unreasonably Restrict Competition Under The Code Of Practice For Competition In The Provision Of Telecommunications Services 2005* ("**Code Guidelines Consultation**"). This submission should be read with regard to REACH's comments in relation to IDA's earlier consultations on the *Code of Practice For Competition in the Provision of Telecommunications Services 2005* ("**Code")** itself, and also the various REACH submissions in relation to SingTel requests for exemption from Dominant Licensee obligations under the previous Code.

Our comments are made on behalf of our subsidiary, Reach International Telecom (Singapore) Pte Ltd. This entity is the holder of a Facilities Based Operator Licence ("**FBO**") in Singapore under which it supplies a broad range of products to other operators. Aside from an overarching interest in Singapore being a competitive telecommunications hub, REACH therefore has a particular interest in the Code Guidelines Consultation as a new entrant endeavouring to compete against the key Dominant Licensee, SingTel. REACH also has a particular interest as a wholesale acquirer of various SingTel services.

In this submission, we provide comments on both draft documents attached to the Code Guidelines Consultation:

- *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 Telecommunications Services 2005*, with the short title, *Reclassification and Exemption Guidelines* ("**REG**")

- *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 Telecommunications Services 2005*, with the short title, *Telecom Competition Guidelines* ("**TCG**")

(collectively, "**Code Guidelines**").

PART A GENERAL COMMENTS

As a matter of terminology, we note at the outset that to avoid repetition we have largely combined comments on services and facilities, such that references to "services" should be read as "services and facilities" where appropriate under the Code and Code Guidelines.

Code Guidelines should provide greater clarity through detail

In the Code Guidelines Consultation, IDA has said that the Code Guidelines are intended to provide additional detail to the Code on both process and analytical approach. REACH finds that Code Guidelines contain very limited detail on both fronts and submits that IDA should include a lot more detail in its final versions.

In some instances, it is very difficult to see how the Code Guidelines add to the Code (and in fact seem to abbreviate rather than enhance the guidance). We refer for example to REG provisions on reclassification, and also the very important area of SingTel's onus of proof and requirement to provide verifiable data.

We believe the Code Guidelines as proposed are too generic, not telecommunications specific enough (as they should be) and do not provide sufficient or accurate guidance to industry as to enable licensees to be reasonably certain about what behaviour or factual scenarios will and will not satisfy the salient tests.

Code Guidelines should refer to international precedent

REACH is surprised and somewhat alarmed that there is no reference to overseas precedent in the Code Guidelines. While the provisions of the Code might be somewhat different to other legislation, the general principles of competition analysis should be the same. It is particularly important where competition law is so new to Singapore, that reliance be placed on international experience. IDA should have regard to the whole range of material in this area, including guidelines prepared for a purpose similar to the Code Guidelines. As examples, we refer to:

- *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*, (2002/C 165/03) ("**EU Guidelines**")
- *Oftel's market review guidelines: criteria for the assessment of significant market power*, 2002 ("**UK Guidelines**")
- *Draft Telecommunications Authority Guidelines: Anti-Competition Conduct in Hong Kong Telecommunications Markets*, February 2004 ("**Draft HK Guidelines**")
- *Anti-competitive conduct in the telecommunications markets: Information Paper*, 1999 ("**ACCC Guidelines**")
- *Bundling in Telecommunications Markets: An ACCC Information Paper*, August 2003 ("**ACCC Bundling Guidelines**").

REACH observes that equivalent guidelines in other jurisdictions refer to overseas precedent, even in countries like Malaysia which tend to present themselves as having a 'unique' approach.

The Draft HK Guidelines also stress the importance of international precedent.[1] Throughout the Draft HK Guidelines, there are also numerous references to international precedent. Yet the IDA's proposed guidelines do not contain any.

We are sure the IDA has had regard to best practice. It would be appropriate to understand from the Code Guidelines which international jurisdictions principles have been taken from and which jurisdictions IDA may rely upon when making decisions.

IDA's application of Code Guidelines must be transparent

We refer to REG 1.3 and TCG 1.2.

IDA provides that the Code Guidelines are advisory and do not impose any binding legal obligation on IDA. We understand that, unlike certain other jurisdictions, Singapore legislation does not require IDA to issue Code guidelines nor make their application binding. However, given that IDA has decided to issue guidelines on the basis of providing industry certainty and regulatory transparency, IDA should express some commitment to these objectives. While IDA may not wish to bind itself, it should as a minimum express in the Code Guidelines an intention to follow the Code Guidelines to the extent possible. Where it needs to deviate in order to make an appropriate decision, IDA should commit in the Code Guidelines to providing reasons why it needs to do so and guidance as to the precedent value (or not) of the deviation.

In the UK, Oftel previously took the approach that while the EC Guidelines were not binding on it, since they were so important, any deviations from them would be explained.[2] In Hong Kong, the TA is required to take this approach.[3]

[1] Draft HK Guidelines, para 1.5.
[2] UK Guidelines, para 1.11.
[3] Section 6A(3)(b)(ii) of the *Telecommunications Ordinance* (Cap. 106).

PART B RECLASSIFICATION AND EXEMPTION GUIDELINES

REACH is pleased to see IDA issuing guidelines on the reclassification and exemption process for Dominant Licensees. This has been an area of some confusion to date. While we are supportive of the proposed REG, we believe that significant improvements are necessary to ensure that the REG provide sufficient industry certainty and are in line with best practice.

1. MARKET DEFINITION

Verifiable data on market definition should be specified

We refer to REG 2.2.2(b)(i).

The REG simply require SingTel to provide verifiable data on market definition and basis, without elaborating the sort of information that this entails. IDA should require SingTel to provide information of the kind it intends to analyse under REG 2.3 ie. on matters such as functionality, characteristics and customer base. IDA should also require SingTel to provide evidence of past consumer responses to price changes ie. whether they have shifted products. This is the kind of evidence that other regulators such as the European Commission view as important.[4] Factors such as switching costs are also relevant and may dictate that products should not be included in the same market.[5] REACH submits that IDA should specify this sort of information as verifiable data SingTel must provide on market definition.

Market definition approach unclear

We refer to REG 2.4.1.

REACH considers that the discussion of market definition in the REG lacks analytical rigour. For example, IDA simply says it "may" apply the SSNIP test but that it "may" also consider practical aspects such as similar functionality. Guidelines in other jurisdictions as well as expert commentaries often refer to when it may be appropriate to use a SSNIP test and when a functional approach may be more suited. For example, a SSNIP test may not work where the price of a service is regulated.

REACH submits that IDA should clarify that it "will" use one of the standard market definition approaches. It should flesh out when it is likely to use either or both and how. For example in its ICS Decision, IDA stated (para 29(a)(i)):

> "*In some cases, IDA may conduct the SSNIP test by gathering and assessing specific evidence regarding consumer conduct. However, consistent with practices in other jurisdictions, in most cases IDA will use the SSNIP test as a more general analytic framework.*"

The REG should also explain how IDA will practically assess whether a service is a substitute, including detail as to the degree of substitutability, what evidence it will rely on and what weight it will give. For example, in the ICS Decision, SingTel had claimed to give evidence that IMDS and IPLC services were in the same market, but IDA relied on other evidence, in the form of IDA interviews with end users, to find that IPLCs were not a reasonable substitute for IMDS. IDA must

[4] EC Guidelines, para 49.
[5] EC Guidelines, para 50. Similar evidence is also referred to in the Draft HK Guidelines, para 4.19.

make clear that substitutability is not simply determined by comparable functionality – also relevant are matters such as quality of service, cost and interoperability.

We also query why IDA has only referred to demand-side substitutability and not supply-side in the context of market definition. Both aspects are generally considered in other jurisdictions. We note, however, in the context of supply substitutability, that this must be a real possibility: "*Mere hypothetical supply-side substitutability is not sufficient for the purposes of market definition*."[6]

As an overall comment, the REG should include more detail on market definition, first detailing its assessment of product markets, then detailing how it will consequently assess geographic markets.

Wholesale markets may exist even where SingTel only offers retail

We refer to REG 2.4.1(c).

REACH continues to be concerned at IDA's reluctance to recognise separate wholesale and retail markets except where SingTel offers a special wholesale product. The REG should recognise that even where SingTel only offers a retail product, which other Licensees have to accept, there may still be a wholesale market subject to different competitive conditions because the relevant product is so critical to other Licensees or they need to use it in a different way from end users. There may also be fewer entities able to supply properly at the wholesale level as distinct from retail. We use as an example LLCs, prior to IDA intervention in the market.

This issue of markets existing even without a product being offered was considered by the High Court of Australia in the leading Australian case of *Queensland Wire Industries v BHP*. BHP argued that there was no "market" for the relevant product because BHP didn't offer it for sale. Deane J said, *obiter*:

> *"While actual competition must exist and be assessed in the context of a market, a market can exist if there be the potential for close competition even though none in fact exists. A market will continue to exist even though dealings in it be temporarily dormant or suspended. Indeed, for the purposes of the Act, a market may exist for particular existing goods at a particular level if there exists a demand for (and the potential for competition between traders in) such goods at that level, notwithstanding that there is no supplier of, nor trade in, those goods at a given time - because, for example, one party is unwilling to enter any transaction at the price or on the conditions set by the other."*[7]

Similar competitive conditions do not define markets

We refer to REG 2.4.1(d), and also 2.1(d).

IDA should more clearly differentiate between market definition and market assessment issues. Similar competitive conditions do not result in services being in the same market. It is still necessary to use a narrower market definition as a tool to find in the first place that competitive conditions are similar. The similarity of competitive conditions would not put all services in the

[6] EC Guidelines, para 52.
[7] [1989] HCA 6 para 7, per Deane J.

same market. It just means that the assessment of each market would lead to a similar result, such that the IDA's finding would apply across a broader market.

We believe that IDA should clarify this point in the REG using the example of route markets for IPLCs in its ICS Decision. Key here is the point that although IDA as a practical matter may have chosen not to use a technically correct narrow market definition in a given case, it may still do so in the future where necessary to adequately assess an exemption request (para 57). Also, in deciding not to use a narrow market definition, IDA still went through the process of assessing narrow markets to determine the level of competition (eg. para 93(b)).

Where a broad market definition is taken on the basis of similar competitive conditions, REACH supports the IDA approach in the past of erring on the side of caution and finding SingTel dominant across these broad markets. A broad market definition makes sense when used as a tool to stop abuse of dominance in related markets where they are all largely subject to the same lack of competition. It would be manifestly wrong to go the other way and apply a broad market definition to give SingTel a blanket exemption where there is only limited competition in some of the more narrowly defined markets. Where exemption is to be granted, a more rigorous approach to market definition should be taken to ensure that all markets are really effectively competitive.

We believe that IDA should also refer to this approach in the REG, using the example of route markets for IPLCs in its ICS Decision.

Inclusion of new services in market should be addressed

The REG are silent on how IDA will treat new services SingTel claims are covered by an exemption.

IDA should elaborate in the REG how it will treat new services that may be affected by an exemption. In other words, there should be guidance as to which market a new service will be 'defined into'. In IDA's ICS Decision, SingTel is required to approach IDA before offering new services so that IDA can determine which market the service falls within. We submit that this approach should be spelled out in the REG. REACH trusts that IDA will allow for industry comment if the classification could be contentious. Although SingTel may argue commercial sensitivity, it is important that IDA gets balanced information and that industry has a chance to comment on which services get exempted from Dominant Licensee obligations, as it does with existing services listed in an exemption request.

We note that in IDA's ICS Decision (para 146), IDA will find that a new product should be treated as in the exempted market if the evidence demonstrates that it is a reasonable substitute for any existing service or product offering in that market. REACH submits that IDA must undertake a proper market analysis and must ensure that any new service does not alter the boundaries of previously defined markets. As an example, we query how IDA would deal with the situation of SingTel introducing a new wholesale service where IDA had previously defined a market to include both wholesale and retail because there was no distinct wholesale service at the time. The new service could be a substitute for licensees. However, it might not be appropriate to treat it in the same exempt market as the competitive conditions for wholesale would be different from retail if this was the only wholesale version of the service available.

The REG should also stress that IDA will not allow SingTel to evade Dominant Licensee obligations by 'dressing up' a dominated service to look like an exempt service. This is a real danger and is just one reason why IDA should be cautious in finding SingTel non-dominant in a market closely related to a dominated market, without full consultation on matters such as appropriate market definition.

2. DOMINANCE ASSESSMENT

Verifiable data on market power should be specified

We refer to REG 2.2.2.

IDA has only specified in broad terms the sort of verifiable data SingTel must provide to disprove its market power. For example REG 2.2.2 only refers to providing data on "barriers to entry", without providing further details. Yet in REG 2.4.2 IDA has included somewhat more detail of the matters it will consider when assessing market power. REACH submits that, at a minimum, REG 2.2.2 should list the same matters as REG 2.4.2 with a similar level of detail. However, ideally, the list of verifiable data required for IDA to assess matters should be even more detailed than the items of analysis the data relates to.

Lack of new build indicates barrier to entry in Singapore context

We refer to REG 2.3.

IDA should not overly focus on a theoretical potential for entry as showing entry barriers are low such that facilities can be replicated. That new entrants have not in fact built networks in Singapore indicates that it is not easy to replicate facilities, barriers to entry are high and that this entrenches dominance. Other factors that may rebut this reasonable assumption do not exist in the local Singapore market.[8]

Market share guidelines need fine-tuning

We refer to REG 2.4.2(a).

We are concerned though that IDA continues to give SingTel leeway to file frivolous exemption requests by failing to set an absolute maximum market share above which it will not consider an exemption request.

REACH is also concerned that the discussion in the Code Guidelines Consultation leaves an impression that a market share less than IDA's threshold indicates an acceptable amount of competition. IDA has recognised that a market share of less than IDA's threshold does not necessarily equate to a competitive market in its ICS Decision at para 38:

> "*Conversely, IDA may find that a Dominant Licensee whose market share is less than 40 percent retains significant market power where there is evidence that the Dominant Licensee has the ability and incentive to restrict competition in the market under review or if the evidence shows that the Dominant Licensee has consistently priced its services above competitive levels*."

[8] In other jurisdictions, factors may exist that point to a different conclusion eg. where mandated prices are so low in the opinion of new entrants that they have been disincented from building. This is definitely not the case in Singapore.

This is the approach taken in the UK as per the extensive quote from the UK Guidelines below, where we discuss other dominance indicia that should be included in the REG.

REACH believes that the REG should also be clarified in relation to market share held by related companies. We point to the Draft HK Guidelines' express inclusion of the market share held by related entities and suggests that the REG should contain a similar statement:[9]

> "*When calculating a licensee's share of the relevant telecommunications market, the TA will take into account the market share of entities:*
>
> - *over which the licensee exercises control, directly or indirectly; and*
> - *which exercise control over it, directly or indirectly*."

REACH would like to see a further enhancement to the discussion of market share in terms of a reference to the ability of licensees to request IDA to provide the market share it is attributing to them in trying to make a decision on dominance. IDA has done so in the past and we believe this is a useful way to check market shares where IDA does not want to disclose more widely the figures it has derived from industry information. Mention should be made in the REG so all licensees are fully aware that this opportunity exists.

Self-supply reference needs clarification

We refer to REG 2.4.2(a)(i).

REACH welcomes the REG reference to IDA including self-supply in its assessment of market share. We agree that in some markets where there is significant self-supply, capacity may be the most useful measure of market share given the difficulty of assigning revenue to self-supply.

However, REACH believes that the REG reference to self-supply is inadequate in that it is just a reference, with no elaboration of IDA's understanding that self-supply should be part of a market share calculation. We believe that IDA should expand the REG to include statements similar to those in its ICS Decision at para 33:

> "*In general, including capacity that a Licensee provides to itself, which is a substitute for the capacity provided to third parties, is necessary to assess fully the ability of the Licensee to exercise market power. Excluding such self-provide [sic] capacity could result in under-estimating a Licensee's competitive significance. For example, if a firm supplies 90 percent of the total capacity in a market to a single customer, the firm would almost certainly have significant market power. If the firm subsequently acquires the customer, it would still be appropriate to consider the firm's provision of capacity to its new affiliate in assessing the firm's market power. Similarly, if a firm provides capacity to itself as a result of vertical integration, rather than as a result of an acquisition, such capacity should be considered in assessing the firm's market power.*"

IDA is aware of our view in relation to the fact that the self-supplied input need not be exactly the same as the input supplied to others as was the issue in the ITS Decision. Given the contentious nature of this point, we would not advocate reference in the REG. In any event, we believe that

[9] Draft HK Guidelines, para 6.10.

dominance in an upstream market, as a result of high market share from self-supply, is likely to be leveraged into a downstream market with the same result that the market share should contribute to a finding of dominance.

Leverage, vertical integration must be addressed

We refer to REG 2.4.2(b).

REACH is concerned to find no mention of vertical integration and ability to leverage across markets as relevant to assessing a dominant position. We submit that the REG must be amended to discuss the indicia of dominance in more detail, using international best practice as a starting point. Vertical integration is one that must be included. While vertical integration is not of itself evidence of dominance or that abuse of dominance will occur, it is often relevant to assessing whether a licensee has a dominant position in the first place. Depending on other factors such as regulatory controls, vertical integration may also assist a party to engage in abuses and make it difficult for a regulator to catch such conduct. We submit that this is the case in Singapore markets where measures to stop this either do not exist or are not strong enough.

REACH notes that vertical integration is included as part of dominance assessments in other jurisdictions. Cross-market leverage is specifically mentioned in European legislation.[10] As another example, the Malaysian regulator has said in its equivalent guidelines that a party need not actually be dominating a market, it just needs to be able to dominate it, for example through leveraging its power in another market:[11]

> "*An example of this might be where a licensee has a monopoly in an important input market to a communications market, and has the potential to exercise its monopoly power in that input market to take a dominant position in the communications market by virtue of vertical integration of its operations in both markets. In this case, the licensee might be judged to be in a dominant position in the communications market, irrespective of its actual market share or actual independence of action in that market*."

In its ICS Decision, IDA has recognised the relevance of cross-market leverage. In deciding to retain the application of *ex post* rules to IMDS, IDA stated (para 5) "*although competition has developed in the IMDS market, SingTel retains the potential to leverage on its dominance in the Local Leased Circuit ("LLC") market to distort competition in this downstream market*". Leverage from the LLC market was also relevant to finding SingTel dominant in the Terrestrial IPLC market. In relation to Backhaul, IDA also noted the significance of SingTel's ability to leverage its control of cable landing stations and connection services.

At para 36(d) of the ICS Decision, IDA lists vertical integration as one of the factors impacting the ability of a Dominant Licensee to act anti-competitively. The REG list is clearly presented in the same way as the ICS Decision yet this reference has been omitted. This should be rectified in the final REG.

[10] Article 14(3) of the framework Directive.
[11] Malaysian Communications and Multimedia Commission, *Guideline on Dominant Position in a Communications Market*, RG/DP/1/00(1), para 7.1(c).

REG omit a number of other dominance indicia as well as explanations

We refer to REG 2.4.2(b) and (c).

Para 36 of the ICS Decision lists other indicia of dominance that should be copied into the REG list, including supply substitutability.

IDA should also consider including dominance criteria and further explanations of criteria from other benchmark jurisdictions. We refer, for example, to the criteria set out by the European Commission, which have also been explained and expanded on by Oftel (now used by Ofcom).[12] To quote from Oftel:

"Table 1: Single dominance criteria listed in EC Guidelines

Criterion	***Implication for assessment of market power***
Market shares	*Market shares are not conclusive on their own. Suppliers with market shares below 25% are not likely to enjoy single dominance. According to case law a market share over 50% would lead to a presumption of dominance. In the European Commission's decision-making practice, single dominance concerns normally arise where an undertaking has at least a 40% market share. However, there may still be concerns about dominance where an undertaking has less than 40%, according to the size of that undertaking's market share relative to its competitors.* *The persistence of a high market share over time is an important factor. The ease with which new entrants might erode that market share and the relative shares of competitors are also relevant. A declining market share may indicate rising competition, but this does not preclude a finding of dominance.* *Where markets are emergent or growing more quickly, high market shares are less indicative of market power than in more mature or slow-growth markets. Fluctuations in market shares may also indicate a lack of market power.* *Market shares may be assessed by volume or value of sales. The appropriate measure will vary between markets, although it is likely that the most appropriate measures will be volume for bulk products (eg wholesale conveyance minutes), and value for differentiated (branded) products (eg retail mobile products). Where a firm has a higher share by value than by volume it*

[12] *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*, (2002/C 165/03); *Oftel's market review guidelines: criteria for the assessment of significant market power*, 2002.

	may indicate that it can price above rivals due to market power.
Overall size of the undertaking	*This refers to the potential advantages, and the sustainability of those advantages, that may arise from the large size of an undertaking relative to its competitors. Areas where such advantages may exist include economies of scale (see also separate criterion below) ; finance; purchasing; production capacities; and distribution and marketing. Such advantages may accrue in part due to other activities of the undertaking outside ~~of~~ the market under consideration.*
Control of infrastructure not easily duplicated	*One example is control/ownership of a large network that a competitor would find costly and time-consuming to build. Such control may represent a significant barrier to entry.*
Technological advantages or superiority	*Such advantages may represent a barrier to entry as well as an advantage over existing competitors.*
Absence of or low countervailing buying power	*The existence of customers with a strong negotiating position, which is exercised to produce a significant impact on competition, will tend to restrict the ability of providers to act independently of their customers.* *Such power is more likely where a customer accounts for a large proportion of the producer's total output, is well-informed about alternative sources of supply, is able to switch to other suppliers readily at little cost to itself, and where it may even be able to begin producing the relevant product itself.*
Easy or privileged access to capital markets/financial resources	*Such access may represent a barrier to entry as well as an advantage over existing competitors.*
Product/services diversification (eg bundled products or services)	*Bundling may support dominance by foreclosing the market for part of the bundle to other suppliers, even where the different elements of the bundle are supplied separately. By bundling a service in the supply of which it is dominant with that of another service for which the market is at least potentially competitive, an operator with SMP can exclude rivals and so lever its dominance from the former to the latter market.*

Economies of scale	*Economies of scale arise when increasing production causes average costs to fall. Economies of scale are common where the production process involves high fixed costs. One other way in which increasing scale can lower unit costs is by allowing greater specialisation, and in turn higher productivity.* *Economies of scale can act as a barrier to entry as well as an advantage over existing competitors.*
Economies of scope	*Economies of scope exist where average costs for one product are lower as a result of it being produced jointly with another product by the same firm. Cost savings may be made where common processes are used in production.* *Economies of scope are common where networks exist, as the capacity of the network can be shared across multiple products. Economies of scope can be a barrier to entry as well as an advantage over existing competitors.*
Vertical integration	*Vertical integration can promote dominance in two ways* • *by making new market entry harder due to control of upstream or downstream markets* • *through the potential ability to lever market power into upstream or downstream markets, thereby adversely affecting competition*
A highly developed distribution and sales network	*Well-developed distribution systems are costly to replicate and maintain, and may even be incapable of duplication. They may represent a barrier to entry as well as an advantage over existing competitors.*
Absence of potential competition	*This refers to the prospect of new competitors entering the market within the timeframe considered by the review. The record of past entry is one factor that can be looked at, as well as potential barriers to entry such as those under 'Ease of market entry' below.*
Barriers to expansion	*There may be more active competition where there are lower barriers to market growth and expansion. However, the higher the barriers to entry into the market, the less significant the absence of barriers to expansion will be in assessing competition, because with high barriers to entry competition is*

	less likely to extend beyond the existing market players.
Ease of market entry	*The threat of potential entry may prevent incumbent firms from raising prices above competitive levels. However, if there are significant barriers to entry, this threat may be weak or absent. Incumbent operators may then be able to raise prices and make persistent excess profits without attracting additional competition that would reduce them again.* *The impact of these barriers is likely to be greater where the market is growing slowly and is initially dominated by one large supplier, as entrants will be able to grow only by attracting customers from the dominant firm. However, barriers to entry may become less relevant where markets are associated with ongoing technological change and innovation.* *Structural barriers plus any evidence of both potential and actual entry are relevant to the assessment, although lack of entry may also be a rational decision given price signals and potential profits. For example, not enough customers may be willing to switch given the level of potential savings available. Reviews should consider whether there is evidence that new competitors might have a significant impact within the time frame considered by the review.* *There are two broad categories of barriers to entry - strategic and absolute. Absolute barriers exist where firms own, have access to, or are granted privileged use of important assets or resources which are not similarly accessible to potential entrants. Strategic barriers arise due to the strategic behaviour of existing market players, for example through pricing behaviour (such as predatory pricing, price-squeezing, cross-subsidies and price discrimination) or through non-price behaviour (such as increased investment, promotion and distribution). Whilst structural and behavioural aspects can be interwoven, making the absolute-strategic distinction may better indicate the appropriate remedies to apply to address dominance.* *Sunk costs can be an important barrier to entry. These are costs which are needed to enter an industry but which cannot be recovered on exit – for example investment to set up a production plant or to build a network. Existing firms, which only have to cover ongoing costs, could set prices too low to allow entrants to both recover sunk costs and compete.* *Other potential barriers to entry are cited among the criteria*

	listed above. Further examples are: patents and other intellectual property rights; legislative or other regulatory requirements; brand image (including high advertising); and distribution agreements.

Table 3: Dominance criteria further to those in the EC Guidelines

Criterion	***Implication for assessment of market power***
Excess pricing and profitability	*The ability to price at a level that keeps profits persistently and significantly above the competitive level is an important indicator of market power. The EC Guidelines (paragraph 73) refer to the importance, when assessing market power on an ex-ante basis, of considering the power of undertakings to raise prices without incurring a significant loss of sales or revenue.* *In a competitive market, individual firms should not be able to persistently raise prices above costs and sustain excess profits. As costs fall, prices should be expected to fall too if competition is effective.* *Factors that may explain excess profits in the short term, such as greater innovation and efficiency, or unexpected changes in demand, should however be considered in interpreting high profit figures. Conversely, low profits may be more an indicator of the inefficiency of the firm than of effective competition.*
Lack of active competition on non-price factors	*Non-price competition refers to differentiation between products and providers. Differentiation may be both vertical (differences in quality) and horizontal (differences in terms of variety). The impact of differentiation will be greater to the extent that customers fully perceive the differences that providers are promoting.* *More differentiation may be expected where customer priorities are more oriented to quality and features of their service relative to low prices.* *In practice, the practical difficulties of monitoring retail offerings in detail may limit the analysis on this criterion to a very general level.*
Barriers to switching	*Limited customer ability to switch between providers increases the extent to which providers can act independently of their existing*

	customers. *Barriers might exist on the demand side or be maintained by suppliers. The former include the cost and practical difficulty of switching relative to the potential benefits, and customers' awareness of both their ability to switch and the procedures involved. Other potential barriers are the perceived quality of service and reputation of alternative suppliers, and customers' reluctance to take risks with alternative providers.*
Customers' ability to access & use information	*Limited customer access to and use of reliable information on prices and other aspects of the services can dampen competition by reducing the degree to which customers act upon differences between providers. As a result, providers are better able to act independently of customers. However, it is possible for active behaviour by relatively more aware customer segments to produce competitive effects disproportionate to the number of customers involved.* *This criterion is distinct from 'Barriers to switching' in that switching does not cover first time purchasers of a product. These customers may be more numerous than switchers at certain stages of a product's life cycle.*

….

Other indicators

3.1 In addition to the criteria described above for assessing effective competition, Oftel considers that some other indicators can also provide a valuable input to the market reviews. These indicators would include items such as:

- *benchmarking of the deal received by UK consumers against that received by consumers in similar economies;*
- *consumer satisfaction with service; and*
- *evidence of previous anti-competitive behaviour or collusion.*

3.2 These indicators are not underlying factors influencing the effectiveness of competition, so should not be used to assess whether there is dominance. But they could nonetheless prove useful as factors to consider :

- *when developing an appropriate regulatory response, if there is a finding of dominance;*
- *in deciding on the timing of the next market review; and*

- *as an additional source of information when considering provisional findings of dominance, especially where finely balanced.*

Even the Draft HK Guidelines have more information in them on dominance indicia than the REG, including discussions of sunk costs, economies of scale and scope, network effects, reputational barriers and strategic behaviour.

Evidence of market trends must be representative

We refer to REG 2.4.2 generally and para (c), as well as REG 2.2.2(b)(viii).

IDA should further elaborate the sort of market trend information that must be provided as verifiable data rather than just referring generically to evidence of price and non-price competition. As IDA is aware, SingTel has previously attempted to use data on price and market share decreases to show it is not dominant. However, typically this data has been flawed and not representative of market trends.

IDA should set out its requirements for market trend information, including that price trends must be shown in a representative fashion eg. in terms of service types and over time. In particular, REACH is concerned that SingTel overly relies on list prices that are not actually used in the market place. The REG should require that pricing information must include actual prices and that little weight will be given to list price trends. IDA's ICS Decision recognises some of the limitations of list price information but perhaps gives such data too much weight when all it may really show is that prices have come down, rather than the essential detail of by how much and why.

In this regard, the REG should make clear that price decreases must be sufficient. They must be in line with other services and other jurisdictions. As an example, we refer to the ICS Decision (fn10) in relation to Backhaul where IDA noted that "*SingTel's current backhaul charges, which, in some cases, are about twice as high as its retail LLC rates, reflect a high degree of market power*", given that LLCs provide similar functionality.

IDA should clarify that it will have regard to factors other than competition in Singapore that may have driven down prices for example excess capacity. Also IDA should distinguish between price decreases that simply represent a reduction from previously monopolistic prices and prices that have reached a level of effective competition, for example because they are in line with international best practice pricing.

REACH also submits the REG should refer to other relevant trends such as the financial performance of the Dominant Licensee. To illustrate, the fact that SingTel might outperform the market in terms of growth might indicate its market share is higher than it alleges. Similarly, increasing revenues might counter claims of reducing market share or may indicate pricing above the market.

It is this level of guidance that industry needs from IDA in the REG. IDA should build on comments made to it in the past in relation to Code decisions. By addressing these comments in the REG, IDA will reduce the uncertainty that industry faces in terms of whether IDA is taking into consideration its concerns. Industry will no longer feel compelled to keep repeating the same critical points as it will be confident from the REG that IDA is aware of the issues.

Prior conduct is relevant

We refer to REG 2.4.2(c)(ii).

REACH is pleased to see the REG includes evidence of prior anti-competitive conduct as indicative of a dominant position. We would like to see this point expanded. Para 37 of the ICS Decision clarifies that prior anti-competitive conduct in the market under scrutiny, *or in any similar or related market*, is relevant to assessing whether dominance regulation should be rolled back. This should be reflected in the REG.

Collective dominance should be mentioned

REACH believes there is an industry expectation that the REG will make some mention of how IDA views collective dominance in the Singapore context. This is a topic that receives much attention in other jurisdictions and the IDA should indicate its views in advance of any issues arising in Singapore.

3. DOMINANT LICENSEE OBLIGATIONS

IDA must analyse whether dominance obligations unnecessary

We refer to REG 2.1.

A particular concern REACH has previously raised is that SingTel and IDA do not seem to follow Code requirements for evidence each Dominant Licensee obligation is unnecessary to protect end users and preserve competition in relation to each service. Once again, the REG also fail to emphasise this requirement. REACH submits that the REG should go through each Dominant Licensee obligation and discuss what factors would tend to indicate the obligation is or is not necessary. The test for exemption is not simply that a licensee is no longer dominant as is the case for reclassification.

Pro-competitive benefits should be explained

We refer to REG 2.5.

REACH is concerned that IDA has made a loose reference to the fact that it will consider whether granting an exemption will have any pro-competitive benefits, with only limited illustration of what it means. We submit that IDA should provide greater detail on the sort of benefits it will treat as relevant and the weight given to each. REACH is concerned to ensure that IDA's reference is not wrongly exploited by SingTel.

Retention of ex post rules should be the norm

We refer to REG 2.6.

REACH strongly endorses IDA's statement in the REG that "*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 [ex post] prohibitions is necessary to deter anti-competitive conduct*".

Given the absence of a general competition law backstop for telecommunications, it is particularly important that IDA retain the application of *ex post* competition provisions in the Code even if rolling back *ex ante* regulation such as tariffing. To say that SingTel is not dominant in 'X' market (such that section 8.2 does not apply) in advance of any conduct that may occur means there is no back stop. For example, in the future SingTel may engage in predation where the particular context dictates that a narrower market definition is appropriate. SingTel may have dominance and have acted anti-competitively in this context but because IDA has said that section 8.2 does not apply in advance, there is no way to punish SingTel. At best IDA could only go through a very long-winded process of reclassification. Even then, it could not catch SingTel conduct retrospectively.

In this regard, we stress that IDA should not see reclassification as an adequate backstop if it makes a wrong decision in relation to removing dominance obligations. Aside from being cumbersome, it would give SingTel far too much room to challenge IDA. It is quite possible that the evidence in the future might make a market look more competitive than it is now such that IDA would be hard-pressed to say that SingTel had suddenly 'regained' dominance. This would be the required test, rather than that IDA had simply made a mistake in rolling back dominance obligations because SingTel had been dominant all along.

There can be absolutely no harm to SingTel from IDA retaining the application of section 8.2 of the Code to markets otherwise exempted from *ex ante* dominance regulation. This is the typical approach in other jurisdictions. If SingTel does not engage in predation such as below cost pricing then the section will never affect it, as compared to *ex ante* requirements such as tariff filing. The application of section 8.2 does not stop pro-competitive behaviour such as quick introduction of new services. IDA has recognised this in its ICS Decision (para 106) where it observes "*Retaining Sub-section 8.2 will impose no regulatory obligations on SingTel. Indeed, it will have no impact whatsoever if SingTel does not engage in anti-competitive conduct*."

We believe that IDA should therefore retain its proposed REG 2.6 but further clarify that in most cases it will retain the application of section 8.2 of the Code to services it otherwise proposes to exempt unless the evidence is unequivocal that a market is effectively competitive. IDA should explain that this sets a high threshold. If IDA provides this certainty of approach then industry will not have to keep voicing its concerns about the need for *ex post* regulation in every consultation. Industry would assume that section 8.2 will continue to apply to a Dominant Licensee unless IDA consults with it and provides reasons as to why it should not (eg. as part of a draft decision).

REACH also submits that IDA should further clarify REG 2.6 as per the ICS Decision, para 40 where it states that "*to the extent that a Dominant Licensee retains, or has any reasonable possibility of regaining, Significant Market Power in a market, or using its dominant position in another market to adversely affect competition in the relevant market…*" retaining *ex post* prohibitions may be necessary [emphasis added to show difference from REG].

The TCG 2.1 also provides that "*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*." In line with this, IDA should make sure it retains the application of *ex post* provisions of the Code to Dominant Licensees even if it exempts them from *ex ante* obligations.

Types of Dominant Licensee obligation should be further discussed

We refer to REG 1.1(b).

For clarity, REACH believes that the REG should list out the provisions from which SingTel may seek exemption and those which would no longer apply if SingTel was reclassified as non-dominant. The current draft summary is a little too vague.

Further, IDA should discuss how it will treat the various types of obligations. For example, exemptions will not be granted in relation to the duty to provide IRS and Mandated Wholesale Services in an otherwise exempted market without a specific inquiry on this. IDA will also be cautious in winding back *ex post* provisions.

The REG should also clarify the interrelationship between various provisions. For example, if IDA exempts SingTel from section 4 on the basis that this contains *ex ante* provisions such as tariff filing, how will it treat conduct that could be caught by both section 4 and section 8. For example, SingTel could be exempt from the obligation to provide services on just, reasonable and non-discriminatory terms under section 4 but IDA should still be able to check for anti-competitive discrimination under section 8. Also, SingTel could be exempt from the unbundling obligations of section 4 but bundling could still constitute an abuse of dominance under section 8, particularly in the form of a price squeeze or price predation. IDA should clarify that the sort of *ex ante* obligations it will more likely exempt SingTel from are procedural items such as tariff filing. Other more generic conduct will still be regulated under section 8 unless the market is so effectively competitive that a complete exemption is justifiable.

4. PROCESS

IDA should reject applications that fail to meet Code requirements

We refer to REG 2.1(d).

IDA indicates in this guideline what it will do if proper market information is not provided by a Dominant Licensee. We submit that IDA should include the possibility of rejecting an application if it is inadequate, in line with REG 4.1(b).

We also believe that the REG should be amended as in their current form they would encourage SingTel to submit overly broad exemption requests on the basis that IDA will figure out the market for itself. While this may be the case, the Code still requires SingTel to provide verifiable data on markets. Also, a key difficulty with SingTel defining broad markets that are then redefined by IDA is that industry does not get a proper chance to comment on market definition issues. The initial consultation will be on too wide a market and even if a draft decision is issued with IDA's redefined markets, it may be too late to substantially influence the outcome. In any event, this would be a clumsy approach to consultation and wasteful of resources. It would be far more efficient and effective for IDA to only accept an exemption request if the market definitions proposed by SingTel were reasonable, with regard to any verifiable data provided.

The REG seem to go some way to addressing this concern in REG 2.1(d), which states that "*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*." However, having said that, IDA does not include any consequences should SingTel

fail to do so. It simply provides that it may come up with its own market definition instead. REACH submits that if the REG says SingTel "must" do this, then to give teeth to the requirement, IDA should include an ability to reject an exemption request if it does not agree with an unsubstantiated SingTel market definition.

We also refer to other IDA statements (eg. REG 2.2.2), where it is said that SingTel "should" provide data. The emphasis throughout should be that SingTel "must" prove its case.

REACH also notes that the REG 2.1(d) reference to requiring verifiable data on service similarities should be included in para (e) in relation to facilities.

Public consultation essential

We refer to REG 4.2(a) and 4.3.

REACH submits that these provisions appear inconsistent with the Code in stating that IDA "generally" will request public comment on reclassification and exemption and will "generally" issue a preliminary decision. This should be amended to reflect the Code, which states in section 2.3(c) that "*IDA **will** seek public comments prior to reclassifying a Licensee*" and section 2.5.2 that "*IDA **will** provide an opportunity for public comment before issuing a preliminary decision and a final decision granting or denying the request* [for exemption]". [emphasis added]

Data provided in support of application should be available for comment

We refer to REG 4.

Verifiable data provided in support of an application should be available for public comment. For example, much of the information listed in REG 2.2 is not necessarily confidential. IDA should place a heavy onus on SingTel to prove why information should not be made available to industry to verify (we query whether data is truly 'verifiable' if it is so confidential that it cannot be checked). If information has been provided that has a bearing on IDA's approach, but is too confidential to provide to industry, then IDA should at least list this data by subject so that there is some regulatory accountability and transparency.

We strongly submit that the REG must be much stronger in this area. REACH is particularly concerned that SingTel has to date been able to get away with submitting a basic exemption application without verifiable data and that only this has been put out for consultation. Material subsequently provided escapes the consultation process. This is a loophole that IDA has allowed SingTel to exploit and SingTel will continue to do so unless IDA makes it clear that:

- an application must be complete with verifiable data before going out to public consultation; and
- any verifiable data provided in the course of public consultation and prior to a final decision will also be made available for public comment.

IDA must be wary of creeping exemptions

We refer to REG 2.1(f) and 2.4.

REACH is concerned that the REG appear supportive of allowing exemptions covering a narrow scope of service or exemptions covering a limited range of obligations, without clarifying that it will not allow SingTel to abuse this approach. There is a real risk that SingTel could apply for 'creeping exemptions', similar to the concept of 'creeping acquisitions'. It would be all too easy for IDA to mistakenly think a limited exemption would not harm competition and then find itself down the track facing a situation where, cumulatively, limited exemptions had allowed SingTel to reassert its dominance.

IDA has recognised some of the dangers of allowing creeping or incremental exemptions in its ICS Decision (para 97):

> "…*at the present time, IDA does not intend to define markets, or grant exemptions, on a route-by-route basis. Granting an exemption on certain routes would impose significant burdens on both IDA and SingTel. If IDA were to do so, it would have to impose conditions to ensure that SingTel would not use its market position in the non-exempted routes to impede competition in the exempted routes. For example, IDA might have to require SingTel to: (i) separately offer service on exempted and non-exempted routes; (ii) adopt safeguards to prevent provision of preferential treatment to customers that purchase service on exempted routes, and (iii) prepare separate accounting separation reports for exempted and non-exempted routes*."

REACH submits that the REG should note that IDA will be wary of granting narrow exemptions, given that this may not take account of broader competitive concerns, and may be administratively burdensome.

IDA and competitors need to be clear on the way applications will be treated in advance otherwise the uncertainty will facilitate SingTel attempts to incrementally escape dominance obligations. SingTel must not be allowed to submit *ad hoc* exemption applications with insufficient evidence, with the IDA treating these as minor matters on the basis that only limited services are involved and those services are subject to some competition. IDA must take a holistic approach to SingTel's dominance so that it does not 'salami slice' its way through the exemption process to full non-dominance.

Timeframes for market reviews can be beneficial

In its ICS Decision, IDA has provided a two year period before it will review its decision on several markets. While SingTel can refile an exemption request during this period IDA will take a strict approach:

> "*SingTel retains the right, under the Code, to file another request for exemption applicable to these markets at any time. If SingTel chooses to do so, however, IDA expects that it will provide specific evidence that competitive conditions have changed significantly from those that IDA has found to exist at the present time. IDA will look with disfavour on any request that simply asks IDA to reconsider the findings that it made in its final decision without any verifiable market information.*"

REACH believes that this is a very useful way to discourage SingTel wasting regulator and industry resources by submitting repeat exemption requests every few months. It will also provide an incentive to SingTel to make sure that it only puts in serious exemption requests as otherwise

a failed request may result in a delay before SingTel can refile. We therefore suggest that IDA should mention in the REG that it has used, and will continue to use, this tool where appropriate.

Reclassification versus exemption

We refer to REG 3.2 and REG 3 more generally.

REACH considers that the REG could usefully put more stress on the difference between reclassification and exemption. It should be made clear that if SingTel has dominance in the supply of even one single service or facility in any market, reclassification is inappropriate.

Over-reliance on exemption or reclassification conditions should be avoided

We refer to REG 4.5.

IDA should provide further detail as to the sort of conditions it may impose when exempting or reclassifying a Dominant Licensee. It should also clarify when the imposition of conditions will be more appropriate than simply rejecting the request. Where it is not proven that a market is effectively competitive, the IDA approach should generally be to reject the request rather than grant it subject to conditions. This would be more consistent with Code requirements. The IDA should only use REG 4.5 where there is a compelling reason to grant exemption or reclassification but some safeguards are still necessary. REG 4.5 should not be relied on as a safeguard for granting exemptions or reclassification before market conditions justify.

PART C TELECOM COMPETITION GUIDELINES

1. GENERAL

We refer to TCG 2.2.

While REACH understands that IDA needs to retain regulatory flexibility, we are concerned that this provision over-emphasises flexibility in a document that is intended to increase industry certainty. REACH submits that IDA should emphasise the point that it will follow the TCG to the extent possible but that if it needs to deviate it will consult and provide reasons.

We refer to TCG 2.3 and 3.2(e).

REACH supports IDA's statements that conduct will meet the Unreasonably Restricts Competition ("**URC**") test not only when it is proven to impact end users but also where it deters or precludes efficient companies.

We also are pleased that IDA has given some indication of how the URC test compares to other tests. As we have already commented, we think it would be useful if the IDA explained how the URC test fits with international precedent. However, it is helpful that IDA has at least indicated that it sets a lower threshold to prove an abuse than the SLC test for consolidations. Perhaps the final TCG could flesh out the difference between 'substantial' and 'unreasonable' and 'lessening' and 'restricting so that industry could gain a clearer picture of the evidence required to prove a case of anticompetitive conduct.

We also find that some of the repetition in the TCG creates confusion by varying the way Code requirements are discussed. For example, TCG 2.3 and 3.2(e) both outline what it means to 'unreasonably restrict competition' but do so in different terms, leaving the reader to puzzle through how to align them.

We refer to TCG 3.1.

REACH finds this introduction to a key section of the TCG poorly drafted and thus confusing. We suggest the IDA more closely follow the Code and expand on it.

We refer to TCG 3.2(a).

REACH has some concern that the Code Guidelines tend to summarise the Code and thus detract from it, rather than clarify it. The numerous 'small' instances cumulatively make the Code Guidelines weaker. As an example, in TCG 3.2(a), which is meant to set the stage for the following provisions, IDA has omitted to refer to the fact that conduct "likely" to unreasonably restrict competition is also caught. If the IDA does not want to keep repeating full references, it should have a provision at the outset that states something to the effect that "*references to conduct that unreasonably restricts competition include conduct that is likely to do so as well*." This would be preferable to having some provisions that state the requirements in full, and some that abbreviate them. We note in this regard that in our discussion of the TCG below, REACH references to conduct with an URC effect should also be taken to refer to conduct likely to have this effect.

2. ABUSE OF DOMINANCE

Relevance of Dominance Classification to SMP needs clarification

We refer to TCG 3.2(c) and (d).

These provisions indicate that making a case under section 8.2 of the Code requires a 'finding' that a Dominant Licensee has Significant Market Power ("**SMP**"). The TCG should clarify what weight IDA will give the review it has undertaken in classifying SingTel as dominant (since the classification is based on SingTel having SMP), and the extent to which it needs to make a further 'finding' of SMP

3. ABUSIVE PRACTICES

Tariff approval is not evidence of pro-competitive pricing

We refer to TCG 3.2.1.

REACH supports the IDA clarification that just because a tariff has been approved and allowed to go into effect does not preclude a subsequent investigation and finding that the tariff is anticompetitive. We would suggest the IDA go further and state that the fact the tariff has been approved is not relevant evidence to show a tariff is pro-competitive.

Predatory pricing guidelines need substantial re-examination

We refer to TCG 3.2.1.1.

The IDA should begin the discussion of predatory pricing with a statement that there is no requirement to prove the conduct unreasonably restricts competition if the elements of the offence in the Code are met.

In para (a), IDA has included a requirement that a Dominant Licensee must not sell its service below its cost for a "sustained period". This is not mentioned in the Code. REACH considers that this reference is ambiguous and may create real difficulties with application of the Code, particularly in the case of predatory pricing which is "likely" to unreasonably restrict competition but which is challenged early in the picture. It cannot be the case that IDA intends competitors to endure predatory pricing for a sustained period before they can complain to IDA. But if they do lodge a complaint as soon as they discover SingTel is pricing below cost, how will they prove that SingTel intended to do so for a "sustained period". It would be all too easy for SingTel to argue differently. REACH submits that the TCG should be amended to remove this reference. The key requirement should be any pricing below cost as per TCG 3.2.1.1(b)(i).

We understand that the predatory pricing provisions are not intended to cover random price cuts but the onus should be on SingTel to prove conclusively that it did not intend to continue to predatory price. If IDA retains the provision, it should still amend it to say that it will assume SingTel intended to predatory price for a sustained period unless it can be shown that the SingTel price cut was random and was stopped unrelated to any threatened action under the Code. REACH submits that in any event the TCG should recognise that discounting can also be caught under the general prohibition on an abuse of dominance (a point we discuss further below).

A similar concern arises with para (c), which details how IDA will assess average incremental cost ("**AIC**"). The TCG provides that the relevant increment is the additional volume of service produced by a Dominant Licensee over the period during which it is alleged to have engaged in predatory pricing (a very short run approach). REACH is confused as to how this test can properly be applied where a competitor seeks to stop predatory pricing at an early stage. REACH is also confused how IDA will distinguish what additional volume can be attributed to the predatory pricing conduct as opposed to other sales conditions. The Code only sets an average incremental cost test for predatory pricing and does not refer to the relevant timeframe so we query why IDA has chosen the approach set out in the TCG.

In the Draft HK Guidelines, there is a somewhat clearer discussion of predatory pricing, for example in para 7.14, which at least allows for an assessment of predatory pricing based on a planned strategy rather than relying on actual predatory volumes. Even with this approach, REACH has concerns as to how IDA will gather proper evidence from SingTel as it would be all too easy for SingTel to cover its tracks or come up with a profit making strategy. We understand that the economic theories of price predation do create all of these difficulties with practical application of competition law but the IDA should consider in advance and include in the TCG how it will really apply its approach.

In terms of the other elements of predatory pricing set out in the TCG eg. in TCG 3.2.1.1(d), REACH believes that, rather than repeating the Code, IDA should clarify the correct application of the Code – the extent to which below cost pricing is predatory. The Draft HK Guidelines note that below-cost pricing can sometimes be conclusive evidence of predation. REACH submits that IDA should give sufficient weight to below-cost pricing over and above the other limbs of the predatory pricing test it has proposed.

IDA should also clarify TCG 3.2.1.1(d) in other respects. For example, subpara (i) refers to the duration of below cost sales as relevant to ascertaining whether rivals would be deterred. This should take account of predatory pricing that is caught early but which would have been likely to unreasonably restrict competition. Subpara (ii) suggests that the "ability" of other licensees to price below cost is similarly relevant. REACH does not consider this correct when other licensees may only do so to survive against the Dominant Licensee. Further, this approach does not promote sustainable and effective competition. Subpara (iii) suggests that the effect of prior price cutting is also relevant. REACH points out that just because previous price cutting did not actually damage competition does not mean that future pricing conduct cannot be predatory. To some extent the test is more of a theoretical economic test and should not be read so literally.

Under para (d), IDA says it will examine barriers to entry to determine whether recoupment is possible. REACH submits that the analysis of barriers to entry should be similar to when IDA is assessing dominance and refer to our suggested amendments to this analysis above in our discussion of the REG. We also believe that IDA should clarify the extent to which IDA's findings in making an initial Dominant Licensee classification will later indicate significant barriers to entering a market where the market has not subsequently been subject to an exemption. IDA should clarify what it means by "significant" entry barriers over and above the sort of barriers that leave SingTel subject to a dominance obligation.

Price squeeze analysis should focus on price to competitors imputed to SingTel

We refer to TCG 3.2.1.2.

The IDA should begin the discussion of price squeezing with a statement that there is no requirement to prove the conduct unreasonably restricts competition if the elements of the offence in the Code are met.

In relation to para (a), REACH supports the description of price squeezing where a Dominant Licensee charges a price above cost for an input to other licensees who are forced to pass on the full price to end users while the Dominant Licensee's competing downstream business only needs to recover the cost from its end users. This focuses on the essence of the conduct, rather than confusing the situation by focusing on whether the Dominant Licensee's downstream business is profitable or not.

In para (b), where IDA is repeating the Code provisions, REACH feels that subpara (ii) should more closely follow the Code by adding that the price charged by the Dominant Licensee must be so high that its downstream business could not profitably sell its product if it really was passing on the full price for the service. REACH also submits that the REG should clarify that a price squeeze can occur not only when an input is priced too high but also when the retail product is priced too low.

In para (c), IDA discusses how it will apply the requirement that the input involved in the price squeeze is required to provide a downstream service. The IDA says it will have regard to whether downstream licensees could obtain "comparable" input services from other providers. We believe that this guideline is worded too loosely and that the other input services considered must be realistic substitutes.

REACH supports the approach in para (d) whereby, rather than just looking at how the Dominant Licensee's downstream business would cope with the pricing, IDA assesses the margin between the input price to other licensees and the retail price of the downstream affiliate to see if other licensees could make a commercially reasonable profit. This is a much more logical approach, which is easier to apply than a strict reading of the Code provision. The Draft HK Guidelines are similar in this regard. REACH submits that the IDA should even further clarify this area by stating that if the input price to other licensees is the same as, or less than, the retail price of the downstream licensee this is enough to establish a price squeeze in breach of the Code.

Ultimately, REACH believes that some of our concerns may best be addressed by adopting the imputation test, which seems to be getting attention overseas. With this test, the dominant operator must provide evidence to the regulator that its retail prices are no lower than the sum of the following:

- the price it is charging competitors for the wholesale services that form part of the retail services (this price is said to be "imputed" in the cost of the dominant provider whether it actually incurs this cost or not)
- the actual incremental costs (above the imputed wholesale costs) that are incurred by the dominant supplier in providing the retail services. For example, marketing, billing, etc. costs

REACH believes that the TCG should discuss the imputation test and relevant costs.

The TCG should also address how IDA will ensure that SingTel does not allocate costs as between upstream and downstream activities so as to conceal price squeezes.

Cross-subsidisation guidelines should not narrow Code net

We refer to TCG 3.2.1.3.

REACH supports the analysis of cross-subsidisation in para (a), particularly to the extent that it talks in terms of services not subject to effective competition being used to cross-subsidise services subject to a "greater degree of competition". We submit that IDA should use this language throughout, presenting this as its interpretation of the Code requirement for cross-subsidisation between a service not subject to effective competition and one that is effectively competitive. Otherwise, the IDA risks letting anti-competitive conduct slip through the cracks in an illogical way. To expand, if SingTel is cross-subsidising from a monopolised service such as local access into a slightly more competitive but still dominated service such as IPLCs, this should still constitute anti-competitive cross-subsidisation as it would if SingTel cross-subsidised from local access into what IDA has found to be a competitive ITS market. In fact, cross-subsidisation is more likely to be a concern where the downstream market is less than competitive since this is what gives a firm the incentive to leverage its dominance downstream. To literally apply a requirement for cross-subsidisation into an effectively competitive market might mean that IDA would have to make distinctions purely on whether a service was still subject to a dominance classification or not.

REACH also observes that there is no discussion of cross-subsidisation within a group. It should be clarified in this guideline that SingTel cannot cross-subsidise its affiliates – the provision is not just restricted to internal cross-subsidisation. The reference to affiliates accepting cross-subsidisation in REG 3.4.4 is insufficient as this and section 8.3 of the Code are targeted at the affiliate rather than creating the offence for the Dominant Licensee in the first place. Related to this, the TCG should also address how IDA will ensure that SingTel does not allocate costs as between different activities so as to conceal cross-subsidisation.

Para (d) attempts to define when IDA will find that cross-subsidisation unreasonably restricts competition. However, subparas (i) and (ii) do little more than repeat the basic test for cross-subsidisation in para (b). The only real addition is subpara (iii). However, REACH submits that this must be deleted as it requires that the cross-subsidised service be sold at a predatory price. This is inconsistent with the Code, which contains no such requirement in section 8.2.1.3, which deals with cross-subsidisation. For the TCG to add in this requirement is inconsistent with the Code because the Code has provided for cross-subsidisation as a separate abuse from predatory pricing. If one has to prove predatory pricing to prove cross-subsidisation there would be no point in having the latter as an offence. REACH observes that there is a Code requirement for predatory pricing in section 8.3 when an affiliate receives an anti-competitive preference in the form of cross-subsidisation but this is a separate provision altogether and refers back specifically to the predatory pricing provision in section 8.2.1.1.

Discrimination guidelines need expansion

We refer to TCG 3.2.2.1.

In para (c), IDA discusses how it will apply the requirement that an infrastructure, system, service or information (referred to cumulatively as "services" in this part of our submission) be necessary to enable other licensees to provide services. REACH notes that this does not contain the same bottleneck type language found in relation to the price squeeze guidelines and so is less confusing. However, the IDA has repeated the statement it will have regard to whether downstream licensees could obtain 'comparable' services from other providers. We believe that this guideline is again worded too loosely and that the other services considered must be realistic substitutes.

REACH is pleased to see refusal to supply conduct getting some recognition in para (d). However, we believe this should be discussed in more detail and examples given as this is a form of anti-competitive conduct that deserves greater attention, which it has been given in other jurisdictions. For example, similar to the European approach, the discussion should cover discriminatory refusals as between operators, but also refusal to supply a service that is not otherwise supplied to competing operators but which is needed to supply new services. Withdrawal of existing services should also be scrutinised as should constructive refusals to supply effected by imposition of unreasonable terms or poor quality of service/delays.

REACH also notes that the Code and TCG only discuss discrimination between a Dominant Licensee's affiliates and other Licensees. We believe the IDA should expand in the TCG that the general prohibition on abuse of dominance may catch other forms of discrimination such as between customers. As per the Draft HK Guidelines, discrimination may involve applying different conditions to different customers where the different conditions do not reflect legitimate differences in customer or service characteristic or applying the same conditions to different customers where there are legitimate differences in customer or service characteristic that justify different conditions. We note that discrimination will not always constitute an abuse but the IDA could qualify its discussion accordingly. IDA could give examples of when discrimination is a problem. For example, the Draft HK Guidelines provide (para 7.18):

> "*However, discriminatory pricing can be an abuse where, for example, a dominant licensee exploits its market power by charging excessively high prices to certain customers. Price discrimination will also be an abuse where it has the effect of excluding competitors from the market in question*."

Discounts should be specifically discussed in the TCG as a potential form of discrimination, or even under a separate head of abuse. Of course, discounts of themselves are not anti-competitive, but in certain circumstances they can raise concerns. In this regard, we again refer to the Draft HK Guidelines at para 8.9, where the TA has listed the sort of discounts that give rise to competition concerns including:

- loyalty rebates, where the discount is dependent on the customer not taking (or restricting) supplies from competitors;
- discounts which are calculated across, and applied to products offered in, a range of markets;

- volume rebates that are calculated on the basis of total telecommunications expenditure across a range of markets even though the discounts are applied to spending only in certain markets (eg. those which are competitive);

- discounts that are targeted at a narrow group of customers, particularly where the group consists of only those customers which have the ability to switch to alternative suppliers.

Again, REACH considers that the TCG would be more likely to achieve its objectives if it spelled out in greater detail, with more examples, the sort of conduct that may constitute discrimination, including certain types of discounting.

Predatory network alteration test should be simplified

We refer to TCG 3.2.2.2.

We are confused by the interrelationship between para (c)(i) and (ii). Surely if (ii) is established – that the network alteration had an adverse impact on interconnecting licensees grossly disproportionate to the benefit to the Dominant Licensee and end users – it would be superfluous to also have to prove that the network alteration was not a commercially reasonable approach for the Dominant Licensee. The same could be said in the reverse. In other words, we do not believe (i) and (ii) should be cumulative requirements. Further, we believe subpara (ii) sets too high and confusing a test in requiring adverse impacts to be "grossly" disproportionate to benefits.

Further clarification of anti-competitive preferences required

We refer to TCG 3.3.

In TCG 3.3.3, IDA has simply restated the Code wording that a Licensee must not obtain an input from a dominant affiliate at a price so high others could not sell their end-product if they purchased the input at the same high price. However, this is perhaps too literal an application of the price squeeze analysis and a more practical approach should be taken as discussed above in relation to price squeezes. The key point is that the downstream licensee may not actually be paying the high input price. As the IDA observed in its discussion of price squeezes, the downstream entity need only recover the costs of the input rather than the full input purchase price that competitors need to recover. The Draft HK Guidelines recognise (para 7.32) that the problem with price squeezes may not be that the downstream licensee is paying a high input price but rather that the dominant licensee is cross-subsidising its downstream operation.

IDA should clarify TCG 3.3.3 to the effect that the licensee will be deemed to have paid the high input price if this is what the dominant affiliate charges others. This avoids the need to investigate whether or not the dominant affiliate has engaged in discriminatory pricing and is in line with the increasing use of an imputation test for price squeezes.

In relation to TCG 3.3.5, IDA should clarify that a licensee cannot accept discriminatory supply from a dominant affiliate that refuses supply to other licensees. This is consistent with TCG 3.2.2.1(d) which details the same conduct in terms of the dominant licensee offence.

Code provisions are illustrative only and can be supplemented

We refer to TCG 3.2(b).

As per this provision and section 8.2 of the Code, a wide range of conduct may be caught as an abuse of dominance, not just the examples of practices that are set out in the Code. REACH submits that this point should be further elaborated in the TCG and that IDA should give some further examples of abuses that it may consider.

The Draft HK Guidelines discuss the specific examples of abuse listed in the TO. However, the Draft HK Guidelines expand on the TO by listing other types of conduct that may be caught by the general prohibition on abuse of dominance. The types of conduct addressed are:

- predatory pricing;
- price discrimination;
- unfair terms;
- bundling and tying;
- discrimination in supply of services to competitors;
- cross subsidisation;
- leveraging dominance into upstream and downstream markets;
- excessive pricing;
- price squeezing; and
- refusal to supply.

REACH observes that the TA in Hong Kong appears to have gone to much greater effort in developing the Draft HK Guidelines to ensure abuses of dominance are caught, despite the fact that competition is substantially more developed and mature than in Singapore.

Bundling should be given specific attention

As REACH has pointed out above, bundling is usually given specific attention in discussions of anti-competitive conduct in telecommunications, with the Draft HK Guidelines as an example. The ACCC in Australia has also given extensive consideration to bundling. While it issued its ACCC Guidelines some time ago, it has recently recognised that bundling is a particular concern in telecommunications markets by conducting a detailed study into bundling, including commissioning expert economic reports. As a result it has issued a detailed supplement to the Australian Guidelines, which is focused on bundling. We submit that IDA should take the benefit of work already done in Australia and incorporate some of the detail into the TCG.

We repeat the key elements identified by the ACCC Bundling Guidelines:

- whether the non-price effects of the bundling conduct are anti-competitive, such as involving the leveraging of market power from non-competitive to competitive markets, or whether the conduct increases barriers to entry;

- whether the price for the bundled services involves any elements of predatory pricing or a vertical price squeeze.

These elements are considered individually and collectively.

REACH does not believe that the IDA can justify exclusion of any reference to bundling on account of the prohibition in section 4 of the Code on bundling. In many cases, conduct such as discrimination addressed under *ex ante* type provisions is, and should be, caught under *ex post* provisions generally prohibiting anti-competitive conduct. We note in particular that where IDA provides partial exemptions from section 4, bundling conduct may still need to be checked by section 8 where it unreasonably restricts competition.

REACH also suggests that IDA specifically recognise that anti-competitive bundling may occur not just when products are only offered in a bundle but may also be found where the Dominant Licensee offers to supply parts of the bundle separately, depending on whether the nature of the services or terms offered results in a constructive tie or bundle. The Draft HK Guidelines refer to this sort of anti-competitive conduct in para 7.23.

Excessive pricing should be mentioned

The Draft HK Guidelines specifically address excessive pricing, and observe (para 7.28):

> "*The principle that an abuse may be committed where an excessive price is charged (that is, the price has no reasonable relation to the economic value of the product or service supplied) has been established in other jurisdictions*."

As the Draft HK Guidelines note, what is required is for a price to be higher than it would normally be in a competitive market.

Unfair methods of competition

We refer to TCG 3.4.

REACH does not find it useful and in fact finds it counterproductive to have guidelines that do not add to the Code but rather summarise it as is the case with TCG 3.4 in relation to unfair methods of competition. Either the TCG should simply state that it has no additional guidance to provide in this area or it should just quote the Code and say it is doing so.

ANTI-COMPETITIVE AGREEMENTS

REACH does not comment on TCG 4 in any detail, although our general comments made earlier apply, including that international precedent should be referred to. We note that the IDA has made some attempts to ensure that pro-competitive agreements between competitors will not be caught, for example, by recognising that joint bids are not unusual in the industry and will only be caught subject to the URC test. However, REACH believes that IDA should provide much greater detail and more practical examples in the TCG of agreements typically found in telecommunications market that do not raise competition concerns.

CONCLUDING COMMENTS

REACH trusts that the above provides some useful feedback on the Code Guidelines Consultation, which IDA will give due consideration to. We remain ready to discuss with IDA SingTel's dominance of Singapore telecommunications markets, and more generally the Code Guidelines, as and when required.