SINGAPORE TELECOMMUNICATIONS LIMITED RESPONSE TO CONSULTATION PAPER

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

1. STATEMENT OF INTEREST AND STRUCTURE OF SUBMISSION

1.1 Singapore Telecommunications Limited (**SingTel**) is licensed to provide telecommunications services in Singapore. SingTel is committed to the provision of state-of-the-art telecommunications technologies and services in Singapore. SingTel has a comprehensive portfolio of services that includes voice and data services over fixed, wireless and Internet platforms. SingTel services both corporate and residential customers and is committed to bringing the best of global communications to its customers in the Asia Pacific and beyond.

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

1.3 SingTel hereby responds to the Info-communications Development Authority of Singapore's (**IDA**) draft advisory guidelines (**Telecom Competition Guidelines** or **Guidelines**) governing abuse of dominant position, unfair methods of competition and agreements involving Licensees that unreasonably restrict competition under sections 8 and 9 of the Code of Practice for Competition in the provision of telecommunication services 2005 (**Code**).

1.4 SingTel welcomes the IDA's publication of the draft Telecom Competition Guidelines for consultation. SingTel considers that the Guidelines will provide market participants with increased regulatory certainty in relation to the operation of sections 8 and 9 of the Code and increase transparency in the IDA's decision making in respect of these sections.

1.5 SingTel believes that the inclusion of the amendments recommended in this submission would further increase regulatory certainty and transparency in the IDA's decision making processes in relation to whether there has been an unreasonable restriction on competition under sections 8 and 9 of the Code.

1.6 This submission is structured as follows:

(a) Section 2 - Summary of major points;

(b) Section 3 – General comments;

(c) Section 4 – Abuse of Dominant Position and Unfair Methods of Competition;

(d) Section 5 – Agreements involving Licensees that Unreasonably Restrict Competition;

2. SUMMARY OF MAJOR POINTS

2.1 The major points SingTel makes in this submission are as follows:

(a) The regulatory principles set out in sub-section 1.5 of the Code should explicitly inform and underpin the IDA's decision making with respect to alleged contraventions of section 8 and 9 of the Code.

(b) Sub-section 11.4 of the Code provides the IDA with multiple roles, including the role of complainant, applicant for enforcement and decision maker in respect of alleged contravention of sections 8 and 9 of the Code. Neither the Code nor the Telecom Competition Guidelines differentiate between the IDA's multiple roles. The Guidelines should include a new section that sets out how the IDA will undertake its multiple roles. In particular, the Guidelines will need to acknowledge that the IDA, in its role as a decision maker, will need to have regard to all the relevant facts and the merits of each particular case. The Guidelines should also note that the IDA's decision making role is such that:

(i) it may require the IDA to make a finding or decision in favour of a Licensee, notwithstanding the fact that the IDA initiated the complaint or took action against the Licensee for an alleged contravention of section 8 or 9 of the Code; and

(ii) it prohibits the IDA from the making of presumptions in relation to matters of fact (such as the existence of Significant Market Power (**SMP**) in a market) and the alleged conduct of Licensees, as such presumptions would be inconsistent with the IDA's responsibility to have proper regard to the facts and merits of each case.

(c) IDA should introduce a new section in the Guidelines to make it clear that:

(i) alleged contraventions of sections 8 and 9 of the Code will be decided by the IDA on the balance of probabilities; and

(ii) the IDA will not engage in public consultation under sub-section 11.8 of the Code in relation to an alleged contravention of sections 8 or 9 of the Code, as this would allow interested parties to "game" the regulatory process by seeking to extract commercial advantage from the Licensee.

(d) There is no provision in the Code that explicitly provides for the IDA to presume that the Dominant Licensee has SMP in respect of an alleged abuse of dominant position under sub-section 8.2 of the Code. The issue of whether a Dominant Licensee has SMP in a market must be decided on a case by case basis, having regard to the facts and merits of the particular case. A failure to do so would be inconsistent with the IDA's role as a decision maker.

(e) The automatic presumption of SMP in respect of allegations of abuse of dominant position is also inconsistent with international best practice. Established principles of market analysis generally require the relevant regulator to:

(i) define the relevant market in which alleged abuse of dominant position occurred;

(ii) determine whether the firm has SMP in the relevant market; and

(iii) if the firm has SMP in the relevant market, determine whether the firm has in fact abused its dominant position in that market; and

(f) Paragraph 3.2(e) of the Guidelines incorrectly focuses on damage to "competitors", rather than damage to "competition", as the basis for establishing an abuse of dominant position under sub-section 8.2 of the Code. The fact that a competitor seeks to damage another competitor is not, in itself, sufficient to establish an abuse of dominant position. The issue of whether a Dominant Licensee has damaged a

competitor is only relevant to the extent that such damage also impacts upon the state of competition in the relevant market (i.e. it results in an unreasonable restriction on competition).

(g) There must be a causal link between a Dominant Licensee's SMP and the *use* of that power to unreasonably restrict competition in a market. The IDA should amend the Guidelines to explicitly acknowledge this requirement.

(h) SingTel does not understand how the IDA could possibly approve a tariff submitted by a Dominant Licensee under section 4.4.3 of the Code and then subsequently determine that such a tariff adopts pricing at a level that constitutes an abuse of dominant position under sub-section 8.2 of the Code. The IDA's responsibility under section 4 of the Code in respect of tariffs requires it to apply specific tests as to adequacy of pricing before approval can be given. If the IDA approves a tariff by having proper regard to the criteria in sub-section 4.4.3 of the Code, it cannot reasonably allege or suggest that such pricing constitutes an abuse of dominant position. This is particularly the case with respect to predatory pricing allegations, as the specific cost measure for approving tariffs under sub-section 4.4.3.1(a) of the Code is exactly the same as that applied by the IDA in considering whether predatory pricing has occurred under sub-section 8.2.1.1 of the Code (i.e. average incremental cost).

(i) The fact that a firm may be pricing a product or service below a particular measure of cost would not, in itself, necessarily provide a conclusive basis for finding that the firm will drive efficient competitors from the relevant market or be said to be engaging in predatory pricing. International best practice generally uses multiple cost measures and considers other factors in determining whether a firm is likely to drive efficient competitors from the relevant market. For the purpose of determining whether pricing conduct is likely to drive efficient competitors from a market or discourage future market entry under sub-section 8.2.1.1(b) of the Code, the IDA should amend paragraph 3.2.1.1(d) of the Telecom Competition Guidelines to provide for the use multiple cost measures and take account of other factors that may point in favour or against the ability of the Dominant Licensee to drive efficient competitors from the market or prevent future entry.

(j) The issue of whether a Dominant Licensee can recoup its losses once it has successfully driven efficient competitors out of the market and prevented re-entry will ultimately depend on the existence of barriers to entry in the relevant market. It is important to ensure that only factors that genuinely constitute a barrier to entry are considered by the IDA in its determination of whether recoupment is possible.

SingTel is concerned that certain factors identified by the IDA as constituting barriers to entry in paragraph 3.2.1.1(e) of the Guidelines cannot reasonably be considered to be such barriers, including advertising costs and retail costs.

(k) The IDA's commentary about access barriers in paragraph 3.2.1.1(e)(ii) of the Guidelines fails to acknowledge that *ex ante* regulation of access to infrastructure and the provision of wholesale services is likely to remove any access barriers that may exist in the relevant wholesale market. It is incorrect to assume that the Dominant Licensee has complete control over the pricing of wholesale services or "inputs". This is not accurate in respect of Interconnection Related Services (**IRS**) and Mandated Wholesale Services (**MWS**).

(l) In respect of allegations of predatory network alteration:

(i) the IDA should recognise that a Dominant Licensee would not obtain any benefit from increasing the costs of another Licensee through network alteration if the costs it incurred itself in effecting the alteration exceeded the costs imposed on a Licensee (or Licensees); and

(ii) where the network alteration results in benefits to the Dominant Licensee and end-users but results in the imposition of costs upon an individual Licensee, such an alternation should not constitute an abuse of dominant position. The costs incurred by an individual Licensee may be an unintended consequence of network alteration and could not reasonably be said to result in damage to "competition" in the relevant market.

(m) The IDA's commentary should acknowledge that some forms of 'bundling' may be caught by the prohibition on anti-competitive preferences. The IDA should monitor developments in the industry and the specific offerings of 'bundled' products and services to ensure that such arrangements are not used as a basis for unreasonably restricting competition in a telecommunications market.

(n) The IDA's commentary on agreements that unreasonably restrict competition has not provided any guidance on the elements that must exist or threshold issues that must be satisfied in order for the IDA to establish the existence of a "tacit agreement".

3. GENERAL COMMENTS

3.1 SingTel considers that the Telecom Competition Guidelines would benefit from the inclusion of an overarching framework that addresses the following matters:

(a) the regulatory principles that will inform and underpin the IDA's decision making under sections 8 and 9 of the Code;

(b) the IDA's role and approach to the enforcement of the prohibitions under sections 8 and 9 pursuant to section 11 of the Code;

(c) the standards of evidence that the IDA will require to establish a breach of section 8 or 9 of the Code; and

(d) procedural fairness matters in the IDA's decision making.

3.2 SingTel considers that the Telecom Competition Guidelines, as currently drafted, do not adequately address the matters described in paragraphs (a)-(d) above. SingTel's comments in respect of each issue is set out in greater detail below.

The IDA should have regard to the regulatory principles set out in the Code in its decisions

3.3 SingTel considers that the Telecom Competition Guidelines would benefit from an overarching framework that informs and underpins the IDA's decision making under sections 8 and 9 of the Code.

3.4 As the IDA's decision with respect to allegations of abuse of dominant positions and agreements which unreasonably restrict competition are made pursuant to sections 8 and 9 of the Code respectively, it follows that the regulatory principles set out in sub-section 1.5 of the Code should guide the IDA's decision making in relation to such matters.

3.5 An acknowledgement of the regulatory principles that inform and underpin the IDA's decision making is important for regulatory certainty. The consistent application of these regulatory principles in decision making is also important, where applicable.

3.6 The regulatory principles set out in the Code are not explicitly acknowledged by the IDA in the Telecom Competition Guidelines. SingTel believes that the IDA should explicitly identify the regulatory principles that it is applying when it makes a

decision with respect to an allegation of abuse of dominant position or agreement that unreasonably restricts competition in a market.

3.7 In particular, SingTel considers that the IDA should have specific regard to the following regulatory principles, which are likely to arise in the context of its decision making in relation to sections 8 and 9 of the Code:

(a) reliance on market forces (sub-section 1.5.1);

(b) promotion of effective and sustainable competition (sub-section 1.5.2);

(c) transparent and reasoned decision making (sub-section 1.5.6);

(d) avoidance of unnecessary delay (sub-section 1.5.7); and

(e) non-discrimination (sub-section 1.5.8).

3.8 SingTel considers that focus on the above regulatory principles will provide the IDA with appropriate guidance in its decision making under sections 8 and 9 of the Code. These principles should be explicitly acknowledged and repeated in the Guidelines and form the basis of the IDA's analytical approach for decision making.

3.9 For example, a focus by the IDA on the principle of "transparent and open decision making" will ensure that unsubstantiated allegations and other factors that have no appreciable impact on the state of competition in a market, such as the movement of inefficient competitors out of a market, are disregarded in the IDA's decision making in respect of allegations that there has been an unreasonable restriction on competition.

3.10 On this basis, SingTel believes that the IDA should introduce a new paragraph 1.6 in the Telecom Competition Guidelines that explicitly:

(a) acknowledges and repeats the regulatory principles set out in sub-section 1.5 of the Code;

(b) states that the regulatory principles will inform and underpin the IDA's analytical approach and decision making with respect to alleged contraventions of sections 8 and 9 of the Code; and

(c) requires the IDA to identify the specific regulatory principle that it is applying in its decisions with respect to an alleged contravention of section 8 or 9 of the Code.

The IDA's approach to the enforcement of the prohibitions under sections 8 and 9 of the Code

3.11 SingTel would like the IDA to amend the Telecom Competition Guidelines to set out the IDA's approach to the enforcement of the prohibitions under sections 8 and 9 of the Code.

3.12 Sub-section 11.4 of the Code provides that enforcement actions for contraventions of the Code can be brought by the IDA, either at the request of a private party or on its own motion. The IDA is also responsible for issuing decisions in respect of the alleged contravention of the Code. Sub-section 11.4.3 and 11.4.4 of the Code gives the IDA broad powers of enforcement, including the power to:

(a) issue an interim direction to cease and desist from specified conduct;

(b) issue warning statements;

(c) issue a direction to cease and assist from conduct that contravenes the Code;

(d) take specified remedial action;

(e) impose financial penalties up to S$1 million per contravention of the Code, having regard to aggravating and mitigating factors; and

(f) in serious cases, where the IDA is satisfied that a Licensee has contravened and is likely to again contravene any provision of the Code, suspension or cancellation of a licence granted under the Telecommunications Act.

3.13 Sub-section 11.4 of the Code provides the IDA with multiple roles, including the role of complainant, applicant for enforcement and decision maker. SingTel is concerned that neither section 11 of the Code nor the Telecom Competition Guidelines (as currently drafted) differentiate between the IDA's multiple roles and the different responsibilities that the IDA has in respect of each role.

3.14 SingTel considers that the IDA's highest level of responsibility arises in its capacity as a decision maker under section 11 of the Code. In its role as a decision maker under sub-sections 11.4.1.10 and 11.4.2.4 of the Code, the IDA must act impartially and make decisions by having proper regard to the relevant facts and merits of each particular case.

3.15 The IDA's role as an impartial decision maker in relation to allegations under sections 8 and 9 of the Code are set out in specific provisions of the Code and reflected in the regulatory principles that underpins the IDA's implementation of the Code, including:

(a) the obligation to "carefully consider the matters set out in the responses submitted by the Licensee before issuing its decision" in sub-section 11.4.2.3 of the Code; and

(b) the regulatory principle of transparent and reasoned decision making in sub-section 1.5.6 of the Code, which requires the IDA to "give full consideration to the comments received" and "clearly explain the basis for its actions" in arriving at its decisions.

3.16 In practice, the IDA's decision making or adjudication role may, following consideration of all the relevant facts and the merits of the specific case, require it to make a finding or decision in favour of a Licensee, notwithstanding the fact that IDA initiated the complaint and undertook enforcement action against the Licensee.

3.17 The IDA's decision making role would also preclude the making of presumptions in its decision making in relation to matters of fact and the alleged conduct of Licensees. Such presumptions would not be consistent with the IDA's role as an impartial decision maker and the need to have proper regard to the facts and merits of each particular case. The IDA would therefore have to make a findings or decisions in respect of matters of fact or alleged conduct on a case by case basis.

3.18 For example, paragraph 3.2(d) of the Telecom Competition Guidelines states that IDA will presume that a Dominant Licensee has SMP in every telecommunications market in which it provides telecommunications services, unless the IDA has previously granted an exemption. SingTel considers that the automatic presumption of SMP is inconsistent with the IDA's role as an decision maker, as it permits the IDA to make a finding that will form part of its decision without sufficient regard to the actual facts and merits of the particular case. If the IDA did consider all the relevant facts in respect of such a matter, it may be the case that the IDA would decide that the Dominant Licensee lacked SMP in the relevant market. SingTel's specific comments in relation to the IDA's decision to automatically presume SMP in every telecommunications market are set out in section 4 of this submission.

3.19 While specific provisions in section 11 of the Code instruct the IDA's decision making role and provide Licensees that are aggrieved by a decision with the right to request that the IDA re-consider its decision or appeal the decision to the Minister (sub-section 11.9.1), neither the Code nor the Telecom Competition Guidelines provide the IDA or market participants with any on the manner in which the IDA will exercise its multiple roles.

3.20 In order to increase the transparency and openness in the IDA's decision making, and to remove any possibility of a conflict of interest between the IDA's role as a complainant, applicant for enforcement and a decision maker, SingTel considers that the IDA should introduce a new introductory section in the Telecom Competition Guidelines that sets out how the IDA will undertake its multiple roles. In particular, SingTel considers that the Telecom Competition Guidelines should provide for the following:

(a) recognise that the IDA has multiple roles under section 11 of the Code in respect of its enforcement of sections 8 and 9 of the Code, including a role as a complainant, applicant for enforcement and decision maker;

(b) acknowledge that the IDA's role as an decision maker in response to allegations of a contravention of provisions in sections 8 or 9 of the Code require the IDA to act impartially and to have regard to the facts and merits of each specific case;

(c) acknowledge that there may be circumstances where, following consideration of the all the relevant facts and the merits of the specific case, the IDA will be required to make a finding or decision in favour of a Licensee, notwithstanding the fact that the IDA (in its capacity as a complainant or applicant for enforcement) initiated a complaint or undertook enforcement action against the Licensee; and

(d) acknowledge that the IDA will not make presumptions about matters of fact (e.g. such as the existence of SMP) or the alleged conduct of Licensees (e.g. whether particular conduct constitutes an abuse of dominant position) in its decision making role without sufficient supporting evidence, as this would be inconsistent with its role as an impartial decision maker and would ignore the facts and merits of the specific case.

Standard of evidence used by the IDA to determine whether there has been a breach of the Code

3.21 SingTel is not aware of any provision in the Code or commentary in the Telecom Competition Guidelines that sets out the evidentiary standard that the IDA will apply in its decision making in respect of alleged contraventions of sections 8 and 9 of the Code.

3.22 SingTel considers that the balance of probabilities is the proper standard to be applied by the IDA in its decision making in respect of alleged contraventions of sections 8 and 9 of the Code. Such an evidentiary standard is consistent with the standard applied by regulators in comparable jurisdictions in respect of *ex post* enforcement.

3.23 On this basis, the IDA should introduce a new section in the Telecom Competition Guidelines in respect of evidentiary matters stating that the IDA's evidentiary standard to be applied in its decision making in respect of alleged contraventions of section 8 and 9 of the Code will be the balance of probabilities.

Procedural fairness in the IDA's decision making processes

3.24 SingTel is concerned that the Code and the Telecom Competition Guidelines lack specific provisions to ensure the privacy of the existence of enforcement action against a Licensee under sections 8 and 9 of the Code. In particular, SingTel is concerned with sub-section 11.8 of the Code, which permits the IDA to conduct public consultation to provide interested parties with an opportunity to comment on any proceedings, where appropriate.

3.25 SingTel believes that public consultation would not only make interested parties aware of the existence of an enforcement action against a Licensee for an alleged contravention of section 8 and 9 of the Code but may also allow interested parties to 'game' the regulatory process by seeking to extract commercial advantage from the allegations against the relevant Licensee by making unsubstantiated allegations or adopting a certain position or course of conduct that seeks to alter the Licensee's competitive conduct in a market. As such, SingTel does not consider that it would be appropriate for the IDA to engage in public consultation under sub-section 11.8 of the Code in respect of allegations of a contravention of sections 8 and 9 of the Code.

3.26 SingTel considers that the IDA should only release public information about enforcement action that is taken against a Licensee for an alleged contravention of section 8 and 9 of the Code following:

(a) a decision by the IDA that the Licensee did in fact contravene the relevant provision of the Code; and

(b) the expiry of the timeframe available to the Licensee to appeal the decision of the IDA under sub-section 11.9.1 of the Code.

3.27 On this basis, SingTel considers that the IDA should introduce a new section in the Telecom Competition Guidelines in respect of procedural matters that makes it clear that the IDA will not engage in public consultation under sub-section 11.8 of the Code in respect of allegations of a contravention of sections 8 and 9 of the Code and that it will only release public information about its enforcement action following the occurrence of both the events set out in paragraphs (a) and (b) above.

4. ABUSE OF DOMINANT POSITION AND UNFAIR METHODS OF COMPETITION

IDA should not presume that a Dominant Licensee has SMP in abuse of dominant position cases

4.1 SingTel is concerned about the IDA's comments in paragraph 3.2(d) of the Telecom Competition Guidelines, in which it states that it will presume, absent evidence to the contrary, that a Dominant Licensee has Significant Market Power (**SMP**) in every telecommunications market, except where the IDA has previously granted an exemption from Dominant Licensee regulation.

4.2 The IDA's automatic presumption under paragraph 3.2(d) of the Telecom Competition Guidelines that a Dominant Licensee has SMP in respect of an allegation of abuse of dominant position appears to stem from the IDA's application of a "licensed entity" approach to dominance classification. SingTel has previously expressed its view of the "licensed entity" approach, which deems SingTel to be "dominant" in every telecommunications market (except where it has been granted an exemption by the IDA).

4.3 The "licensed entity" approach, however, does not provide a proper basis for the IDA to automatically presume that a Dominant Licensee has SMP in respect of allegations of abuse of dominant position under sub-section 8.2 of the Code. This is particularly the case when the IDA is acting as the adjudicator in an *ex post* role.

4.4 Section 8 of the Code only applies to SingTel by virtue of the fact that it is designated as a Dominant Licensee under the "licensed entity" approach to dominance. It does not provide the basis for the IDA to automatically presume that the Dominant Licensee has SMP in a telecommunications market in respect of allegations of abuse of dominant position under sub-section 8.2 of the Code. There is no provision in the Code that explicitly provides a basis for the IDA to presume that the Dominant Licensee has SMP in respect of an allegation of abuse of dominant position.

4.5 While the "licensed entity" approach may generally be applied through *ex ante* regulation (e.g. in relation to the provision of Interconnection Related Services and Mandated Wholesale Services, and retail tariffs), it is not suitable for application in the context of *ex post* regulation.

4.6 The automatic presumption that a firm has SMP in respect of alleged abuse of dominant position is contrary to established methods of market analysis, as evidenced by international best practice. SMP cannot be automatically assumed in the context of *ex post* regulation. As noted above, the IDA is responsible for deciding whether a contravention of sub-section 8.2 of the Code has occurred. In doing so, the IDA is exercising a decision making or adjudication type function.

4.7 In automatically assuming that a Dominant Licensee has SMP, the IDA is making a presumption about factual circumstances which are not necessarily consistent with its role as a decision maker under section 11 of the Code. A finding by the IDA that a Dominant Licensee has SMP in respect of an alleged contravention of sub-section 8.2 of the Code must be made on a case by case basis, having regard to the specific facts and merits of each particular case. It is on this basis that SingTel considers that the IDA must determine whether a Dominant Licensee has SMP in accordance with established principles of market analysis, which require the decision maker to apply certain tests to determine whether a firm in fact has SMP.

4.8 Indeed, established principles of market analysis generally require regulators to assess whether a firm has abused its dominant position as follows:[1]

(a) as a preliminary step, defining the relevant market in which alleged abuse of dominant position has occurred;

[1] See for example, Office of Fair Trading, *The application of the Competition Act in the Telecommunications Sector*, OFT 417, January 2000, paragraph 5.1.

(b) as a second step, determining whether the firm accused of abusing its dominant position has SMP in the relevant market; and

(c) as a third step, if the firm is found to have SMP in the relevant market, determining whether the firm has in fact abused its dominant position in the relevant market.

4.9 The Telecom Competition Guidelines do not state that the IDA will undertake the process set out in paragraphs (a)-(c) above to determine whether a Dominant Licensee has abused its dominant position in a telecommunications market. However, the fact that the IDA intends to automatically presume that a Dominant Licensee has SMP in respect of allegations of abuse of dominant position suggests that the IDA will:

(a) bypass the process of market definition and the assessment of whether the Dominant Licensee has SMP in the relevant market; and

(b) immediately proceed to consider whether a contravention of sub-section 8.2 of the Code has occurred in accordance with paragraph 3.2(e) of the Telecom Competition Guidelines.

4.10 Similarly, the IDA's comment in paragraph 2.3(a) of the Telecom Competition Guidelines that it "will conduct a fact-specific assessment of the Licensee's conduct and the structure of the relevant market" implies that the IDA will ignore market definition and the assessment of SMP and immediately proceed to determine whether the Licensee's conduct breaches sub-section 8.2 of the Code.

4.11 SingTel is not aware of any comparable jurisdiction where a firm is automatically assumed to have SMP in relation to an allegation of abuse of dominant position or in the context of *ex post* regulation. In fact, all comparable jurisdictions explicitly require the regulator to define the relevant market in which the contravention allegedly occurred and assess whether the relevant firm has SMP before it can consider whether that power has been abused. For example, the European Commission has stated:

> *"In assessing whether an undertaking as SMP, that is, whether it 'enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers', the definition of the relevant market is of fundamental importance*

since effective competition can only be assessed by reference to the market thus defined".[2]

4.12 Indeed, the European Courts have held that a market must be defined before a dominant position can be found.[3] Similarly, the Australian Competition and Consumer Commission has noted that "market definition is fundamental to the assessment of alleged anti-competitive conduct".[4]

4.13 Market definition is essential in determining whether a Dominant Licensee has SMP, as it identifies those competitors that are capable of preventing or constraining the Dominant Licensee from acting independently of effective competitive pressure.[5] The risks associated with not defining the relevant market have been highlighted by the Office of Fair Trading in the United Kingdom:

> *"In the absence of an explicit market definition stage, subsequent analysis might be undertaken in an arbitrary manner. Without any coherent framework in which to conduct the analysis, there is a real danger that the analysis could degenerate to the level of 'I know abuse when I see it' in which there are no identifiable benchmarks against which to discriminate between 'competitive behaviour' and 'anti-competitive behaviour'".*[6]

4.14 In practice, the IDA's approach to determining whether a Dominant Licensee has abused its dominant position is likely to be highly subjective and unable to properly differentiate between legitimate competitive conduct and a genuine abuse of dominant position. SingTel considers that the risks identified by the Office of Fair Trading are directly relevant to the IDA's stated approach in paragraph 3.2(d) of the Telecom Competition Guidelines.

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2 European Commission, *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and service,* (2002/C 165/03), 11 July 2002, paragraph 34.

3 *Continental Can Co Inc.* (Case 6/72 (1973) ECR 215).

4 Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – An information paper*, August 1999, page 28.

5 European Commission, *Commission notice on the definitio of the relevant market for the purpose of Community competition law*, OJ C 372, 9 December 1997

6 Office of Fair Trading, *The role of market definition in monopoly and dominance inquiries*, Economic Discussion Paper 2, OFT 342, July 2001, paragraph 3.14.

4.15 On this basis, SingTel considers that the IDA should:

(a) remove the statement in paragraph 3.2(d) of the Telecom Competition Guidelines that it will automatically presume that a Dominant Licensee has SMP in a telecommunications market in respect of allegations of abuse of dominant position;

(b) amend the Telecom Competition Guidelines so that the issue of whether a Dominant Licensee has SMP in a telecommunications market in respect of an allegation of abuse of dominant position is determined as follows:

(i) defining the relevant market in which alleged abuse of dominant position has occurred;

(ii) determining whether the Dominant Licensee has SMP in the relevant market; and

(iii) if the Dominant Licensee has SMP in the relevant market, determining whether the firm has in fact abused its dominant position in the relevant market; and

(c) develop commentary setting out the IDA's approach to market definition, the assessment of SMP and its process for determining whether a Dominant Licensee has abused its dominant position.

4.16 SingTel preferred approach to market definition and the assessment of whether a Dominant Licensee has SMP (and its comments on the IDA's stated approach) is set out in its submission in respect of the IDA's advisory guidelines governing petitions for reclassification and requests for Exemption under sub-sections 2.3 and 2.5 of the Code.

IDA should focus on damage to competition not damage to competitors

4.17 SingTel is also concerned about the IDA's comments in paragraph 3.2(e), in which it states that the "IDA will find that a Dominant Licensee's unilateral conduct has unreasonably restricted competition, or is likely to unreasonably restrict competition, in a telecommunication market where the Dominant Licensee has engaged in conduct that has preserved or enhanced its dominant position, or is likely to preserve or enhance its dominant position, by:

(i) excluding other Licensees from the market; or

(ii) impairing other Licensees' ability to compete effectively,

rather than by competing against other Licensees based on service availability, price and quality".

4.18 These comments do not provide a proper basis for establishing that a Dominant Licensee has contravened sub-section 8.2 of the Code. The IDA's comments in paragraph 3.2(e) of the Telecom Competition Guidelines are inherently flawed and are not consistent with the regulatory principles set out in the Code.

4.19 The test in paragraph 3.2(e) under which the IDA will find that a Dominant Licensee has abused its dominant position also does not appear to be consistent with the IDA's own comments in paragraphs 2.3(c) and (d) of the Guidelines in respect of the "unreasonably restricts competition" standard.

4.20 While the IDA's comments in paragraph 2.3(b) of the Guidelines are highly ambiguous and should be deleted for clarity, SingTel notes that paragraphs 2.3(c) and (d) make it clear that the question of whether there has been an abuse of dominant position should be determined by reference to the *effect* that the alleged conduct will have on "competition" in a market. Unfortunately, however, the IDA's comments in paragraph 3.2(e) of the Guidelines incorrectly focus on damage to "competitors", rather than damage to "competition", as the basis for establishing an abuse of dominant position.

4.21 The hallmark of competition is the infliction of damage by one competitor on another (e.g. reduced sales or profit margins, the removal of inefficient competitors from the market). The fact that one competitor seeks to damage another competitor is not, in itself, sufficient to establish an abuse of dominant position.

4.22 SingTel is concerned that paragraph 3.2(e) of the Telecom Competition Guidelines, as currently drafted, is likely to capture legitimate competitive conduct between firms. The fact that SingTel is a Dominant Licensee should not affect its ability to compete aggressively against other Licensees using the standard commercial practices of a profit maximising firm. As the High Court of Australia has observed:

> *"Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort…and these injuries are the inevitable consequence of the competition s 46 is designed to foster. In fact, the purpose*

provisions in s 46(1) are cast in such a way as to prohibit conduct designed to threaten that competition…The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing".[7]

4.23 The correct test of whether a Dominant Licensee has abused its dominant position is whether the Dominant Licensee has damaged "competition" in the relevant market, not a "competitor". This test is embodied in sub-section 8.2 of the Code itself, which prohibits an unreasonable restriction on "competition" in any telecommunications market.

4.24 The correct test of what is required to establish an abuse of dominant position has been explained by the Office of Fair Trading in the United Kingdom:

"In making this assessment it is important to draw a distinction between conduct that inflicts harm to competition and which inflicts harm to competitors. In assessing whether business conduct constitutes an abuse, the burden of proof should be placed on competition authorities and particularly on any complainants to show how the conduct adversely affects consumers. As the guidelines make clear, demonstrating harm to competitors is only important insofar as it leads ultimately to adverse impacts on consumers. It is not simply sufficient to show harm to competitors and thereby conclude that this necessarily has an adverse impact on competition".[8]

4.25 Therefore, the issue of whether a Dominant Licensee has damaged a competitor in a market would only be relevant to establishing an abuse of dominant position to the extent that such damage also impacts upon the state of competition in the relevant market.

4.26 On this basis, SingTel considers that the IDA should amend paragraph 3.2(e) of the Telecom Competition Guidelines to make it clear that:

(a) the test of whether a Dominant Licensee has abused its dominant position depends on whether the Dominant Licensee's conduct has damaged "competition" in the relevant market;

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7 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191.

8 Office of Fair Trading, *The role of market definition in monopoly and dominance inquiries*, Economic Discussion Paper 2, OFT 342, July 2001, paragraph 4.21.

(b) damage inflicted by a Dominant Licensee on its competitors will not, in itself, constitute an abuse of its dominant position; and

(c) the infliction of damage by a Dominant Licensee against a "competitor" is only relevant in respect of an allegation of abuse of dominant position to the extent that it impacts adversely on "competition" in the relevant market.

The causal link between SMP and the "use" of that power to unreasonably restrict competition

4.27 SingTel also disagrees with the IDA's specific comment in paragraph 3.2(e) of the Telecom Competition Guidelines that the Dominant Licensee would have abused its dominant position if it has "engaged in conduct" that has preserved or enhanced its dominant position.

4.28 While conduct "engaged in" by a Dominant Licensee provides the causal connection between the Dominant Licensee's possession of SMP and its use of that power (i.e. its abuse of dominant position), the wording used by the IDA in the Guidelines does not explicitly acknowledge the link between SMP and need to "use" or take advantage of that power. As the Federal Court of Australia has noted, there is a need to establish a causal link between the existence of SMP and use of such power:

> *"There must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power".*[9]

4.29 SingTel is concerned that a failure to explicitly acknowledge the link between SMP and the "use" of that power in the Telecom Competition Guidelines may result in the IDA taking enforcement action against a Dominant Licensee in relation to legitimate competitive conduct, such as the protection of a Dominant Licensee's market position where such conduct does not involve a "use" of SMP to unreasonably restrict competition. The High Court of Australia has noted the following in respect of the phrase "take advantage of" (which is equivalent to the term "use" in sub-section 8.2 of the Code):

> *"The words "take advantage of" do not extend to any kind of connection at all between market power and the prohibited purposes described in s 46(1). Those words do not encompass conduct which has the purpose of protecting*

9 *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) 111 ALR 631 at 637.

> *market power, but has no other connection with that market power. Section 46(1) distinguishes between "taking advantage" and "purpose". The conduct of "taking advantage of" a thing is not identical with the conduct of protecting that thing".*[10]

4.30 Therefore, a Dominant Licensee's protection of its market position through legitimate competitive conduct does not constitute a contravention of sub-section 8.2 of the Code. It is only when the alleged conduct by the Dominant Licensee involves a "use" of SMP in a market in a manner that results in an unreasonable restriction on competition is a contravention of sub-section 8.2 of the Code likely to arise.

4.31 The link between SMP and the "use" of that power is explicitly acknowledged in the language of sub-section 8.2 of the Code and should also be specifically acknowledged in the Guidelines.

4.32 On this basis, SingTel considers that the IDA should amend paragraph 3.2(e) of the Telecom Competition Guidelines to make it clear that:

(a) there must be a causal link or co-relation between the existence of SMP and the Dominant Licensee's use of such power to unreasonably restrict competition in a telecommunications market; and

(b) the protection of a Dominant Licensee's market position will not constitute an abuse of dominant position in the absence of causal link between the existence of SMP in the relevant market and the "use" of that power to unreasonably restrict competition in the relevant market.

Pricing Abuses

4.33 SingTel is concerned by the IDA's comment in paragraph 3.2.1 of the Telecom Competition Guidelines that "even if IDA has allowed a tariff to go into effect, IDA may subsequently determine that the Dominant Licensee has priced its services in a manner that constitutes an abuse of dominant position".

4.34 SingTel does not understand how the IDA could possibly approve a tariff submitted by a Dominant Licensee under section 4 of the Code and then subsequently determine that such a tariff adopts pricing at a level that constitutes an abuse of dominant position under sub-section 8.2 of the Code.

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10 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 203 ALR 217 at 233.

4.35 SingTel notes that the IDA's responsibility under section 4 of the Code in respect of tariffs requires it to apply specific tests as to adequacy of pricing before approval can be given. Indeed, sub-section 4.4.3.1(a) of the Code states that in assessing whether a proposed retail tariff is "just and reasonable", the IDA will:

> *"assess whether the prices, terms and conditions are either excessive or inadequate…To determine whether the prices are inadequate, IDA will assess whether the prices are either above incremental cost or not less than those by Licensees that provide a comparable service".*

4.36 If the IDA approves a tariff by having proper regard to the above quoted criteria in sub-section 4.4.3.1(a) the Code, it cannot reasonably allege or suggest that such pricing constitutes an abuse of dominant position.

4.37 This is particularly the case with respect to predatory pricing allegations, as the specific cost measure for approving tariffs under sub-section 4.4.3.1(a) of the Code is exactly the same as that applied by the IDA in considering whether predatory pricing has occurred under sub-section 8.2.1.1 of the Code (i.e. average incremental cost). Similar issues arise in respect of wholesale services.

4.38 The possibility that the IDA may contradict an *ex ante* decision in the application of *ex post* regulation would create significant regulatory uncertainty for a Dominant Licensee.

4.39 On this basis, SingTel considers that the IDA should amend paragraph 3.2.1 of the Telecom Competition Guidelines to make it clear that it will not allege or take action against a Dominant Licensee for an abuse of dominant position in respect of tariffs that have been approved by the IDA under sub-section 4.4.3.1 of the Code.

Predatory Pricing

4.40 SingTel refers to the IDA's comments in paragraph 3.2.1.1(b) of the Telecom Competition Guidelines that it will find that a Dominant has engaged in predatory pricing if the evidence demonstrates that:

(a) the Dominant Licensee is selling its service at a price less than its average incremental cost;

(b) the Dominant Licensee's sale at prices below average incremental cost are likely to drive efficient rivals from the market or deter future market entry; and

(c) entry barriers are so significant that after driving rivals from the market or deterring entry, the Dominant Licensee could increase prices sufficient to enable the Dominant Licensee to fully recoup all the losses incurred during the period of price cutting.

4.41 SingTel notes that the IDA's adoption of a 3 tier test is generally consistent with international best practice. SingTel, however, is concerned by the IDA's use of a single cost measure (i.e. average incremental cost) in paragraph 3.2.1.1(d) of the Guidelines in determining whether a Dominant Licensee is likely to drive efficient competitors out of a market or deter future entry for the purposes of satisfying sub-section 8.2.1.1(b) of the Code. In particular, SingTel is concerned that the use of a single cost measure is inconsistent with international best practice, as evidenced by the approach to predatory pricing adopted in countries such as Australia and the European Union.

4.42 International best practice recognises the limitations associated with the use of a single cost measure as the basis for establishing that a dominant firm is engaging in predatory pricing. The fact that a firm may be pricing a product or service below a single cost measure would not, in itself, necessarily provide a conclusive basis for finding that the firm will drive efficient competitors from the relevant market or be said to be engaging in predatory pricing.

4.43 Best practice regulatory frameworks generally use a single cost measure only as a starting point for an investigation of whether predatory pricing may be occurring. That is, if specific pricing conduct fails a certain cost measure, then the regulator will commence a more measured and thorough predatory pricing investigation. Actual decisions by a regulator of whether predatory pricing is in fact occurring are not generally decided until a range of other relevant factors are considered.

4.44 For example, the Australian Competition and Consumer Commission (**ACCC**) uses average total cost as the starting point or base cost measure for its price analysis in predatory pricing cases.[11] Average total cost is used as the starting point for price analysis because marginal costs in the telecommunications industry are likely to be low. To take account of low marginal costs, the ACCC uses marginal cost as a cost measure only where marginal costs exceed the average variable cost.

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[11] Australian Competition and Consumer Commission, *Bundling in Telecommunications Markets* – An ACCC information paper, August 2003, page 16.

4.45 Following this analysis, if the pricing conduct of the relevant firm fails a test based on average total costs but passes a test based on marginal costs (where marginal cost exceeds average variable cost), the ACCC considers pricing in this range to constitute an "grey area". In such an instance, the ACCC will determine whether the pricing is anti-competitive by having regard to the following factors:[12]

(a) whether there are any regulatory or commercial reasons that a firm is pricing in such a manner and what the intention of the firm is in pricing in such a manner;

(b) whether the pricing would have an appreciable effect on existing competitors or new or potential entrants to the market;

(c) whether there are retail price decreases of some substance or duration;

(d) whether such retail price decreases are selective in terms of the customers to which they apply;

(e) whether past patterns of pricing conduct point to similar levels of pricing (e.g. seasonal pricing or pricing related to utilisation rates of infrastructure capacity); and

(f) what the likely future impact of bundling conduct may be on retail prices for the relevant product or service.

4.46 The High Court of Australia has also adopted a broader view in respect of the factors that must be taken into account in determining predatory conduct is occurring:

> *"In my view, what is required is not a bright line rule about costs but a more sophisticated analysis of the firm, its conduct, the firm's competitors, and the structure of the market not only at the time in which the firm has engaged in conduct allegedly in breach of the Act but also before and after that conduct".*[13]

4.47 The avoidance of using a single cost measure and the consideration of a multiple of measures and factors as a means of establishing the existence of predatory pricing by the ACCC and the High Court in Australia stems from a realisation that:

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12 Ibid, page 17.

13 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 195 ALR 609 at 273.

(a) no single cost measure is without its limitations (e.g. a pure marginal cost approach does not take account of the fact that marginal costs in the telecommunications industry are generally low);

(b) the application of a single cost measure without regard to alternative cost measures and other factors may not provide an adequate explanation of *why* pricing is below a particular measure of cost or the reasons behind this (e.g. as the ACCC has noted, the fact that a firm prices below average total cost but above average variable cost would not necessarily prove the existence of predatory pricing but may merely indicate the existence of a competitive market[14]); and

(c) pricing below a specific measure of cost may not necessarily result in the removal of efficient competitors from the market or deter future entry

4.48 A similar approach has been taken in the European Union in respect of general competition law matters. In the AZCO case, the European Court held that the level of analysis required to determine whether predatory pricing was occurring was dependant on the relationship between the price under consideration and the relevant cost measure. In particular, it held that

(a) pricing below average variable cost was almost certainly indicative of predatory pricing;

(b) pricing above average variable cost but below average total cost is not indicative of predatory pricing unless the pricing is intended to eliminate a competitor from the market; and

(c) pricing above average total cost is generally not assumed to be predatory.

4.49 Therefore, the test in the European Union of whether pricing above average variable cost but below average total cost constitutes predatory pricing depends on satisfying more than a particular cost measure. It also requires the consideration of a range of factors to establish that the conduct was intended to eliminate a competitor. Indeed, the Office of Fair Trading in the United Kingdom has stated in determining whether an undertaking's intention is to eliminate a competitor in predatory pricing cases (i.e. where pricing is above average variable cost but below average total cost), it will consider factors such as direct evidence of intentions, whether the conduct makes

14 Ibid, page 17.

commercial sense and other behavioural evidence of intention.[15] This test is significantly broader than the test currently proposed by the IDA under paragraph 3.2.1.1(d), which confines its analysis of whether a Dominant Licensee's pricing behaviour is likely to drive out efficient competitors or discourage future market entry using tests that are based on only a single cost measure (i.e. average incremental cost).

4.50 SingTel also notes that the AZCO principles have been applied specifically in the context allegations predatory pricing in the telecommunications industry.[16]

4.51 SingTel believes that some of the best practice features associated with regulatory frameworks that apply in Australia and the European Union in respect of predatory pricing can be readily included in the Telecom Competition Guidelines to underpin the IDA's decision making in respect of such matters.

4.52 On this basis, SingTel considers that the IDA should amend paragraph 3.2.1.1 of the Telecom Competition Guidelines to recognise that:

(a) pricing a product or service below a single cost measure (i.e. average incremental cost) would not, in itself, necessarily provide a conclusive basis for finding under sub-section 8.2.1.1(b) of the Code that a Dominant Licensee will drive efficient competitors from a market or discourage future market entry; and

(b) while the test of "average incremental cost" is the relevant test of whether a Dominant Licensee is selling its service below cost for the purposes of sub-section 8.2.1.1(a) of the Code, in determining whether pricing conduct is likely to drive efficient competitors from a market or discourage future market entry under sub-section 8.2.1.1(b) of the Code and paragraph 3.2.1.1(d) of the Telecom Competition Guidelines, the IDA will take account of:

(i) multiple cost measures (rather than the single measure currently proposed by the IDA); and

(ii) other factors that may point in favour or against the ability of the Dominant Licensee to drive efficient competitors out of the market or to discourage market entry, such as those taken into account by the ACCC and the Office of Fair Trading in the United Kingdom (see paragraphs 4.45 and 4.49 above).

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15 Office of Fair Trading, *Assessment of conduct: Draft competition law guideline for consultation,* OFT 414a, April 2004, pages 16-18.

16 European Commission, *Commission Decision of 16 July 2003 relating to a proceeding under Article 82 of the EC Treaty*, (Comp/38.233 – Wanadoo Interactive).

4.53 Finally, SingTel notes that the issue of whether a Dominant Licensee can recoup its losses once it has successfully driven efficient competitors out of the market and prevented re-entry will ultimately depend on the existence of barriers to entry in the relevant market.

4.54 Given the importance of barriers to entry in establishing whether recoupment is possible by the Dominant Licensee, it is necessary to ensure that only factors that genuinely constitute a barrier to entry should be considered by the IDA in its determination of whether recoupment is possible. SingTel is concerned that certain factors identified by the IDA as constituting barriers to entry in paragraph 3.2.1.1(e) of the Guidelines cannot reasonably be considered as such.

4.55 SingTel is particularly concerned about the inclusion of advertising costs and retail costs as a commercial barrier to entry. High advertising and retail costs are not barriers to entry. As the Office of Fair Trading in the United Kingdom has observed:

> *"In markets where brand image is important, a new entrant may have to invest heavily in advertising before it can attain a viable scale. However, even where advertising expenditure is a sunk cost, this does not necessarily mean that entry barriers are high. For example, incumbents may have had to establish their brands and may also have to advertise heavily to maintain them, and so will not necessarily have a cost advantage over potential entrants".*[17]

4.56 SingTel believes that the comments of the Office of Fair Trading accurately summarise how advertising costs should be treated by the IDA in determining barriers to entry in a market. SingTel does not have any cost advantage over new entrants in terms of advertising costs, as it is required to advertise heavily to maintain its brand in existing markets and faces similar sunk costs prior to its own entry into new markets. Similar arguments apply in respect of retail costs also.

4.57 SingTel cannot envisage a scenario where high advertising or retail costs are likely to amount to a barrier of entry or allow a Dominant Licensee to recoup losses it has allegedly incurred in driving competitors out of the relevant market.

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17 Office of Fair Trading, *Assessment of Market Power*, Competition Law Guideline, December 2004, paragraph 5.35.

4.58 On this basis, SingTel considers that the IDA should amend paragraph 3.2.1.1(e)(iv) of the Telecom Competition Guidelines to remove any reference to high advertising costs and retail costs as being a barrier to entry.

4.59 SingTel is also concerned about the IDA's commentary about access barriers in paragraph 3.2.1.1(e)(ii) of the Telecom Competition Guidelines. The IDA's comments fail to acknowledge that regulation of access to infrastructure and the provision of wholesale services is likely to remove any access barrier that may otherwise exist at a wholesale level, as well as the ability of the Dominant Licensee to leverage that power into a downstream market. As the Office of Fair Trading in the United Kingdom has observed:

> *"In some sectors the economic behaviour of undertakings (such as the prices they set or the level of services they provide) is regulated by…an industry sector regulator, and an assessment of market power may need to take that into account. Although an undertaking might not face effective competition from existing competitors, potential competitors or the nature of buyers in the market, it may still be constrained from profitability sustaining prices above competitive levels by an industry sector regulator".*[18]

4.60 The fact that SingTel must provide Interconnection Related Services (**IRS**) and Mandated Wholesale Services (**MWS**) to Requesting Licensees in accordance with the prices, terms and conditions set out in the SingTel's Reference Interconnection Offer (**SingTel RIO**) is sufficient to remove any access barrier to entry that may otherwise exist as a consequence of its control of a wholesale "input". SingTel believes that this should be explicitly acknowledged in the IDA's commentary on access barriers in paragraph 3.2.1.1(e)(iv) of the Telecom Competition Guidelines.

Price Squeezes

4.61 The IDA's comments in respect of "price squeezes" in paragraph 3.2.1.2 of the Telecom Competition Guidelines appear to assume that the Dominant Licensee has complete control over the pricing of wholesale services or "inputs" provided to Licensees that provide the basis for the provision of retail products or services in the downstream market.

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[18] Office of Fair Trading, *Assessment of Market Power*, Competition Law Guideline, December 2004, paragraph 6.7.

4.62 As noted above, this is not accurate in respect of charges for Interconnection Related Services (**IRS**) and Mandated Wholesale Services (**MWS**), which are set out in the SingTel RIO and subject to the approval of the IDA. The IDA should explicitly acknowledge the role of access regulation in eliminating the ability of a Dominant Licensee to engage in a "price squeeze" at a wholesale level in respect charges for Interconnection Related Services and Mandated Wholesale Services.

4.63 The Draft Guidelines on the Section 47 Prohibition released by the Competition Commission of Singapore also acknowledge that regulation by an industry regulator should be taken into account in the assessment of SMP.[19]

4.64 On this basis, SingTel believes that the IDA should amend paragraph 3.2.1.2 of the Telecom Competition Guidelines to make it clear that:

(a) the charges for Interconnection Related Services and Mandated Wholesale Services are set out in the SingTel RIO and subject to the approval of the IDA;

(b) the Dominant Licensee does not have the ability to engage in a "price squeeze" in respect of IRS and MWS as it lacks SMP in those markets; and

(c) the IDA will take account of the application of regulation at the wholesale level in making determinations as to whether there has been an abuse of dominant position.

4.65 SingTel is also concerned by the IDA's use of ambiguous language in paragraph 3.2.1.2(d)(ii) of the Guidelines, in which it states that in assessing the margin between what a Dominant Licensee charges downstream competitors for the input and the price it charges its own End Users, it will determine whether it is sufficient to allow a non-affiliated service providers to obtain a "commercially reasonably profit" for such an activity.

4.66 The use of phrase "commercially reasonable profit" is highly ambiguous. SingTel is not aware of what the IDA would consider a "commercially reasonable profit" to be.

4.67 In any case, however, such a test may be inappropriate where the service that is subject to the alleged price squeeze is offered as part of a 'bundle'. In such cases, it may be necessary to apply what is known as an "aggregate imputation test", which

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[19] Competition Commission of Singapore, *CCS Draft Guideline on the Section 47 Prohibition*, paragraph 3.15.

sums "the relevant price and cost information for all services in a bundled package".[20] Applying an aggregate imputation test to 'bundled' products is not without its difficulties[21]. However, the IDA should be aware that it may be inappropriate to calculate whether a service provider is obtaining profiting from a single activity in circumstances where that activity is only an input into one of several products or services that are provided as part of a 'bundle'.

4.68 Finally, SingTel objects to the IDA's comment in paragraph 3.2.1.3(e) of the Guidelines that it may also require the Dominant Licensee to "reduce its price for a service" if the IDA concludes that the price of service is substantially above cost for the purposes of cross-subsidisation. The IDA's use of its "cease and desist" power under sub-section 11.4.4.2 of the Code would be sufficient for the purposes of eliminating such conduct. It would not be necessary or appropriate for the IDA to set the price of a service in such an instance.

Discrimination

4.69 SingTel is concerned about the IDA's comments in paragraph 3.2.2.1 of the Telecom Competition Guidelines in relation to the circumstances where discrimination will constitute an abuse of dominant position under sub-section 8.2 of the Code.

4.70 SingTel notes sub-section 8.2.2.1 of the Code and paragraph 3.2.2.1(b) of the Guidelines state that a Dominant Licensee will be held to have engaged in discrimination and therefore abused its dominant position if:

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

(b) whether access to the infrastructure, systems, services or information is necessary to enable a non-affiliated Licensee to provide telecommunication services; and

(c) the Dominant Licensee provided its Affiliate with access to the infrastructure, systems, services or information on prices, terms or conditions that are "more favourable" that those which the Dominant Licensee provides to non-Affiliates.

4.71 SingTel believes that the use of the phrase "more favourable" is highly ambiguous, as it does not set a materiality threshold or objective test for determining whether a

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[20] Australian Competition and Consumer Commission, *Bundling in Telecommunication Markets: An ACCC Information Paper*, August 2003, page 14.

[21] Ibid, pages 14-15.

particular form of conduct constitutes discrimination. For example, it is unreasonable for every minor or immaterial instance of differential treatment between an Affiliate and non-Affiliate to be subject the prohibition against discrimination.[22]

4.72 It is also necessary for the discrimination to not just harm a "competitor" but also result in an "unreasonable restriction of competition" in a telecommunications market. The test of whether a Dominant Licensee has damaged a competitor will only be relevant to establishing an abuse of dominant position to the extent that such damage results or is likely to result in an unreasonable restriction of competition in a telecommunications market.

4.73 Discrimination between an Affiliate and non-Affiliate by a Dominant Licensee cannot therefore be reasonably said to contravene sub-section 8.2 of the Code if does not result in an "unreasonable restriction of competition".

4.74 On this basis, SingTel considers that the IDA should amend paragraph 3.2.2.1 of the Telecom Competition Guidelines to make it clear that the issue of whether a Dominant Licensee is liable for an abuse of dominant position through discrimination will depend on whether:

(a) the Dominant Licensee's treatment of a non-Affiliate is "materially" or "appreciably" different from its treatment of an Affiliate; and

(b) the Dominant Licensee has used its dominant position to discriminate against a Licensee in a manner that unreasonably restricts or is likely to unreasonably restrict competition in a telecommunications market in Singapore.

4.75 Finally, SingTel considers that the IDA should amend paragraph 3.2.2.1(d) of the Guidelines to make it clearer that the prohibition against discrimination will not apply in the event that the relevant input (i.e. the infrastructure, system, service or information) is not a "bottleneck" facility that is required for the purposes of providing a service in an downstream market. If it is not a "bottleneck" there is no obligation to provide access.

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[22] SingTel notes that this ambiguity also arises in paragraph 3.3.5(b)(ii) of the Guidelines in respect of discrimination in the context of anti-competitive preferences. SingTel's comments and recommended changes in this section are therefore equally applicable to paragraph 3.3.5(b)(ii) of the Guidelines.

Predatory Network Alteration

4.76 SingTel is also concerned with the IDA's commentary in relation to what it describes as "predatory network alteration" in paragraph 3.2.2.2 of the Telecom Competition Guidelines.

4.77 In particular, SingTel is concerned with the IDA's comment in paragraph 3.2.2.2(b) that it will find that a Dominant Licensee has abused its dominant position if the evidence demonstrates that the Dominant Licensee:

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

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

4.78 SingTel considers that the issue of whether network alteration imposes "significant costs on any interconnected Licensee" is incomplete, as it does not require the IDA to consider the costs incurred by a Dominant Licensee in effecting the relevant network alteration.

4.79 A Dominant Licensee would not obtain any benefit from such conduct if its costs exceeded the costs imposed on a Licensee (or Licensees) as a consequence of the network alteration. The IDA should amend the Telecom Competition Guidelines to make it clear that it is unlikely to consider that a Dominant Licensee has engaged in "predatory network alteration" where the costs associated with effecting an alteration exceed the costs such an alteration would impose on a Licensee (or Licensees) interconnected at the relevant point of interconnection.

4.80 SingTel also considers that the IDA's comments in paragraph 3.2.2.2(c)(i) of the Telecom Competition Guidelines are insufficient. The IDA should also recognise that the efficiencies that are gained by network alteration may not just accrue to SingTel and its own end-users but may also accrue to other Licensees and their end-users, while resulting in the imposition of specific costs on an individual Licensee.

4.81 Where the network alteration results in benefits to the Dominant Licensee, other Licensees and end-users (i.e. competition generally) but results in the imposition of costs upon an individual Licensee, such an alternation should not constitute an abuse of dominant position. In such a case, the costs incurred by that individual Licensee may be an unintended consequence of network alteration. Such an outcome could not reasonably be said to result in damage to "competition" in the relevant market, as it

would result in efficiencies to all other Licensees and their end-users. SingTel considers that network alteration in such an instance would be technically and operationally justified.

4.82 On this basis, SingTel considers that the IDA should amend paragraph 3.2.2.2 of the Telecom Competition Guidelines to make it clear that:

(a) a Dominant Licensee is unlikely to engage in the practice of "predatory network alteration" or obtain any benefit from such conduct where the costs incurred by the Dominant Licensee in effecting such an alteration exceed the costs imposed upon the Licensee (or Licensees) that interconnect at the relevant point of interconnection; and

(b) network alteration will be technically justified (and therefore would not constitute an abuse of dominant position) where such an alteration results in benefits to the Dominant Licensee, other Licensees and end-users but results in an individual Licensee incurring costs.

Anti-competitive preferences

4.83 SingTel generally agrees with the IDA's approach in respect of anti-competitive preferences.

4.84 SingTel notes that one of the reasons that anti-competitive preferences are prohibited under sub-section 8.3 of the Code is to prevent a firm with SMP in a particular market from leveraging that power into a separate market thereby causing an unreasonable restriction of competition in that market.

4.85 In addition to the specific types of anti-competitive preferences described in sub-section 8.3(b) of the Code, SingTel considers that an anti-competitive preference may also possibly arise where a firm with SMP in a market:

(a) 'bundles' a product or service from a non-competitive market (i.e. in the market in which it has SMP) with a product or service that is provided in a competitive market; and

(b) prevents a competitor that provides products or services in the competitive market from obtaining access to the "input" that is used by that firm to provide the relevant product or service in the non-competitive market, thereby preventing the competitor from offering a comparable 'bundle'.

4.86 SingTel notes that 'bundling' may be pro-competitive or anti-competitive, depending on the specifics of the conduct.[23] It may therefore be the case that the factual scenario described in paragraphs (a) and (b) above could potentially constitute an anti-competitive preference in breach of sub-section 8.3 of the Code. As the Australian Competition and Consumer Commission has noted:

> *"Bundling can be detrimental for consumers and competitors of the carrier…supplying the bundled services if it is used for anti-competitive purposes or has anti-competitive effects. Bundling may be anti-competitive if it forecloses or reduces competition by enabling the leveraging of market power from one market to another. In this way bundling may be used strategically to diminish competition or significantly reduce the ability of competitors in a particular market to compete".*[24]

4.87 Bundling is already offered to some extent in the telecommunications industry in Singapore. For example, StarHub currently 'bundles' telecommunications services with subscription television services. SingTel notes that StarHub has SMP in the subscription television market and therefore may have an incentive to leverage that power to unreasonably restrict competition in a telecommunication market through the type of anti-competitive preferences described in paragraph 4.85 above. Indeed, in its assessment of the merger between StarHub Pte Ltd and Singapore Cable Vision Ltd (now StarHub Cable Vision Ltd), the IDA acknowledged that SCV possessed market power in the subscription television services market stating that:

> *"IDA recognises that SCV has the ability to use its Market Power in the subscription nationwide television service market to impede competition within the telecommunications markets".*

4.88 SingTel believes that there are some examples of anti-competitive bundling strategies that are designed to leverage dominance in the subscription television services market to obtain an unfair advantage in competitive telecommunications markets.

4.89 As 'bundling' is likely to increase in prominence with the ongoing development and maturity of the telecommunications industry in Singapore, SingTel considers that the IDA should carefully monitor developments in the industry and the specific offerings of 'bundled' products and services to ensure that such arrangements are not used as a basis for unreasonably restricting competition in a telecommunications market.

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[23] Australian Competition and Consumer Commission, *Bundling in Telecommunications Markets: An ACCC Information paper*, August 2003, page 5.

[24] Ibid, page 5.

4.90 On this basis, SingTel considers that the IDA should amend paragraph 3.3 of the Telecom Competition Guidelines to recognise the possibility that an anti-competitive preference may arise in the context of "bundling", depending on the specifics of the conduct. In particular, the IDA should recognise that a preference may be anti-competitive if a firm with SMP in a market:

(a) 'bundles' a product or service from a non-competitive market (i.e. in the market in which it has SMP) with a product or service that is provided in a competitive market; and

(b) prevents a competitor that provides products or services in the competitive market from obtaining access to the "input" that is used by that firm to provide the relevant product or service in the non-competitive market, thereby preventing the competitor from offering a comparable 'bundle'.

4.91 SingTel notes that paragraphs 3.3.1, 3.3.3, 3.3.4 and 3.3.5 of the Telecom Competition Guidelines state that a Licensee that has an Affiliate with SMP cannot benefit from conduct by the Affiliate that constitutes a price squeeze and discrimination. This is neither fair nor reasonable for Licensees with Affiliates that have SMP, given that the Licensee in question may not have knowledge that it is in fact accepting a benefit that was in fact disallowed. For example, the Licensee may not have any knowledge that it has obtained an input from its Affiliate at a price that constitutes a price squeeze, nor would it be aware that it has accepted access to infrastructure, systems, services or information on prices, terms and conditions that area more favourable than those offered by its Affiliate to non-affiliated Licensees. SingTel considers that the onus on the Licensee in these paragraphs is unreasonable and should be deleted. Alternatively, paragraphs 3.3.4 (b), 3.3.3(b)(iii) and 3.3.5(b)(ii) should be revised to reflect that the Licensee has the necessary knowledge or is aware of such a fact.

4.92 SingTel also notes that paragraph 3.3.4(c) of the Telecom Competition Guidelines states that the IDA will conclude that a Licensee accepted a subsidy in any case where it:

(a) received revenue from the Affiliate;

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

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

4.93 Affiliates may provide goods and services to each other at less than cost where such goods or services are unrelated or incidental to the relevant firm's main business activity. The provision of these types of goods or services would not "enable the Licensee to engage in predatory pricing" as required by sub-section 8.3(b)(ii) of the Code. Sub-section 8.3(b) of the Code is only intended to capture cross-subsidisation in respect of telecommunication services. SingTel considers that the IDA should therefore amend the reference to "any goods or service" to refer specifically to "telecommunication services", thereby removing any ambiguity and ensuring consistency with drafting intention of sub-section 8.3(b)(ii) of the Code.

4.94 SingTel also notes that the reference to "market value" in paragraph 3.3.4(c)(ii) of the Guidelines is ambiguous and may not accurately describe the basis on which goods and services are supplied. SingTel considers that the reference to "market value" in paragraph 3.3.4(c)(ii) of the Guidelines should be replaced with "cost".

5. AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION

Determining the Existence of an Agreement

5.1 SingTel's considers that the IDA's commentary on determining the existence of an "agreement" in paragraph 4.2 of the Telecom Competition Guidelines lacks precision and a sound theoretical framework that is capable of providing guidance to private parties and the IDA in respect of whether a "tacit agreement" is likely to exist before the private party lodges a complaint or the IDA commences enforcement action under section 11 of the Code.

5.2 As currently drafted, SingTel considers that the Telecom Competition Guidelines are unclear as to the manner in which the IDA will seek to determine whether a Licensee has entered into a "tacit agreement".

5.3 While the IDA's specific examples of what may constitute an "tacit agreement" in paragraph 4.2(e)(iii) of the Telecom Competition Guidelines provide some indication as to what forms of conduct will establish the existence of an "agreement", the IDA has not provided any guidance on the elements that must exist or threshold issues that must be satisfied in order for the IDA to establish the existence of a "tacit agreement".

5.4 A breach of section 9 of the Code is a very serious issue. Any "agreement" (as that term is used in section 9 of the Code) is inherently anti-competitive and highly damaging to the interests of both consumers, businesses and competitors in the

relevant. As such, all Licensees must clearly understand their obligations under section 9 of the Code and the IDA's approach to determining whether an "agreement" is in existence. This is particularly important given that the sub-section 9.2 of the Code does not set out the elements or provide any guidance on what needs to be satisfied in order to establish a breach of section 9.

5.5 For example, in Australia, an "arrangement" (which has the same meaning and function as the term "tacit agreement" in the Code) will only exist under section 45 of the Trade Practices Act if each of the following elements exist:

(a) a "meeting of the minds" of the parties by way of some sort of communication;

(b) the arousal of certain expectations in the minds of the parties; and

(c) an acceptance that each party will act in a particular way.

5.6 SingTel considers that the IDA should amend paragraph 4.2 of the Telecom Competition Guidelines to include an identical or similar list of elements that must be satisfied in order to establish the existence of a "tacit agreement".

5.7 This would provide a benchmark that permits private parties and the IDA to make an informed preliminary assessment as to whether an "agreement" is in fact likely to exist before a private party complains to the IDA or the IDA commences enforcement action against the relevant Licensees.

5.8 The establishment of such elements would provide a clear indication of whether an "agreement" is likely to exist and whether enforcement action is required, as it would permit private parties and the IDA to apply specific facts against a sound theoretical framework.

The identification of "off-setting efficiencies" in agreements that unreasonably restrict competition

5.9 The IDA states in paragraph 4.4.3(c) of the Telecom Competition Guidelines that it will not determine that there is a contravention of the Code if it "identifies" off-setting efficiencies in an "agreement". Based on a literal interpretation, the requirement to actually "identify" efficiencies imposes an overly high standard of proof, which in some cases may not be able to be conclusively established from an evidentiary perspective.

5.10 The IDA should also consider the use of "estimates" in such circumstances as well. The use of estimates, for example, through economic modelling, is used by competition regulators throughout the world in decision making about the efficiencies or inefficiencies associated with a particular course of action.

5.11 On this basis, the IDA should amend paragraph 4.4.3(c) of the Telecom Competition Guidelines to make it clear that it may also use "estimates" in its consideration of whether an "agreement" contains any off-setting efficiencies.