

## **SINGAPORE TELECOMMUNICATIONS LIMITED RESPONSE TO CONSULTATION PAPER**

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

#### **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 SingTel has a strong interest in the development of the Advisory Guidelines. SingTel has been designated as a Dominant Licensee and, as a Dominant Licensee, SingTel has lodged requests for exemption with the IDA on two separate occasions with respect to the International Telephone Services Market and the International Capacity Services Market. In doing so, SingTel has developed views about the operation of sub-section 2.5 of the Code and the IDA's decision making processes in respect of requests for exemption. SingTel considers that the IDA should take these views into account in the development of the Advisory Guidelines.
- 1.3 SingTel hereby responds to the Info-communications Development Authority of Singapore's (**IDA**) draft advisory guidelines (**Advisory Guidelines**) governing petitions for reclassification and requests for exemption under sub-sections 2.3 and 2.5 of the Code of Practice for Competition in the provision of Telecommunication Services 2005 (**Code**).
- 1.4 SingTel welcomes the IDA's publication of the Advisory Guidelines for consultation. SingTel considers that the Advisory Guidelines will increase regulatory certainty and transparency in the IDA's decision making in respect of petitions for reclassification and requests for exemption under sub-sections 2.3 and 2.5 of the Code.

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 under sub-sections 2.3 and 2.5 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 – Analytical framework for the assessment of petitions for reclassification;
- (d) Section 5 – Analytical framework for the assessment of exemption requests;
- (e) Section 6 – the IDA's approach to market definition;
- (f) Section 7 – the IDA's approach to the assessment of significant market power;
- (g) Section 8 – Evidentiary issues;
- (g) Section 9 – the scope of exemptions granted by the IDA; and
- (h) Section 10 – Miscellaneous.

## **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 guide the IDA's decision making with respect to petitions for reclassification and requests for exemption.
- (b) The time taken by the IDA to finalise decisions in relation to requests for exemption unfairly prolongs the application of Dominant Licensee regulation to SingTel in respect of otherwise competitive markets. SingTel believes that the IDA is capable of issuing a preliminary and final decision in respect of a request for exemption within 30 days of the close of public consultation. On this basis, SingTel considers that the IDA should take approximately 4 months to finalise its decision in respect of a request for exemption. However, based on the timeframes provided in the Code and allowing reasonable time for consultation, the IDA's finalisation of request for exemption

would take approximately 8 months. We note that it took the IDA over 13 months to finalise its decision with respect to International Capacity Services.

- (c) SingTel considers that the test set out in paragraph 2.3(b) and referred to in paragraph 3.3 of the Advisory Guidelines provides the IDA with little, if any, practical guidance for determining whether a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code. The test currently set out in paragraph 2.3(b) does not provide a proper analytical framework for the IDA’s decision making in respect of requests for reclassification and requests for exemptions in relation to a “facility”. Paragraphs 2.3(b) of the Advisory Guidelines should be amended to incorporate a robust series of tests which must be satisfied before the IDA can determine that a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code. These tests should be modelled on the criteria set out in sub-section 7.3.1 of the Code, which currently applies in respect of Critical Support Infrastructure.
- (d) SingTel generally agrees with the IDA’s stated approach to market definition. However, SingTel’s experience to date is that the IDA:
  - (i) has taken a very narrow view of what constitutes a reasonable substitute for a product or service from a demand side perspective;
  - (ii) has not had sufficient regard to the principle of technological neutrality in defining markets;
  - (iii) has not had sufficient regard to supply side substitutability in defining markets; and
  - (iv) has not provided a sufficient or detailed explanation of the evidence it has relied upon as part of its market analysis.
- (e) The IDA should not automatically presume that a firm with a market share in excess of 40 percent has Significant Market Power (**SMP**). International best practice has moved away from the use of presumptive tests of market share to measure whether a firm has SMP in non-merger cases. SingTel is concerned that the IDA, upon presuming that a Dominant Licensee has SMP in a market, will discount or be less rigorous in its review of other factors such as barriers to entry and price competition.
- (f) The IDA should place primary emphasis on price competition in its assessment of whether a Dominant Licensee has SMP in a market. Price competition provides the most accurate indication of the state of competition in a market. It also provides the

most immediate and tangible benefit to consumers associated with competition, that is, price reductions. Evidence of price reductions demonstrate the existence of a competitive market, as it would not be possible for a Dominant Licensee to impose a small but significant non-transitory increase in price (**SSNIP**) in relation to the relevant product or service without the customer switching to a substitute product or service.

- (g) The IDA should not use “capacity” as a means of measuring market share. The use of capacity ignores the purpose for which capacity is used and the price, terms and conditions on which it is provided. For example, the use of capacity will result in artificially high market shares being attributed to a Dominant Licensee where there is excess capacity in a market or following a successful tender to provide a large volume of capacity to a certain customer, notwithstanding the fact that the additional capacity results in lower prices to consumers or the relevant tender process was highly competitive.
- (h) The IDA should not include “self-supply” in calculations of market share. The use of self-supply will result in artificially high market shares being attributed to a Dominant Licensee. Self-supply cannot be considered to be a reasonable substitute for the provision of wholesale services by a third party, and as such cannot be considered to be within the same market.
- (i) The IDA’s commentary on “access barriers” to entry should explicitly take account of the fact that regulation of access such as the designation of a service as a Interconnection Related Service (**IRS**) or Mandated Wholesale Service (**MWS**) constrains any SMP that SingTel may have in a wholesale market, as well as any ability to leverage such SMP into the relevant downstream retail market. In its market analysis, the IDA should have regard to the positive effect that access regulation of a service as an IRS or MWS will have on competition in a market over the foreseeable future.
- (j) SingTel does not consider that high advertising costs are a barrier to entry. A Dominant Licensee 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.
- (k) The IDA should adopt a “real world” approach to determining whether there are barriers to entry in a market by having regard to the rational conduct of profit maximising firms as a means of explaining a failure or lack of market entry in a market, rather than merely attributing the lack of entry to the existence of barriers to

entry. A profit maximising firm would deploy its assets and undertake operations in markets where returns are likely to be the greatest. Non-entry, therefore, may simply be due to the absence of a business case that justifies market entry, that is, the expected returns on investment do not warrant entry.

- (l) SingTel submits that while the IDA should consider all submissions it receives that oppose a request for exemption, the IDA should not attribute any weight or significance to any submission that opposes a request for exemption if it lacks verifiable data or makes unsubstantiated assertions or allegations. The IDA should also, where necessary, obtain its own verifiable data in determining whether the removal of Dominant Licensee regulation is justified.
- (m) SingTel submits that the IDA should grant exemptions in general terms (rather than in relation to specific products or services) so that all future services that are offered by the Dominant Licensee in the exempt market are automatically exempt from Dominant Licensee regulation without the need for notification to and approval by the IDA.

### 3. GENERAL COMMENTS

#### **IDA should have regard to the regulatory principles set out in the Code**

- 3.1 The Advisory Guidelines do not currently identify any general principles that will underpin the IDA's consideration of petitions for reclassification (**Reclassification Requests**) and requests for exemption (**Exemption Requests**) under sub-section 2.3 and 2.5 of the Code respectively.
- 3.2 SingTel considers that the Advisory Guidelines would benefit from the inclusion of an overarching framework setting out the regulatory principles that will inform and underpin the IDA's decision making in respect of petitions for reclassification and requests for exemption.
- 3.3 As the IDA's decision with respect to Reclassification Requests and Exemption Requests are made pursuant to sub-sections 2.3 and 2.5 of the Code, it follows that the regulatory principles set out in sub-section 1.5 of the Code should guide the IDA's decision making with respect to such requests.
- 3.4 An acknowledgment 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.

3.5 The regulatory principles set out in the Code are not explicitly acknowledged by the IDA in the Advisory 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 Exemption Request or Reclassification Request. In particular, SingTel considers that the IDA should have specific regard to the following regulatory principles:

- (a) reliance on market forces (sub-section 1.5.1);
- (b) the promotion of facilities-based competition (sub-section 1.5.3);
- (c) proportionate regulation (sub-section 1.5.4);
- (d) technological neutrality (sub-section 1.5.5);
- (e) transparent and reasoned decision making (sub-section 1.5.6); and
- (f) avoidance of unnecessary delay (sub-section 1.5.7).

3.6 SingTel considers that the IDA's decision making in respect of Reclassification Requests and Exemption Requests should be clearly informed and underpinned by the regulatory principles set out in the Code.

3.7 On this basis, SingTel believes that the IDA should introduce a new paragraph 1.7 in the Advisory 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 with inform and underpin the IDA's analytical approach and decision making with respect to Reclassification Requests and Exemption Requests; and
- (c) requires the IDA to identify the specific regulatory principle that it is applying in its decisions with respect to an Exemption Request or Reclassification Request.

## **The “licensed entity” approach to dominance and timeframes for decision making in respect of Exemption Requests**

- 3.8 SingTel considers that the continued designation of SingTel as a Dominant Licensee across the telecommunications industry as a whole is inherently flawed.<sup>1</sup> SingTel’s preferred approach has been set out in previous submissions to the IDA. The continuation of the “licensed entity” approach to dominance in the Code and the regulatory burden that this “broad-brush” approach places on SingTel raises significant issues for SingTel regarding its ability to compete effectively and the time taken for the IDA to finalise decisions in respect of Exemption Requests.
- 3.9 Since the IDA has not removed the “licensed entity” approach to dominance testing in its most recent Code review, SingTel considers that the IDA should at least ensure that its decision making process in relation to Exemption Requests is as efficient and streamlined as possible in order to minimise the duration of time that SingTel is subject to Dominant Licensee regulation in respect of otherwise competitive markets.
- 3.10 In SingTel’s experience, the time taken by the IDA to finalise decisions in relation to Exemption Requests has unfairly prolonged the application of disproportionate regulation on SingTel in respect of otherwise competitive markets. The prolongation of disproportionate regulation on SingTel ultimately harms competition and consumers. Disproportionate regulation imposes additional compliance costs on SingTel and prevents SingTel from competing as vigorously or effectively as it otherwise would in the absence of Dominant Licensee regulation.
- 3.11 For example, SingTel’s Exemption Request in respect of International Capacity Services was published by the IDA for consultation on 4 March 2004. The IDA released its Final Decision in respect of International Capacity Services on 12 April 2005, over 13 months after the date of SingTel’s Exemption Request. Similarly, the IDA took over 7 months to finalise its decision in respect of SingTel’s Exemption Request for the International Telephone Service.
- 3.12 Given that there is likely to be effective competition in respect of the markets that are subject to an Exemption Request from (at least) the date on which such a request is lodged, it follows that SingTel was subject to disproportionate regulation in respect of the exempted markets for an average of 10 months following the lodgement of an

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<sup>1</sup> Government Gazette, *Telecommunications (Classification of Dominant Licensees under the Telecom Competition Code) Notification 2005*, 18 February 2005. SingTel is not aware of any market analysis that has been conducted or evidence which has been produced since the Code review that provides the basis for the continued designation of SingTel as a Dominant Licensee.

Exemption Request for International Capacity Services and the International Telephone Service.

- 3.13 SingTel appreciates that the process of conducting market inquiries and determining whether a Dominant Licensee has SMP is both complex and time consuming. However, the time taken by the IDA to finalise Exemption Requests is considerably longer than that envisaged under the Code and that which SingTel considers reasonable and necessary.
- 3.14 Sub-section 2.5.2 of the Code provides that the “IDA will seek to issue its preliminary and final decision within 90 days from the close of consultation”, but may extend the time by providing written notice to the Dominant Licensee. The Code does not include a mandatory timeframe within which the IDA must make a decision in respect of an Exemption Request.
- 3.15 SingTel considers that the timeframes set out in sub-section 2.5.2 of the Code should be both shorter and mandatory. In any case, however, SingTel does not believe that the IDA requires 90 days from the close of public consultation to issue a preliminary and final decision. The IDA is a well funded and well resourced regulator. Further, the 90 day period set out in the Code is only intended to be *indicative* of the *maximum* amount of time it the IDA should take to finalise a preliminary and final decision.
- 3.16 SingTel believes that the IDA should be capable of issuing a preliminary and final decision within 30 days of the close of public consultation. On this basis, SingTel believes that the finalisation of an Exemption Request should take approximately 4 months (allowing for 4 weeks of public consultation prior to the preliminary and final decisions).
- 3.17 Based on the timeframes provided under the Code and allowing for 4 weeks of public consultation prior to the preliminary and final decisions, the finalisation of Exemption Requests will take approximately 8 months. This is too long.
- 3.18 Table 1 below provides a stage-by-stage breakdown of the time it should take the IDA to finalise a decision with respect to an Exemption Request based on SingTel’s proposed timeframe and the timeframe provided in the Code:



<b>Breakdown of the time the IDA should take in its decision making regarding Exemption Requests</b>		
<b>Stage in decision making process</b>	<b>Based on SingTel's reasonable timeframe</b>	<b>Based on timeframe provided under the Code</b>
Lodgement of Exemption Request	Lodgement Date	Lodgement Date
IDA issues Consultation Paper	Lodgement Date + 7 days	Lodgement Date + 7 days
Close of Public Consultation	Lodgement Date + 37 days	Lodgement Date + 37 days
IDA issues Preliminary Decision	Lodgement Date + 67 days	Lodgement Date + 127 days
Close of Public Consultation	Lodgement Date + 97 days	Lodgement Date + 157 days
IDA issues Final Decision	Lodgement Date + 127 days	Lodgement Date + 247 days
<b>Time taken to finalise decision</b>	Approximately 4 months	Approximately 8 months

3.19 On this basis, SingTel considers that the IDA should introduce a new section in the Advisory Guidelines that:

- (a) provides for the IDA to have regard to the regulatory principle of “avoidance of unnecessary delay” set out in sub-section 1.5.7 of the Code in its decision making in respect of Exemption Requests;
- (b) provides for the IDA to use its best endeavours to finalise its decision in respect of an Exemption Request within SingTel’s proposed timeframe (but in any event, no later than the timeframes envisaged under the Code); and
- (c) provides a stage-by-stage breakdown of the time the IDA will take to consider and finalise its decision in respect of an Exemption Request.

#### 4. ANALYTICAL FRAMEWORK FOR THE ASSESSMENT OF PETITIONS FOR RECLASSIFICATION

##### **Re-classification of a Dominant Licensee as non-dominant**

- 4.1 As currently drafted, section 2.3(a) of the Code and paragraph 3.1(b)(i) of the Advisory Guidelines provide that the IDA will re-classify a Dominant Licensee as non-dominant if it concludes that the Licensee no longer satisfies *both* criteria set out in sub-sections 2.2.1(a) and 2.2.1(b) of the Code.
- 4.2 Sub-section 2.2.1 of the Code states that a Licensee will be classified as dominant if:
- (a) it is licensed to operate facilities used for the provision of telecommunications services in Singapore that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor (sub-section 2.2.1(a)); or
  - (b) it has the ability to exercise Significant Market Power in any market in which it provides telecommunication services pursuant to its licence (sub-section 2.2.1(b)).
- 4.3 SingTel believes that the requirement for a Dominant Licensee to demonstrate that it no longer satisfies *both* sub-section 2.2.1(a) and (b) of the Code when seeking reclassification as a non-dominant Licensee is grossly unfair.
- 4.4 Further, SingTel considers that paragraph 3.3 of the Advisory Guidelines provide little, if any, practical guidance to the IDA for the purposes of determining whether a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code.
- 4.5 SingTel notes that paragraph 3.3 of the Advisory Guidelines cross-reference and seek to utilise the test referred to in paragraph 2.3(b). SingTel considers that the criteria in paragraph 2.3(b) of the Advisory Guidelines does not provide the IDA with any proper analytical basis for determining whether a facility is in fact “sufficiently costly or difficult to replicate”.
- 4.6 Indeed, as currently drafted, paragraph 2.3(b) of the Advisory Guidelines provides that the issue of whether a facility is “sufficiently costly or difficult to replicate” will depend on whether an efficient competitor:

- (a) can construct a facility that performs the same function at a cost that would enable it to provide competitive telecommunications service (paragraph 2.3(b)(i)); or
  - (b) could obtain such a facility from third parties on prices, terms and conditions that would enable it to provide a competitive telecommunication service (paragraph 2.3(b)(ii).
- 4.7 SingTel notes that entry into nearly any market will require an efficient competitor to incur costs in constructing or obtaining access to a facility offered by a third party. Such a test is therefore likely to be satisfied in nearly any instance, notwithstanding the fact that the facility in question does not necessarily constitute a genuine “bottleneck” using objective international standards.
- 4.8 The mere fact that a new entrant needs to construct or obtain access to a facility is not a sufficient basis for finding that a facility “is sufficiently costly or difficult to replicate” or that a Dominant Licensee should not be reclassified as non-dominant. In practice, such a test is likely to discourage investment in competing facilities based infrastructure.
- 4.9 SingTel considers that the analytical framework in paragraph 2.3(b) of the Advisory Guidelines (which is referred to in paragraph 3.3) should incorporate a robust series of tests or criterion which must be satisfied before the IDA can determine that a facility is “sufficiently costly or difficult to replicate”. Such an approach is consistent with regulatory best practice. SingTel believes that these tests can be modelled or based upon those that currently apply in respect of Critical Support Infrastructure (CSI) under sub-section 7.3.1 of the Code.
- 4.10 Sub-section 7.3.1 of the Code states that the IDA will not deem infrastructure to be a CSI based solely on evidence that allowing a Licensee that wants to share the infrastructure would reduce its costs or allow it to provide telecommunications services more quickly. Instead, the IDA will only deem infrastructure to be a CSI if:
- (a) the infrastructure is required to provide telecommunications services;
  - (b) an efficient new entrant would neither be able to replicate the infrastructure within the foreseeable future, nor obtain it from a third party through a commercial transaction, at a cost that would allow market entry;
  - (c) the Licensee than controls the infrastructure has sufficient current capacity to share with other Licensees;

- (d) the Licensee that controls the infrastructure has no legitimate justification for refusing to share the infrastructure with other Licensees; and
  - (e) failure to share the infrastructure would unreasonably restrict competition in any telecommunication market in Singapore.
- 4.11 SingTel considers that a facility should only be considered to be “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code if it satisfies each of the above criteria. Alternatively, if a facility fails to satisfy the above criteria, it should not be considered to be “sufficiently costly or difficult to replicate”.
- 4.12 On this basis, SingTel considers that the IDA should amend paragraph 2.3(b) of the Advisory Guidelines to ensure that in determining whether a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code, the IDA uses a robust series of tests which would genuinely allow it to establish whether the facility is in fact “sufficiently costly to duplicate”. As noted above, SingTel considers that the IDA should use the criteria which currently applies to Critical Support Infrastructure under sub-section 7.3.1 of the Code.

#### **Re-classification of a non-dominant Licensee as a Dominant Licensee**

- 4.13 Section 2.3(a) of the Code and paragraph 3.1(b)(ii) of the Advisory Guidelines provide that the IDA will re-classify a non-dominant Licensee as a Dominant Licensee if it concludes that the Licensee satisfies at least one of the two criteria set out sub-sections 2.2.1(a) *or* 2.2.1(b) of the Code.
- 4.14 SingTel notes that paragraphs 3.2(b) and (c) of the Advisory Guidelines clarify that the criteria in sub-section 2.2.1(a) of the Code applies in relation to Reclassification Requests that relate to “facilities” while the criteria in sub-section 2.2.1(b) of the Code applies to Reclassification Requests that relate to “services”.
- 4.15 As noted above, paragraph 3.3 of the Advisory Guidelines sets out the manner in which the IDA is to consider whether a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code in respect of Reclassification Requests that relate to a facility. Such a test also applies in the case of reclassification of a non-dominant Licensee as a Dominant Licensee.
- 4.16 As noted above, SingTel considers that the IDA should amend paragraph 2.3(b) of the Advisory Guidelines to ensure that the IDA uses a robust series of tests which would genuinely allow it to establish whether the facility is “sufficiently costly to duplicate”

for the purposes of sub-section 2.2.1(a) of the Code. The series of tests to be used should be based on those that currently apply to Critical Support Infrastructure under sub-section 7.3.1 of the Code.

## **5. ANALYTICAL FRAMEWORK FOR THE ASSESSMENT OF EXEMPTION REQUESTS**

### **IDA should clarify what constitutes an Exemption Request in respect of a “facility” or “service”**

- 5.1 Paragraphs 2.3 and 2.4 of the Advisory Guidelines establish different analytical frameworks for decision making depending on whether the request relates to a facility<sup>2</sup> (**Facility Exemption Request**) or a service<sup>3</sup> (**Service Exemption Request**). There is no specific requirement to this effect in the Code.
- 5.2 Paragraphs 2.3 and 2.4 of the Advisory Guidelines do not provide sufficient guidance as to what constitutes a “facility” or “service”. Nor does the Code. As such, it is not entirely clear as to the circumstances in which a Dominant Licensee should submit a Service Exemption Request or a Facility Exemption Request.
- 5.3 Presumably, the IDA intends for a Dominant Licensee to submit a Facility Exemption Request in relation to facilities such as Essential Support Facilities while Service Exemption Request are to be submitted in respect of retail products and services and the inputs used to provide such products or services.
- 5.4 SingTel considers that the IDA should amend paragraph 2.3 and 2.4 of the Advisory Guidelines to:
- (a) make it clear as to the circumstances in which the Dominant Licensee should submit a Service Exemption Request or a Facility Exemption Request; and
  - (b) include an indicative list of the specific type of products or services that the IDA would consider constitute a “service” or “facility” for the purposes of sub-section 2.5 of the Code.

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<sup>2</sup> IDA, *Advisory Guidelines governing petitions for reclassification and requests for exemption under sub-sections 2.3 and 2.5 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005*, 11 March 2005, paragraph 2.3.

<sup>3</sup> Ibid, paragraph 2.4.

## **IDA should amend paragraph 2.3(b) of the Advisory Guidelines**

- 5.5 As noted above in context of Reclassification Requests, paragraph 2.3(b) of the Advisory Guidelines provide little, if any, practical guidance to the IDA for the purpose of determining whether a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code.
- 5.6 SingTel considers that the IDA should amend paragraph 2.3(b) of the Advisory Guidelines to ensure that in determining whether a facility is “sufficiently costly or difficult to replicate” under sub-section 2.2.1(a) of the Code in relation to a Facility Exemption Request, the IDA uses a robust series of tests which would genuinely allow it to establish whether the facility is in fact “sufficiently costly to duplicate”. As noted above, SingTel considers that the IDA should use the criteria which currently applies to Critical Support Infrastructure under sub-section 7.3.1 of the Code.

## **6. THE IDA’S APPROACH TO MARKET DEFINITION**

- 6.1 SingTel generally agrees with the IDA’s stated approach to market definition set out in paragraph 2.4.1 of the Advisory Guidelines.
- 6.2 The purpose of the IDA’s market analysis is to identify all relevant substitutes for a service that impose a competitive constraint on SingTel. In order to determine what services impose a competitive constraint, the IDA must identify the smallest area of the product, geographic and functional space within which a hypothetical monopolist could impose a small but significant and non-transitory increase in price above competitive levels (**SSNIP**) without resulting in customers switching to other services (i.e. substitutes), assuming that the price of all other services remains constant (**SSNIP Test**).
- 6.3 While SingTel generally agrees with the IDA’s stated approach to market definition, SingTel’s experience to date in respect of Exemption Requests is that the IDA:
- (a) takes a very narrow view of what constitutes a reasonable substitute for a product or service by requiring too great a degree of demand side substitutability;
  - (b) does not have sufficient regard to the principle of technological neutrality in defining markets;
  - (c) does not have sufficient regard to supply side substitutability in defining markets; and

(d) does not provide a sufficient or detailed explanation of the evidence it has relied upon as part of its market analysis.

6.4 Each of these issues is discussed in more detail below.

### **Demand side substitution**

6.5 Demand side substitution is the most obvious and usually the most direct competitive constraint between 2 products or services. SingTel wishes to emphasise to the IDA that the primary test of substitutability from a demand side perspective is whether a SSNIP will result in switching by customers to a substitute product or service, thereby defeating any benefit to the hypothetical monopolist as a consequence of the SSNIP.

6.6 Paragraph 2.4.1(a)(ii) of the Advisory Guidelines state that the “IDA may also consider whether other telecommunication product offerings have a similar function, characteristic or customer as the Licensee’s telecommunication product offerings”. The IDA’s comments in paragraph 2.4.1(a)(ii) appear to suggest that the consideration of factors such as the price, quality or characteristics of the relevant product or service is an additional test to be applied by the IDA following the application of the SSNIP Test.

6.7 SingTel notes that the price, quality or other characteristics of a service will only be relevant to market analysis insofar as such factors affect the ability of a customer to switch from one product or service to another. The fact that different products or services have different functions, characteristics or customers should not, in itself, result in findings that these products or services are not within the same market. The Office of Fair Trading in the United Kingdom has made the following observation in respect of the physical characteristics of demand side substitutes:

*“Indeed, it is possible for products with different physical characteristics to be seen as sufficiently substitutable by customers for them to be legitimately regarded as demand-side substitutes. For this reason, defining relevant markets solely with reference to physical characteristics will often lead to markets defined too narrowly”.*<sup>4</sup>

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<sup>4</sup> Office of Fair Trading, *The role of market definition in monopoly and dominance inquiries*, Economic Discussion Paper 2, OFT 342, July 2001, paragraph 2.16.

6.8 Similarly, the fact that a service differs in price and quality in comparison to another service does not necessarily mean that that first service is not in fact a substitute or within the same market as the second service. The Office of Fair Trading in the United Kingdom has also remarked:

*“Substitutes do not have to be identical products to be included in the same market...The products’ prices do not have to be identical. For example, if two products perform the same purpose, but one is of a higher quality, they might be included in the same market. This depends on whether the price of one constrains the price of the other. Although one is of a lower quality, customers might still switch to this product if the price of the more expensive product rose and if they no longer felt that the higher quality justified the price differential”.*<sup>5</sup>

6.9 Similarly, the Federal Court of Australia has noted:

*“The existence of price differentials between different products, reflecting differences in quality or other characteristics of the products, does not by itself place the products in different markets. The test of whether or not there are different markets is based on what happens (or would happen) on either the demand or supply side in response to a change in relative price”.*<sup>6</sup>

6.10 On this basis, SingTel considers that the IDA should amend paragraph 2.4.1(a) of the Advisory Guidelines to make it clear that:

- (a) the only relevant test for market definition is the SSNIP Test; and
- (b) factors such as price, quality and physical characteristics are only relevant to the extent that they affect the ability of the customer to switch from one product or service to another following a SSNIP in relation to the first product or service.

### **Technological neutrality**

6.11 SingTel’s experience to date is that the IDA does not sufficiently consider the purpose for which a product or service is used in order to determine whether other products or services constitute reasonable substitutes. As such, the IDA’s practical application of market analysis overstates actual differences between certain products and services from a customer or demand side perspective.

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<sup>5</sup> Office of Fair Trading, *Market Definition Guideline*, March 1999, page 5. See also,  
<sup>6</sup> *Trade Practices Commission v Australian Meat Holdings* (1988) ATPR 40-876 at 49,480.



6.12 The fact that a product or service contains different technical elements or utilises a different technology or delivery platform to another product or service does not necessarily mean that the first product or service is not fact a substitute or within the same market as the first product or service. SingTel refers the IDA to the regulatory principle of technological neutrality set out in sub-section 1.5.5 of the Code:

*“IDA’s regulatory requirements will reflect the phenomenon of convergence, which is eroding historical difference among platforms such as wireline, cable, wireless and satellite. Regulatory requirements will be based on sound economic principles and, to the extent feasible, will be technology neutral”<sup>7</sup>.*

6.13 The primary issue from a market analysis perspective is always whether a SSNIP in respect of one product or service will result in customers switching to another product or service. The actual technology used to provide a product or service will only be significant insofar as it affects the ability of the customer to switch to another product or service. As Oftel (now Ofcom) has observed:

*“Of tel’s approach is based on a Competition Law based assessment of markets and an assessment of the extent to which switching among services by consumers constrains prices, irrespective of the infrastructure used by the providers of those services”<sup>8</sup>.*

6.14 For example, technologies such as VoIP are breaking down traditional market boundaries and challenging previously accepted market definitions. Since the services provided through such technology impose a competitive constraint on the traditional providers of voice telephony services, such services should be considered to be in the same market as traditional voice telephony services.

6.15 SingTel considers that the IDA should amend paragraph 2.4.1 of the Advisory Guidelines to explicitly recognise that the type of technology or delivery platform that is used to provide a product or service will only be significant to the extent that it affects the ability of a customer to switch from one product or service to another.

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<sup>7</sup> Code at paragraph 1.5.4

<sup>8</sup> Oftel, *Wholesale International Services Markets: Identification and analysis of markets, determination of market power and setting of SMP conditions*, Explanatory Statement and Notification, 26 August 2003, pages 24.

## Supply side substitutability

- 6.16 SingTel notes with concern that the IDA's commentary in paragraph 2.4.1 of the Advisory Guidelines does not explicitly mention supply side substitutability. SingTel expressed the view in its submissions in respect of International Capacity Services that the IDA had not given sufficient consideration to supply side substitution possibilities in its market analysis. In its International Capacity Services decision, the IDA focused almost exclusively on demand side substitution, with virtually no focus on supply side substitution possibilities.
- 6.17 SingTel considers that the IDA should revise the Advisory Guidelines to specifically recognise the possibility of supply side substitution.
- 6.18 Supply side substitution is a less obvious form of substitution but may be as effective as demand side substitution.<sup>9</sup> As such, it is an essential component of market analysis. The inclusion supply side analysis is consistent with best practice regulation and is utilised by regulators in Australia, the European Union and the United States. The European Commission has said:

*“In assessing the scope of supply substitution, NRAs may also take into account the likelihood that undertakings not currently active on the relevant market may decide to enter the market, within a reasonable time frame, following a relative price increase, that is, a small but significant, lasting price increase”.*<sup>10</sup>

- 6.19 Similarly, the High Court of Australia has stated:

*“In setting the limits of a market the emphasis has historically been placed upon what is referred to as the ‘demand side’, but more recently the ‘supply side’ has also come to be regarded as significant. The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or the demand for a product may be substituted for another...”*<sup>11</sup>

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<sup>9</sup> Office of Fair Trading, *The role of market definition in monopoly and dominance inquiries*, Economic Discussion Paper 2, OFT 342, July 2001, paragraph 2.18.

<sup>10</sup> European Commission, *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications network and services*, 2002/C 165/03, paragraph 52.

<sup>11</sup> *Queensland Wire Industries Pty Ltd v BHP* (1989) ATPR 40–925 at 50,014.

- 6.20 SingTel also notes that the Competition Commission of Singapore explicitly recognises the existence of supply side substitutability in its Draft Guidelines on Market Definition.
- 6.21 In circumstances where the total costs of switching production to the product or service that is subject to the SSNIP are small or negligible, the relevant product or service should include the relevant definition of market.<sup>12</sup> SingTel believes that there are likely to be several scenarios where a firm can modify the use of technology to commence providing services in the relevant market in response to a SSNIP, thereby defeating any benefit gained by the hypothetical monopolist in raising prices above competitive levels.
- 6.22 As telecommunications networks are increasingly digitised, a wider range of services will be provided through a single technology, thereby providing for a high degree of supply side substitution. For example, broadband connections can be used to provide both voice services and data services. The incremental cost in providing voice over broadband is small. Similarly, some satellite facilities can be used to supply a range of alternative services.
- 6.23 A failure by the IDA to take account of supply side substitution possibilities in its market analysis may result in the IDA adopting an overly narrow market definition which does not reflect the true state of competition in a market or acknowledge the competitive constraints that apply to the Dominant Licensee.
- 6.24 On this basis, SingTel believes that the IDA should amend paragraph 2.4.1 of the Advisory Guidelines to make it clear that it will take account of supply side substitution possibilities in its market analysis.

### **Evidence used by the IDA in its market analysis**

- 6.25 SingTel submits that the IDA should provide sufficiently detailed data and explanations of the evidence it has relied upon to conduct its market analysis in Exemption Request decisions. SingTel's concerns in respect of this issue arise from the IDA's recent decision with respect to International Capacity Services where such information was lacking.

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<sup>12</sup> European Commission, *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications network and services*, 2002/C 165/03, paragraph 52.

6.26 While the IDA's conclusions are likely to be based on verifiable data provided by the Dominant Licensee in accordance with sub-sections 2.6.1 or 2.6.2 of the Code, it is unclear as to whether the IDA has a process of attributing weight or significance to specific types of verifiable data in its conduct of market analysis.

6.27 If the IDA does attribute weight or significance to particular types of verifiable data over others in its decision making, SingTel considers that the IDA should include a indicative list in paragraph 2.4 of the Advisory Guidelines setting out the weight (if any) it will attribute to particular types of verifiable data.

## **7. THE IDA'S APPROACH TO THE ASSESSMENT OF SIGNIFICANT MARKET POWER**

### **Presumption of Significant Market Power on the basis of market share**

7.1 SingTel disagrees with the IDA position in paragraph 2.4.2(a)(ii) of the Advisory Guidelines that it will presume that a Dominant Licensee has SMP where it has market share in excess of 40 per cent.

7.2 SingTel submits that such an approach no longer reflects regulatory best practice. Traditionally, market share thresholds were applied as a presumptive test in assessing whether a firm had SMP. Over the last few years, however, regulators around the world have moved away from using high market shares as a presumptive test of dominance in non-merger matters. Instead, the existence of high market shares is now merely considered to indicate that a firm may have SMP. As the European Commission has noted:

*“It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power”.*<sup>13</sup>

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<sup>13</sup> European Commission, *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications network and services*, 2002/C 165/03, paragraph 78.

7.3 The competition law framework in the European Union does not provide for the automatic presumption of SMP in a market upon the finding that an undertaking has a large market share. As the Office of Fair Trading in the United Kingdom has observed:

*“There are no market share thresholds for defining dominance under Article 82 or the Chapter II prohibition. An undertaking’s market share is an important factor in assessing dominance but does not determine on its own whether an undertaking is dominant”.*<sup>14</sup>

7.4 SingTel considers that the automatic presumption of SMP will result in the IDA placing too much reliance on market shares as a basis for determining whether a Dominant Licensee has SMP. SingTel is concerned that the IDA will, upon finding that a Dominant Licensee has a large market share, inadvertently discount or be less rigorous in its review of other factors such as barriers to entry and price competition on the basis that the existence of SMP in a market has already been established.

7.5 On this basis, SingTel considers that the IDA should amend paragraph 2.4.2 of the Advisory Guidelines to remove the presumption that a Dominant Licensee will have SMP in a market if it has a market share in excess of 40 percent.

### **Primary emphasis should be placed on price competition in the assessment of SMP**

7.6 The IDA’s comments in paragraph 2.4.2 of the Advisory Guidelines, as well as its decision in response to SingTel’s Exemption Request for International Capacity Services, appear to over emphasise the significance of market share in determining whether a Dominant Licensee has SMP in a market.

7.7 As currently drafted, the Advisory Guidelines state that the IDA will consider the following factors in descending order in considering whether a Dominant Licensee has SMP in a market:<sup>15</sup>

(a) market share;

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<sup>14</sup> Office of Fair Trading, *Assessment of Market Power*, Competition Law Guideline, December 2004, paragraph 2.11.

<sup>15</sup> IDA, *Advisory Guidelines governing petitions for reclassification and requests for exemption under sub-sections 2.3 and 2.5 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005*, 11 March 2005, paragraph 2.4.2.

- (b) other factors that would affect the ability of the Dominant Licensee to act anti-competitively, including market concentration and barriers to entry; and
- (c) evidence of actual market performance, including price and non-price competition.

(each an **SMP Criteria**).

7.8 The IDA has not indicated in the Advisory Guidelines the weight it intends to give each SMP Criteria in making a determination with respect to the existence of SMP in a market, although it has explicitly recognised in its decision with respect to International Capacity Services that “no one factor will be dispositive”.<sup>16</sup>

7.9 Notwithstanding the IDA’s comments in the International Capacity Services decision, SingTel still considers that the IDA’s approach places too much weight on market shares as a basis for determining whether a Dominant Licensee has SMP. This is demonstrated by the IDA’s:

- (a) presumption of dominance where a Dominant Licensee has a market share in excess of 40 per cent; and
- (b) decision in relation to International Capacity Services, in which it held that SingTel had SMP in relation to the backhaul market and terrestrial IPLC market based on what SingTel considers to be an excessive reliance on market shares at the expense of other indicia.

7.10 SingTel submits that price competition and price declines represent a more accurate indicator of the state of competition in a market and in determining whether a Dominant Licensee has SMP. As such, price competition should be the primary consideration in determining whether a Dominant Licensee has SMP in a market.

7.11 Price competition provides consumers with the most immediate and tangible benefit associated with competition, that is, lower prices.

7.12 Other factors such as market share do not affect consumer welfare to the same extent as price competition (or sometimes not at all) in terms of immediate or tangible benefits. It may, for example, be the case that although 2 competitors in a market

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<sup>16</sup> IDA, *Explanatory Memorandum to the decision of the Info-communications Development Authority of Singapore on the request by Singapore Telecommunications Limited for exemption from Dominant Licensee obligation with respect to the “International Capacity Services” Market*, 12 April 2005, paragraph 38.

both have large market shares, the state of price competition is such that neither competitor has SMP in the relevant market. Alternatively, a smaller competitor may be able to constrain a firm that possesses a large market share. As the Australian Competition and Consumer Commission has noted:

*“In some markets the ‘maverick’ behaviour of particular firms, even small firms, serves to undermine attempts to coordinate the exercise of market power. These firms tend to deliver benefits to consumers beyond their own immediate supply, by forcing other market participants to deliver better and cheaper products”.*<sup>17</sup>

- 7.13 Similarly, a firm with a large market share may lack SMP where all its sales are to a single customer or to a few concentrated buyers that are able to exert considerable bargaining strength.<sup>18</sup> Indeed, Singapore has over 6,000 multinational corporations (MNCs) with regional headquarters or operations in Singapore<sup>19</sup>. MNCs are typically bulk purchasers and highly sophisticated users of telecommunications products and services. As such, they are frequently able to exercise countervailing market power by requiring Licensees to comply with competitive processes (such as tendering) to be able to obtain the right to provide telecommunications services to the relevant MNC.
- 7.14 There may therefore be several situations where a firm cannot act independently of its competitors, customers or consumers notwithstanding the fact that it has a large market share in the relevant market. As such, the existence of a large market share does not provide a practical or “real world” indication of the existence of SMP in a market.
- 7.15 Price competition is also the accurate way to establish whether a Dominant Licensee has SMP in a market. Evidence of price competition is highly accurate, readily available, up to date and provides actual evidence of “the market at work”. It provides a practical or “real world” indicator of the state of competition in the relevant market
- 7.16 Evidence of price reductions also demonstrate a lack of SMP in the relevant market, as it would not be possible for a Dominant Licensee to impose a SSNIP in relation to the relevant product or service in a market that is the subject of price reductions without a customer switching to a substitute product or service.

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<sup>17</sup> Australian Competition and Consumer Commission, *Merger Guidelines*, June 1999, page 53.

<sup>18</sup> Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – An information paper*, August 1999, page 37.

<sup>19</sup> IDA, *A Pro-Business Environment*, 1 May 2003.

- 7.17 Evidence in relation to other factors such as market share are generally not as accurate as evidence in respect of price competition in identifying the actual state of competition or whether a firm has SMP in a market. Similarly, certain types of information that are used to calculate market share (e.g. capacity – see below - or revenue) may not necessarily provide an accurate or “real world” indication of the state of competition in a market. For example, the use of revenues may provide a distorted view of market share in some instances (e.g. where a Licensee is a subsidiary of a global company who may record all their revenues in their country of origin or as part of the accounts of a regional division).
- 7.18 Accordingly, a finding that a Dominant Licensee had SMP on this basis would not necessarily represent the true state of competition in the relevant market.
- 7.19 On this basis, SingTel considers that the IDA should amend paragraph 2.4.2 of the Advisory Guidelines to ensure that price competition (rather than market share) is given primary consideration in determining whether a Dominant Licensee has SMP in a market;

#### **The IDA’s use of ‘capacity’ in measuring market share**

- 7.20 SingTel disagrees with the IDA’s comment in paragraph 2.4.2(a) of the Advisory Guidelines in relation to use of “capacity” to measure market share. SingTel considers that the use of revenue or other similar measures such as units of sales generally provide a suitable basis for the measurement of market shares in most, if not all, instances.
- 7.21 While the IDA should have some discretion in determining which unit of measurement to use as the basis for calculating market shares, SingTel considers that the IDA should not use “capacity” as a means of calculating market shares in any situation.
- 7.22 SingTel considers that the use of “capacity” in determining market share is highly inappropriate. The use of “capacity” as a means of calculating market share is likely to, for historical reasons, always result in a finding that SingTel has a high market share.
- 7.23 The use of “capacity” to measure market share would be inappropriate as it ignores the purpose for which it is used and the prices, terms and conditions on which it is provided.



- 7.24 The use of capacity may also result in artificially high market shares being attributed to a Dominant Licensee where there is excess capacity in a market (e.g. immediately following the “roll out” of additional capacity), notwithstanding the fact that the additional capacity may result in lower prices to consumers. For example, the excessive supply of international bandwidth capacity in Singapore has resulted in significant price reductions and changes in the level of market concentration. Capacity in such a context is inconsequential, as the primary test for determining whether competitive constraints exist in the relevant market is the existence of vigorous price competition between firms.
- 7.25 A similar outcome may also occur following a successful tender to provide a large volume of capacity to a certain customer, notwithstanding the fact that the process by which such capacity was allocated to the successful tenderer was highly competitive.
- 7.26 On this basis, SingTel considers that the IDA should amend paragraph 2.4.2(a) of the Advisory Guidelines to ensure that “capacity” is not used as a means of calculating market shares in any situation.

#### **The IDA’s inclusion of self-supply in the measurement of market shares**

- 7.27 In addition to the use of capacity as a means of measuring market share, SingTel disagrees with the IDA’s use of self-supply in the calculation of market shares.
- 7.28 SingTel disagrees with the IDA’s comment in paragraph 2.4.2(a)(i) of the Advisory Guidelines that “in markets for ‘upstream’ services that could be used as an input for other services, and in which self-supply accounts for a significant portion of the market, capacity may be a more reliable measure than revenue because it is often not feasible to assign revenues to self-supplied inputs”. SingTel submits that this comment is flawed.
- 7.29 In its decision with respect to International Capacity Services, the IDA found that SingTel had SMP in the backhaul market after it included self-supply in the definition of backhaul market. The IDA remarked:

*“IDA believes that both services are in the same market because self-providing backhaul is a substitute for purchasing backhaul from another carrier”.*<sup>20</sup>

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<sup>20</sup> IDA, *Explanatory Memorandum to the decision of the Info-communications Development Authority of Singapore on the request by Singapore Telecommunications Limited for exemption from Dominant*

7.30 This finding was based on IDA’s stated approach to the assessment of market shares as set out in paragraph 33 of the International Capacity Services decision:

*“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 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”.*<sup>21</sup>

7.31 The inclusion of self-supply is contrary to established methods of market definition, which define markets on the basis of substitutability using the SSNIP test. SingTel cannot envisage a scenario where a SSNIP by a Dominant Licensee in relation to a wholesale service it supplies to itself will result in the Dominant Licensee switching or obtaining that service from another Licensee. It would be irrational for SingTel to invest in deploying its own infrastructure and then use the infrastructure of a third party rather than the infrastructure it has deployed. The provision of wholesale services by a third party is not therefore a reasonable substitute for self-supply.

7.32 Although it may be theoretically possible for SingTel to purchase wholesale services for self supply purposes from another Requesting Licensee, this would never occur in practice – SingTel does not (and would not) purchase services for self-supply purposes from another Requesting Licensee. Similarly, Requesting Licensees that have rolled-out their own infrastructure to SingTel's submarine cable landing stations self-provide their own backhaul services and do not acquire backhaul from SingTel.

7.33 Mere theoretical possibilities should not be included in market definition, as they cannot be considered reasonable substitutes. As the US Department of Justice has observed:

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*Licensee obligation with respect to the “International Capacity Services” Market*, 12 April 2005, paragraph 50.

<sup>21</sup> Ibid, paragraph 33.

*“In measuring a firm’s market share, the Agency will not include its sales or capacity to the extent that the firm’s capacity is committed or so profitability employed outside the relevant market that it would not be available to respond to an increase in price in the market”.*<sup>22</sup>

- 7.34 The IDA’s flawed approach to the assessment of market share through the inclusion of self-supply is compounded by the fact that the IDA does not publish how it calculates self-supply or the specific types of self-supply that it includes in an assessment (e.g. self-supply for operational and maintenance purposes).
- 7.35 On this basis, SingTel considers that paragraph 2.4.2(a)(i) of the Advisory Guidelines should be amended to ensure that self-supply is not used by the IDA in the calculation of market shares.

#### **The IDA’s assessment of “access barriers” to entry**

- 7.36 SingTel considers that the list of barriers to entry set out in paragraph 2.4.2(b)(i) provides a comprehensive summary of the factors that should be taken into account by the IDA in assessing whether a Dominant Licensee has SMP in a market.
- 7.37 SingTel, however, has reservations about some of the examples given by the IDA in respect of specific barriers to entry and would like to see greater detail about how the IDA is to consider such factors in its analysis.
- 7.38 In respect of the “access barriers” referred to in paragraph 2.4.2(b)(ii) of the Advisory Guidelines, SingTel notes that many wholesale services that are offered by SingTel are subject to access regulation by the IDA pursuant to the Code. SingTel provides 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**).
- 7.39 The IDA should explicitly take account of the fact that its regulation of IRS and MWS is likely to constrain any SMP that SingTel may have in the wholesale market, as well as its ability to leverage that power into the downstream retail market (see paragraph 7.41 below). As the Office of Fair Trading in the United Kingdom has observed:

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<sup>22</sup> US Department of Justice, *Horizontal Merger Guidelines*, revised 8 April 1997, page 14.

*“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”.*<sup>23</sup>

- 7.40 SingTel therefore considers that its control of a wholesale “input” should not, in itself, be considered to be a barrier to entry, particularly where that “input” is subject to regulation as an IRS or MWS. SingTel considers that the provision of IRS and MWS under the SingTel RIO is sufficient to negate any barrier to entry that may exist or SMP that SingTel may have 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.
- 7.41 SingTel believes that the IDA’s decision making to date has not had sufficient regard to:
- (a) the fact that regulation of IRS and MWS is sufficient to negate any SMP that SingTel may have as a consequence of its control of a wholesale “input”; and
  - (b) the prospective impact a decision to designate a service as an IRS or MWS will have on the state of competition in the relevant market.
- 7.42 For example, in its decision with respect to International Capacity Services, the IDA decided that backhaul and terrestrial international private leased circuits should continue to be subject to Dominant Licensee regulation, notwithstanding its designation of SingTel’s Local Leased Circuits as an MWS and its decision on 10 September 2004 to allow greater access to submarine cable systems through amendments to Schedules 4B and 8D of the SingTel RIO.
- 7.43 In doing so, SingTel considers that the IDA did not have sufficient regard to the positive effect that the regulation of each service as an IRS and MWS would have on the state of competition in the relevant market over the foreseeable future. SingTel considers that the IDA should evaluate all Exemption Requests to take account of its regulation (or increased regulation) of IRS and MWS, and the positive impact such

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<sup>23</sup> Office of Fair Trading, *Assessment of Market Power*, Competition Law Guideline, December 2004, paragraph 6.7.

regulation will have on the state of competition in the relevant market in the foreseeable future. As the European Commission has noted:

*“NRAs should determine whether the market is prospectively competitive, and thus whether an lack of effective competition is durable, by taking into account expected or foreseeable market developments over the course of a reasonable period”.*<sup>24</sup>

7.44 In addition to the above, SingTel also believes that where a wholesale “input” is an IRS or MWS, the retail offering provided using the wholesale “input” should not, as a general principle, be subject to Dominant Licensee regulation.

7.45 The purpose behind the regulation of IRS and MWS is to ensure that Requesting Licensees can obtain access to such services to compete effectively in the “downstream” retail market. SingTel believes that the regulation of SingTel at a wholesale level under the Code and through the SingTel RIO is sufficient to remove any ability for SingTel to leverage any SMP it may have at a wholesale market level into the downstream retail market. As the Malaysian Communications and Multimedia Commission has observed:

*“Access regulation is...intended to target regulation of upstream markets in order to promote competition in downstream markets, while minimising distortions to efficient infrastructure investment in the long term... By regulating at the “upstream” or access level, regulation in downstream” markets becomes less relevant. By being provided with access on non-discriminatory terms and conditions, all competitors will be competing on a level playing field in markets which use the access services as an essential input”.*<sup>25</sup>

7.46 On this basis, SingTel considers that the IDA should amend paragraph 2.4.2(b)(ii) to make it clear that:

(a) a Dominant Licensee’s control of a wholesale “input” should not, in itself, be considered to an “access barrier” to entry, particularly where that “input” is subject to regulation as an IRS or MWS;

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<sup>24</sup> European Commission, *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), paragraph 20.

<sup>25</sup> Malaysian Communications and Multimedia Commission, *Public Inquiry Paper: Review and Expansion of Access List Determination*, 8 February 2005, page 38.

- (b) the requirement for SingTel to provide IRS and MWS under the SingTel RIO is sufficient to:
- (i) negate any “access barrier” to entry that may exist or SMP that a Dominant Licensee may have in the relevant wholesale market; and
  - (ii) remove any ability it may have to leverage any SMP it may have at a wholesale market level into the downstream retail market; and
- (c) the IDA must take account of the regulation of IRS and MWS in its decision making in respect of Exemption Requests and the positive impact such regulation will have on the state of competition in the relevant market over the foreseeable future.

### **High advertising costs are not a barrier to entry**

7.47 SingTel believes that the IDA should clarify that high advertising and retail costs are not a barrier 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”.*<sup>26</sup>

7.48 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.

7.49 SingTel cannot therefore reasonably envisage a scenario where high advertising or retail costs is likely to amount to a barrier of entry or result in a finding that a Dominant Licensee has SMP in a market.

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<sup>26</sup> Office of Fair Trading, *Assessment of Market Power*, Competition Law Guideline, December 2004, paragraph 5.35.

7.50 On this basis, SingTel considers that the IDA should amend paragraph 2.4.2(b)(ii) of the Advisory Guidelines to remove any reference to high advertising costs as being a barrier to entry.

### **The IDA's should also have regard to "real world" possibilities to explain non-entry**

7.51 SingTel also considers that the IDA should adopt a "real world" approach to determining whether there are barriers to entry in a market.

7.52 The IDA should have regard to the rational conduct of profit maximising firms as a means of explaining a failure or lack of market entry in a market, rather than merely attributing the lack of entry to the existence of barriers to entry.

7.53 Non-entry may be due to the absence of a business case that justifies market entry. For example, where all operators in a retail market have poor or low margins, further market entry would not be reasonably justified by a rational profit maximising firm. In such a case, the failure of market entry at a retail level would not necessarily suggest that a Dominant Licensee has SMP in the relevant retail market or wholesale market.

7.54 The IDA should therefore be diligent to ensure that its economic analysis of barriers to entry does not overlook evidence that can explain the lack of market entry for other reasons or which suggests that SingTel does not have SMP in any real or practical sense in a market.

## **8. EVIDENTIARY ISSUES**

### **The obligation to provide verifiable data**

8.1 Sub-section 2.5.1 of the Code provides that a Dominant Licensee *must* provide "verifiable data" to support its Exemption Request. Similarly, sub-sections 2.6.1 and 2.6.2 of the Code provides that the following persons *should* provide verifiable data in respect of the ability of competitors to replicate facilities or the Licensee to exercise SMP (as the case may be):

- (a) a person that is seeking to demonstrate that Licensee does or does not meet the requirements in sub-section 2.2.1(a) and (b) of the Code; and
- (b) the Dominant Licensee in the case of an Exemption Request.

- 8.2 SingTel considers that the IDA should amend the Advisory Guidelines to make it clear that it will consider but not necessarily attribute any weight to arguments included in a submission from a person that opposes Exemption Requests if it does not include “verifiable data” in support.
- 8.3 The lack of any mandatory requirement for persons that oppose an Exemption Request to provide “verifiable data” permits non-dominant Licensees to ‘game’ the regulatory process. Such conduct occurs in the hope that SingTel will continue to be subject to Dominant Licensee regulation and therefore continue to face a commercial disadvantage in an otherwise competitive market.
- 8.4 SingTel considers that the IDA should not attribute any weight to submissions that make unsubstantiated allegations and assertions or which does not include verifiable data. SingTel believes the Guidelines should be amended to explicitly state that the IDA while the IDA will consider all submissions, it will not attribute any weight to a submission (or part of it) that does not include verifiable data or makes unsubstantiated allegations or assertions. SingTel considers that such a discretion is available to the IDA – there is nothing in the Code that prohibits the IDA from doing this.
- 8.5 Further, SingTel considers that the Code and Guidelines place a disproportionate burden on a Dominant Licensee to prove that the removal of Dominant Licensee regulation is justified.
- 8.6 SingTel considers that the IDA should conduct its own market inquiries for the purposes of determining whether the removal of Dominant Licensee regulation is justified, in the absence of suitable information from the applicant. The IDA is ultimately responsible for the approval or rejection of an Exemption Request. It should therefore conduct its own independent market inquiries to support its decision making.
- 8.7 Obviously, the IDA’s conduct of market analysis involves the examination of verifiable data for the purposes of defining the relevant market and determining whether the Dominant Licensee has SMP in the relevant market. However, SingTel believes that the IDA should specifically recognise under the Guidelines that, where necessary, it will obtain its own verifiable data.
- 8.8 This is consistent with regulatory practice in all comparable jurisdictions – competition regulators frequently make their own market inquiries to independently verify representations made by interested parties and objectively determine the state



of competition in the relevant market. The Australian Competition and Consumer Commission, for example, frequently make such inquiries in respect of merger clearances and other competition issues.

- 8.9 On this basis, SingTel considers that the IDA should amend paragraph 2.2 of the Advisory Guidelines to:
- (a) make it clear that while the IDA will consider all submissions that oppose an Exemption Request, it will not attribute any weight or significance to a submission (or the relevant part of it):
    - (i) if it does not contain “verifiable data” in support of the arguments set out within;
    - (ii) if it makes baseless or unsubstantiated allegations; and
  - (b) recognise that the IDA will obtain its own verifiable data, where necessary.

#### **Evidence of “actual” switching by customers**

- 8.10 Paragraph 2.1(d) of the Guidelines provide that where an Exemption Request includes a submission that multiple services fall within the same market, the Dominant Licensee may need to include “evidence of actual switching by Customers” in the verifiable data it provides in respect of that market definition.
- 8.11 Based on a literal interpretation, the requirement to provide verifiable data of “actual switching” imposes a very high standard of proof, which in some cases may not be available to the Dominant Licensee or be able to be conclusively established from an evidentiary perspective.
- 8.12 SingTel considers that the IDA should also accept estimates and trends of switching by customers (e.g. overall loss of subscribers data).
- 8.13 On this basis, SingTel considers that the IDA should amend paragraph 2.1(d) of the Advisory Guidelines to make it clear that estimates and trends will also be considered to be verifiable data and may also be submitted to the IDA for the purposes of paragraph 2.1(d) of the Advisory Guidelines.

## **9. THE SCOPE OF EXEMPTIONS GRANTED BY THE IDA**

- 9.1 The IDA currently grants exemptions from Dominant Licensee regulation by reference to the name of specific products or services offered by SingTel in the relevant market. For example, in its decision in relation to International Capacity Services, the IDA granted exemptions in the Terrestrial International Private Leased Circuits market specifically in relation to SingTel's ConnectPlus Bilateral IPLC, ACASIA IPLC, ConnectPlus N2N IPLC and Telecast Broadcast Fibre Network Service products.
- 9.2 The IDA has also stated in its Direction to SingTel in respect of its International Capacity Services decision that if SingTel releases a new product or service after the date of the exemption that falls within the exempt market, that product or service is also exempt from Dominant Licensee regulation subject to:
- (a) SingTel providing the IDA with written notification requesting that the exemption be extended to the new product or service, including a clear and complete description of the product or service, and reasons why it believes that the product or services falls within the exempt market; and
  - (b) the IDA's consideration of the notice and written confirmation by the IDA that the relevant product or service falls within the exempt market.
- 9.3 SingTel considers that this requirement is unnecessary. SingTel believes that it would be more efficient for the IDA to grant an exemption in general terms so that all future services that are offered by the Dominant Licensee in the exempt market are automatically exempt from Dominant Licensee regulation without the need for notification to and approval by the IDA.
- 9.4 On this basis, SingTel considers that the IDA should introduce a new section in the Advisory Guidelines in relation to IDA's process of granting approvals in respect of Exemption Requests. This section should provide for the IDA to grant exemptions in general terms so that all future services that are offered by the Dominant Licensee that fall within the exempt market are excluded from Dominant Licensee regulation with the need for notification to and approval by the IDA.

## **10. MISCELLANEOUS**

### **Narrow Exemption Requests**

- 10.1 The IDA states in paragraph 2.1(f) of the Advisory Guidelines that a Dominant Licensee may submit a narrow Exemption Request, for example, in relation “to a particular class of customers or in a particular geographic area”.
- 10.2 For the avoidance of doubt, SingTel requests that the IDA amend paragraph 2.1(f) to make it clear that a narrow Exemption Request may include other types of “classes”, such as corporate, residential, government or financial customer classes.