

**REPUBLIC OF SINGAPORE  
INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY  
OF SINGAPORE**

**PROPOSED**

**ADVISORY GUIDELINES GOVERNING APPLICATIONS FOR  
LICENCE ASSIGNMENTS OR CHANGES IN OWNERSHIP OF A  
LICENSEE IN CONNECTION WITH A PROPOSED CONSOLIDATION**

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## **PROPOSED**

# **ADVISORY GUIDELINES GOVERNING APPLICATIONS FOR LICENCE ASSIGNMENTS OR CHANGES IN OWNERSHIP OF A LICENSEE IN CONNECTION WITH A PROPOSED CONSOLIDATION**

The Info-Communications Development Authority of Singapore (“IDA”) hereby invites comments on its proposed Advisory Guidelines Governing Applications for Licence Assignments or Changes in Ownership of a Licensee in Connection with a Proposed Consolidation (“Consolidation Review Guidelines” or “Guidelines”).

## **1. INTRODUCTION**

1.1 This Public Consultation represents another step by IDA to foster full competition in the Singapore telecommunication market.

1.2 On 1 April 2000, IDA fully liberalised the Singapore telecommunication market. Five months later, on 15 September 2000, IDA issued the Telecom Competition Code (“Code”), which set out many of the rights and responsibilities of IDA’s Licensees in a competitive market.

1.3 Section Nine of the Code contains provisions governing requests by Licensees to enter into mergers, acquisitions and similar transactions (“Consolidations”). Sections 9.2.1 and 9.2.2 state that, consistent with the terms of their licences, a Licensee must receive the approval of IDA before either: (a) assigning, transferring, subletting or otherwise disposing its rights, duties, liabilities, obligations and privileges under its licence to any other entity (“Licence Assignment”) or (b) implementing a change in ownership (whether direct or indirect), shareholding or management of the Licensee (“Change in Ownership”). Section 9.3 of the Code further provides that IDA will not approve an application to for a Licence Assignment or Change in Ownership in connection with a proposed Consolidation (“Consolidation Application”) where IDA determines that the proposed Consolidation is likely to unreasonably restrict competition in any telecommunication market within Singapore.

1.4 IDA has concluded that industry and the public would benefit from further clarification regarding the standards applicable to IDA’s Consolidation reviews. IDA has also concluded that it would be beneficial to adopt a more formalised procedure governing the process by which Licensees and other parties can seek approval for a proposed Consolidation in connection with a Licence Assignment or Change in Ownership.

## **2. PRACTICES IN OTHER COUNTRIES**

2.1 Most countries have adopted legal regimes designed to prevent Consolidations that are likely to substantially restrict competition. In developing these Guidelines, IDA

has conducted an extensive review of the experiences in three benchmark jurisdictions: the United States, the European Union, and Australia.

- 2.2 In the US, authority for the review of telecom sector transactions is divided between the Department of Justice, which has authority to determine whether a proposed Consolidation would “substantially lessen competition”, and the Federal Communications Commission, which has the authority to approve (subject to conditions) any assignment or transfer of control of a telecommunication licence. By contrast, in the EU and Australia, telecom mergers are subject to review solely by the competition regulatory authority.
- 2.3 The US and the EU both require that, in the case of Consolidations that meet certain minimum size requirements, the parties notify and obtain prior regulatory approval before concluding the transaction. To facilitate this process, both the US and EU have developed comprehensive notification forms. In Australia, parties may voluntarily consult the competition regulatory authority before effecting a Consolidation, but generally are not required to do so.
- 2.4 The US, EU and Australia have each issued detailed advisory guidelines describing the standards that they will use to assess whether a proposed Consolidation would adversely affect competition. There is a substantial consensus among these jurisdictions regarding the appropriate analytic approach. Each jurisdiction seeks to apply economic analysis to the facts regarding the relevant markets. In each jurisdiction, the analysis begins with an effort to define the relevant market and to determine the participants’ market shares. Each jurisdiction has adopted certain presumptions, based on the Consolidating firms’ market shares, that are designed to facilitate an assessment of the likely competitive effect of a proposed Consolidation. However, each jurisdiction also considers other probative factors – such as market structure and conditions, likelihood of new entry, and efficiencies. All three jurisdictions agree that horizontal consolidations (*i.e.*, Consolidations involving direct competitors) raise the most significant concerns. In addition, all of the jurisdictions have adopted procedures designed to obtain necessary information, both from the parties proposing to enter the Consolidation and from other interested parties – such as competitors, suppliers and customers. Finally, all of the jurisdictions use transparent procedures to review Consolidations in the telecom sector.

### **3. OVERVIEW OF THE PROPOSED APPROACH**

- 3.1 IDA proposes to take an approach that combines “best practices” from the benchmark jurisdictions, builds on the experiences of those jurisdictions, and reflects the particular needs of Singapore. Like regulators in other jurisdictions, IDA recognises that, in most cases, voluntary Consolidation agreements – like other voluntary transactions – result in the most efficient allocation of society’s resources. However, in certain limited cases, Consolidations can have an adverse impact by reducing competition. Therefore, IDA generally will prevent the consummation of a proposed Consolidation where the transaction would unreasonably restrict competition and where the anti-competitive harm cannot be adequately remedied through the imposition of narrowly tailored structural or behavioural remedies. Because

regulation generally is a poor substitute for the operation of a competitive market, preventing such Consolidations is superior to approving the Consolidation and imposing pervasive regulation.

- 3.2 In this Consultation Document, IDA proposes to: (a) adopt comprehensive advisory guidelines specifying the procedures and substantive standards applicable to IDA’s review of Consolidations involving a Change in Ownership or a Licence Assignment and (b) amend Section Nine of the Code to contain mandatory procedures governing the filing of Consolidation Applications and the provision of necessary supplemental information.
- 3.3 The proposed Guidelines adopt an approach similar to that used in the benchmark jurisdictions to assess the likelihood that a proposed Consolidation will adversely affect competition. This includes the use of certain numeric presumptions as a starting point for IDA’s analysis. The proposed Guidelines also provide further clarity regarding the timing of IDA’s review process, the means by which IDA will gather information and protect confidential material, the conditions that IDA may impose, and the procedures that IDA will use to notify and, where appropriate, obtain public comments regarding a proposed Consolidation.
- 3.4 The proposed amendments to Section Nine of the Code will adopt an approach similar to that used by the US Department of Justice and the European Commission Competition Directorate. The amended Section Nine of the Code will specify, in detail, the information that Applicants must submit to IDA. The amended Section Nine of the Code will also provide for the use of a form – similar to the forms used in the US and the EU – designed to allow IDA to determine, within a few days, whether the Applicants have submitted the minimum required information to enable IDA to begin its review. The proposed amendments to Section Nine of the Code will also contain detailed provisions governing the means by which IDA can obtain additional information, and the confidentiality protection that it will provide.
- 3.5 In order to create a single document that contains all of the relevant standards and procedures, the procedures specified in the proposed amendments to Section Nine of the Code will be incorporated into the Guidelines.

#### **4. SUMMARY OF THE PROPOSED GUIDELINES**

The proposed Guidelines contain ten sections.

- 4.1 Section One describes IDA’s legal authority to review Consolidations; states that the Guidelines will be advisory (*i.e.*, they clarify the way in which IDA will implement the requirements contained in Section Nine of the Code); reserves IDA’s right to modify the Guidelines and take other actions in the public interest; and specifies that the Guidelines will become effective upon publication.
- 4.2 Section Two contains the basic principles that will govern IDA’s review of any proposed Consolidation. This Section first describes some of the concerns that can be raised by Consolidations between competing Licensees (“Horizontal Consolidations”)

as well as Consolidations involving firms that are not current competitors (“Non-Horizontal Consolidations”). Consistent with international practices, Section Two recognizes that Horizontal Consolidations generally raise more serious competitive concerns, but that certain Non-Horizontal Consolidations (especially those involving firms with market power) can also adversely affect competition. This Section then describes the goals of IDA’s Consolidation review process – which is designed to distinguish among proposed Consolidations that do not raise significant competitive concerns, those that raise concerns that can be adequately addressed through the imposition of narrow pro-competitive safeguards, and those that raise such significant competitive concerns that they should not be permitted.

- 4.3 Section Three describes the procedures that parties seeking to enter a Consolidation must follow in order to obtain IDA’s approval. (Sub-sections 3.1 through 3.6 reprint the mandatory provisions to be contained in the proposed amendments to Section Nine of the Code). This Section makes clear that IDA’s assessment of a proposed Consolidation will not begin until after the parties have entered a binding Consolidation Agreement. Once they have done so, they are obligated to file a Consolidation Application that includes: a Consolidation Application Form; a copy of the Consolidation Agreement and all ancillary agreements; supporting documentation (such as business plans, internal analyses of the proposed Consolidation, and an organisation chart showing all parents, subsidiaries and affiliates of the consolidating parties); and a Description, Competitive Impact and Public Interest Statement (which must provide a good faith economic assessment of the likely impact of the proposed Consolidation on competition). IDA will impose an application processing fee of S\$10,000. Section Three also contains procedures that will allow parties to seek Informal Guidance from IDA regarding the permissibility of Consolidation at an earlier stage. Such Informal Guidance, however, is not binding and cannot be used as a substitute for a full review of a proposed Consolidation following the adoption of a binding Consolidation Agreement by the parties.
- 4.4 Section Four describes the length of the Consolidation Review Period. IDA will seek to complete its review within 30 days – but may extend the Review period to a total of 120 days in the case of a Consolidation that raises novel or complex issues. IDA will “toll” the running of the Review Period in any case in which the Applicants fail to provide supplemental information requested by IDA in a timely manner.
- 4.5 Section Five contains provisions governing information gathering and the protection of confidentiality. (Sub-sections 5.1 through 5.1.5 reprint the mandatory provisions to be contained in the proposed amendments to Section Nine of the Code). Where appropriate, IDA may seek to obtain additional information from an Applicant by requesting the Applicant to: provide a written response to questions; provide specific documents; participate in an interview; or allow physical inspection of its operations. IDA may obtain information from other parties through public consultations or interviews. Section Five also contains provisions governing confidentiality. IDA will not entertain requests to treat all information submitted as confidential. Rather, IDA will provide confidential treatment in those cases in which an Applicant or other party demonstrates that information is proprietary, commercially sensitive or covered by a non-disclosure agreement, or that disclosure would otherwise have a material adverse impact.

- 4.6 Section Six sets forth, in significant detail, the methodology that IDA will use to assess a Consolidation Request. Section Six distinguishes between Horizontal and Non-Horizontal Consolidations.
- 4.6.1 In assessing a proposed Horizontal Consolidation, IDA will first seek to define the relevant market and establish the participants' respective market shares. Consistent with the practice in the benchmark jurisdictions, Section Six uses certain numerical presumptions as a starting point for its assessment of the likely competitive impact of a transaction. For example, in those cases in which the Post-Consolidation Entity will have a market share of 15 percent or less, IDA will generally approve the proposed Consolidation without significant review. This reflects the fact that firms of this size generally are unlikely to be able to have an adverse impact on competition. The determination of market shares, however, is only the starting point for IDA's analysis. IDA will consider several factors that are likely to increase the risk of anti-competitive conduct – either by the Post-Consolidation Entity unilaterally or as a result of collusion among market participants. For example, IDA will be more likely to deny or impose Conditions on the grant of an Application where the Post-Consolidation Entity will have a market share of more than 35 percent – a level at which, most jurisdictions recognize, there is a greater likelihood that a firm will be able to exercise market power. IDA will also consider whether the market involves commodity products, whether prices are customarily disclosed publicly or whether the proposed Consolidation would eliminate, as an independent competitor, a firm that has been a source of price competition and innovation.
- 4.6.2 IDA is only likely to deny or condition an application in connection with a Non-Horizontal, where one of the Applicants either has market power or participates in a concentrated market. In such cases, IDA will seek to determine whether the proposed Consolidation could adversely affect competition by: eliminating a potential future competitor in a concentrated telecom market; foreclosing an important source of supply of an input required to provide telecommunication services or a means of distribution of such services; or otherwise facilitating conduct that distorts a telecom market within Singapore. IDA will generally approve a proposed Consolidation if neither of the Applicants has a market share in excess of 15 percent.
- 4.6.3 Finally, in assessing both Horizontal and Non-Horizontal Consolidations, IDA will consider several factors that could reduce its competitive concerns. In particular, IDA will consider the likelihood that additional firms can and would enter the market, in a timely manner, to the extent sufficient to counter any anti-competitive conduct following the Consolidation. In a close case, in which a proposed Consolidation may have some anti-competitive effect, IDA will also consider whether the proposed Consolidation would result in significant efficiencies – although efficiencies alone will seldom, if ever, justify a Consolidation that creates a firm with an actual or near monopoly. IDA will also consider whether either Applicant constitutes a “failing firm” which, but for the proposed Consolidation, would exit the market. Finally, IDA will consider any other relevant factors, and any applicable public interest consideration, not otherwise addressed by the methodology.
- 4.7 Section Seven addresses certain special situations – such as Consolidations involving parties that are not subject to IDA's jurisdiction (such as foreign operators or non-

telecommunication companies), Consolidations involving Licensees that were commonly owned prior to the Consolidation and Consolidations that would result in common ownership of competing Licensees by the Post-Consolidation Entity. In each case, IDA will seek to make a determination that reflects actual competitive conditions in the relevant markets.

- 4.8 Section Eight describes the three ways in which IDA may dispose of a Consolidation Application: approval of the Application, denial of the Application and approval of the Application subject to the Applicants' acceptance of conditions. Section Eight describes two broad categories of conditions: structural and behavioural. Consistent with practices in the benchmark jurisdictions, IDA may grant approval of a Consolidation Application on the condition that the Applicants agree to divest certain assets, where this is necessary to preserve competition. Alternatively, IDA may grant approval on the condition that the Applicants agree to operate certain lines of business on a structural separate basis. In other cases, IDA may grant approval on the condition that the Applicants agree to adopt behavioural safeguards – such as accounting separation, non-discrimination requirements, limitations on information sharing among subsidiaries or affiliates and modification or termination of existing agreements that, following the Consolidation, could adversely affect competition.
- 4.9 Section Nine describes the procedures that IDA will use to notify and obtain public comments regarding a proposed Consolidation. IDA will notify the public at the time a Consolidations Application is accepted for filing and will provide a second notification, which will describe IDA's disposition of the Application. In appropriate cases, IDA will conduct a public consultation regarding the proposed Consolidation.
- 4.10 Finally, Section Ten states that any party that is adversely affected by a decision regarding a proposed Consolidation may appeal to the Minister of Communications and Information Technology within 14 days.

## **5. REQUEST FOR COMMENTS**

- 5.1 IDA hereby invites Licensees and any other interested parties to submit written comments regarding the proposed Guidelines. Because the proposed amendments to Section Nine of the Code will be incorporated into Section Three of the Guidelines, there is no need for Commenters to separately address the proposed amendments to Section Nine of the Code.
- 5.2 IDA requests that commenting parties use the following format:
- Description of the commenting party and its interest in the proceeding;
  - General views;
  - Comments regarding specific provisions of the proposed Guidelines; and
  - Suggestions for any additional provisions
- 5.3 Parties that choose to comment on specific provisions of the proposed Guidelines should identify the provision (by number) and, where appropriate, should suggest

alternate language accompanied by an explanation of the reasons for the proposed revision.

- 5.4 All comments may be submitted to IDA in hard copy (two copies) and diskette (Word 97 or 2000 format). Comments may also be emailed. Comments should be clearly and succinctly written. All comments must be received by IDA by noon, **30 October 2001, 12pm**. Comments received after that time will not be accepted or considered. Comments should be addressed to:

Aileen Chia  
Director (Economic Regulation)  
Info-communications Development Authority of Singapore  
8 Temasek Boulevard, 14-00 Suntec Tower 3  
Singapore 038988  
Email: aileen\_chia@ida.gov.sg

- 5.5 IDA will post all comments on its website ([www.ida.gov.sg](http://www.ida.gov.sg)).
- 5.6 IDA will not entertain requests for private meetings to discuss the proposed Guidelines.
- 5.7 Based on the written comments, IDA will make any appropriate modifications to the proposed Guidelines.