

SUBMISSION OF SINGAPORE TELECOMMUNICATIONS LIMITED

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

19 November 2001

1. INTRODUCTION

1.1 Singapore Telecommunications Ltd (“**SingTel**”) is pleased to be given the opportunity to comment on the Proposed Advisory Guidelines Governing Applications for Licence Assignments or Changes in Ownership of a Licensee in Connection with a Proposed Consolidation, issued by the Info-Communications Development Authority of Singapore (“**IDA**”) on 16 October 2001 (the “**Guidelines**”).

1.2 SingTel is licensed to provide telecommunications and postal services in Singapore. It was corporatised on 1 April 1992 and listed on the stock exchange in November 1993. SingTel is committed to the provision of state-of-the-art telecommunications technologies and services in Singapore.

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

1.4 This Submission is structured as follows:

- this Section 1 describes the commenting party and its interest in this proceeding;
- Section 2 sets out a suggested revised process;
- Section 3 sets out SingTel’s general views and a summary of views on the Guidelines;
- Section 4 contains comments on the specific paragraphs of the Guidelines. Section 4 also contains suggestions for additional material.

2. REVISED PROCESS

2.1 In this submission, SingTel sets out its views about the draft Guidelines and the process contained in those Guidelines.

2.2 In summary, SingTel submits that:

- where there is no change in control, there should be an exemption from the application of the Consolidation rules;
- where there is a change in control but either the assets or turnover of the target signify that the transaction is minimal (minimal transaction test) or the market share of the

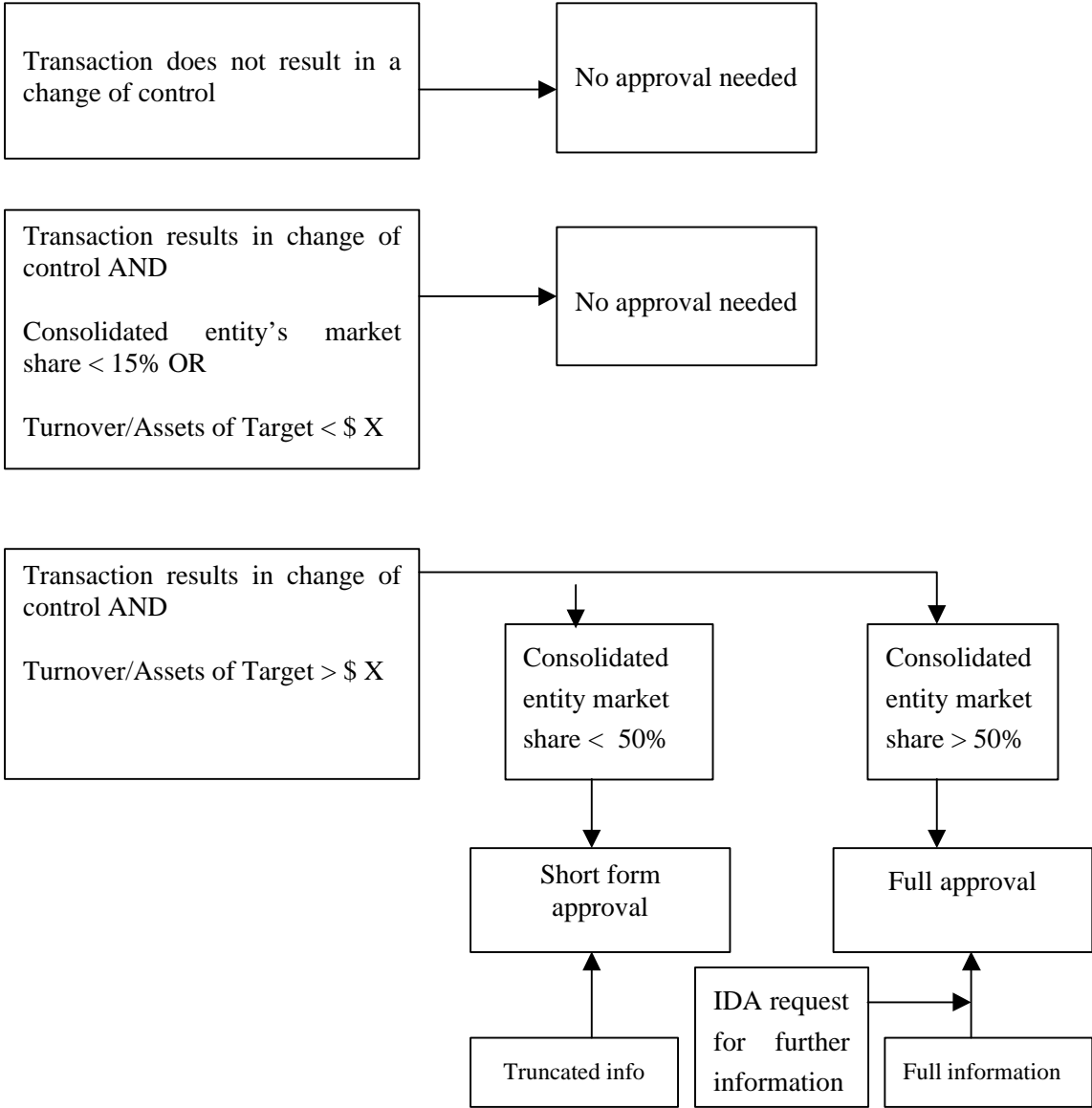
consolidated entity is below 15% then there should be an exemption from the application of the Consolidation rules (minimal market share test);

- where there is a change in control and neither the minimal transaction test nor the minimal market share test are satisfied (as stated above), then a short or long form procedure may apply as specified below.

2.3 Note that other jurisdictions use the minimum asset/turnover test. For example, in the UK acquisitions of assets of less than £70 million or involving turnover of the target company of less than £45 million are exempt from investigation. Clearly, these numbers need adjusting for the Singapore environment but are provided as a guide.

2.4 Our submission is represented diagrammatically as follows:

Suggested process



3. GENERAL VIEWS

3.1 SingTel supports the need for clarification of the procedures and criteria to be employed by IDA when exercising its powers under section 9.3 of the Telecom Competition Code of 15 September 2000 (the “Code”).

3.2 In general terms, SingTel supports an approach to consolidation policy in the telecommunications sector:

- which supports a market based approach;
- where intervention is narrowly focussed on anti-competitive outcomes;
- where the public interest inquiry is only used to balance against anti-competitive effect to test whether the consolidation should be permitted to proceed and is not used as a mechanism to block a consolidation which would not otherwise have an anti-competitive effect;
- where due regard is had to features of the telecommunications industry such as globalisation, dynamism and rate of change;
- where regulation of consolidation outcomes (eg the imposition of conditions) are proportionate to the anti-competitive risk;
- where due regard is had to international factors and precedents;
- which is not presumptive about outcomes;
- where consolidation enquiries are transparent and open to public comment;
- where regulatory decision making is efficient and delays are minimised.

SingTel believes that overall objectives reflecting the above dot points should be explicitly stated as objectives under the Guidelines.
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In the following subsections of this section 3, SingTel sets out a summary of the points that we wish to make to the IDA in relation to the Guidelines.

3.3 Market Forces

SingTel supports statements in the Guidelines (section 2.1 and 2.2) that in competitive markets voluntary transactions are highly beneficial. SingTel believes this section should be expanded to provide that:

- markets generally provide the most appropriate outcomes; and
- regulatory intervention should not occur unless there is a clear case for such intervention, on the basis that regulated outcomes are second best; and
- only a few consolidations will warrant any form of regulatory intervention. For example, in the Australian merger guidelines, the Australian Competition & Consumer Commission (“**ACCC**”) indicates that it only objected to a very small number of hundreds of mergers formally investigated by the ACCC. In some jurisdictions the amount of rejected transactions was as low as 1%.¹

SingTel suggests the inclusion of new paragraphs in section 2 which includes statements about market based outcomes and which refer to the preference for market based outcomes than regulated ones.

3.4 Horizontal and non-horizontal consolidations’ distinction

SingTel understands the distinction made by the IDA regarding horizontal and non-horizontal consolidations. However, SingTel does not believe that there should be a distinction made between the two types of consolidations for the purpose of presuming that non-horizontal consolidations generally do not have an anti-competitive effect (see section 2.2.2). Telecommunications is impacted strongly by convergence. Convergence means that players in other sectors of the economy (eg cable system operators, electricity providers, television operators) may soon be able to use their networks to provide telecommunications. Accordingly, there is no reason to presume that the potential for abuse of market power in a non-horizontal consolidation will have any greater or lesser impact than in a horizontal consolidation. SingTel therefore believes that the presumption about non-horizontal consolidations should be removed.

SingTel suggests the retention of the horizontal and non-horizontal distinction but that all presumptions about the likely competitive impact of such consolidations be removed (eg, in sections 2.2.2, 6.2.3 and 6.3).

¹ A useful survey is to be found in Chapter 3 of the International Competition Policy Advisory Committee Final Report at <http://www.usdoj.gov/atr/icpac/finalreport.htm>.

3.5 Process issues

Section 3, 4 and 5 of the Guidelines set out important process issues to be considered when processing consolidation applications. SingTel's detailed comments are set out in section 4 of this submission. The consolidation process issues include:

- the need for exemptions for consolidations that are economically insignificant;
- the need for a short form approval process for consolidations that are unlikely to have an anti-competitive effect;
- generally shortening the time periods within which decisions are made;
- providing an opportunity for applicants to respond or comment when the IDA takes information from the public or in private interviews.

3.6 Waivers

The Guidelines provide for a process of waivers of certain requirements (section 3.5). SingTel does not support an approach which would allow some parties to obtain a waiver whereas others would not be granted such a waiver. As described below, SingTel would support exemptions and a more streamlined application process. In particular, we support a shorter form process for Consolidations which are below a certain threshold. However, a discretionary element to waive certain procedures for some but not others in similarly situated circumstances is not supported.

SingTel submits that section 3.5 should be removed and that waiver applications be resisted.
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3.7 Unreasonably Restrict Standard

SingTel generally supports the IDA's interpretation of the "unreasonably restrict" standard as contained in the Guidelines (section 6.1). SingTel believes, however, that the "future competition" aspect needs to be tightened. SingTel believes that such future competition should only be considered where it is "likely" to emerge. The intention here is that the likely effect on competition must be considered but a theoretical risk to future competition will not suffice to satisfy this test.

SingTel also suggests the expansion of discussion of the meaning of the term "significant", to have a similar meaning to "substantial" (ie real or of substance as distinct from nominal).

SingTel submits that the “future competition” test (section 6.1) should be restricted to likely impacts on future competition and not theoretical risks. “Significant” should be given an appropriate meaning as specified above.

3.8 Thresholds

Generally the thresholds for scrutiny and possible rejection of a transaction are too easily passed.

As stated in Section 2 above, SingTel believes the following thresholds should apply:

- where there is no change in control, there should be an exemption from the application of the Consolidation rules;
- where there is a change in control but either the assets of the target signify that the transaction is minimal (minimal transaction test) or the market share of the consolidated entity is below 15% then there should be an exemption from the application of the Consolidation rules (minimal market share test);
- where there is a change in control and neither the minimal transaction test nor the minimal market share test are satisfied (as stated above), then a short or long form procedure may apply as stated above.

SingTel believes that the concept of control should be determined strictly and by reference only to control of a share in capital in excess of 50%; the ability to appoint more than half of the directors onto the board or other legally recognised means of controlling the company in question. This must go beyond mere protection of an investment and extend to control of commercial strategy and financial management.

SingTel also seeks clarification on the application of the Guidelines to Changes in Ownership. For example, will a party that invests say 10% in an entity be subject to the Guidelines in the absence of “control”? SingTel’s submission is that unless there is a change in control, there can be no substantial risk of anti-competitive effect.

SingTel's submits that:

- the thresholds should be adjusted as set out in the diagram in section 2;
- the IDA should give clarity to the meaning of "control" as stated above.

3.9 Use of Thresholds

SingTel is also concerned that the thresholds proposed to be used by the IDA currently operate as a presumptive mechanism to block or place conditions on consolidation activity.

In other jurisdictions, thresholds are used to create presumptions either that:

- no approvals are required and the consolidation may proceed; or
- the consolidation is "examinable".

In no circumstances should there be a presumption that a consolidation may or will have a certain anti-competitive effect. SingTel believes that thresholds in the Guidelines should be similarly used and restricted so that presumptions are removed and thresholds are used to create safe harbours or to identify examinable conduct but extend no further.

SingTel submits that presumptive statements contained in the Guidelines such as those contained in section 6.2.3.1 and 6.2.3.2 (eg "the factors that make such conduct more likely") should be removed. The factors listed including the thresholds should only trigger an examination and not a presumption about an anti-competitive effect.

3.10 Dominance

SingTel does not believe that the classification of dominance under the Code is relevant to the Guidelines (see sections 6.2.3.1 and 6.3.1). As the IDA is aware, a dominance classification is imposed on an entity as a whole rather than on specific activities of that entity in which it may have a "dominant" position. Accordingly, an entity classified as dominant may merge with another entity in a fully competitive market where the thresholds (perhaps even the 15% threshold) are not met. Such a consolidation should not be examinable.

Those entities which have been classified as dominant should be subject to the thresholds which apply to all other operators. It may be that some or most considerations by these dominant

entities exceed the thresholds and should therefore be subject to an examination. However, when they are below the thresholds then dominance would not appear to play a role. To provide otherwise unnecessarily extends the reach of regulatory intervention.

SingTel submits that the dominance tests are irrelevant for the purposes of these Guidelines and they should be removed (section 6.2.3.1 and 6.3.1).

3.11 Market Analysis

SingTel has several comments in section 4 of this Submission about the market analysis in sections 6.2.1 and 6.3.3 of the Guidelines.

In summary:

- There should be greater emphasis on market features rather than the thresholds and market share analysis. Market features provide a better guide than the thresholds and market share analysis themselves;
- Provisions regarding the geographic and product markets (sections 6.2.1.1.1 and 6.2.1.1.2) need adjusting. The four dimensions of a market are:
 - the product dimension;
 - the geographic dimension;
 - the functional dimension;
 - the temporal (or time) dimension.
- All dimensions taken together inform a decision about market definition;
- There should be less emphasis on the determination of market participants to form a view about market definition. Identifying market participants who sell the same services does not appropriately define the product market which is broader and includes all close substitutes. Market participants should only be identified as part of the assessment of market shares and other factors to be considered after an assessment of the market has been made.

SingTel submits that the process of market definition should be re-aligned with a traditional analysis of the four dimensions of the market. The features of the market should be emphasised rather than the thresholds or market shares as features provide a better guide to competition effect. Section 6.2.1.2 regarding determination of market participants should be removed as it provides no guidance in relation to the market analysis.

3.12 Factors relevant to the IDA's Assessment

As stated above, SingTel submits that the presumption contained in the titles to sections 6.2.3.1 and 6.2.3.2 and contained in those sections themselves should be removed.

SingTel also believes that the relevant considerations, both positive and negative, should be contained in the one section. In section 4, we set out those considerations which are currently contained in sections 6.2, 6.3 and 6.4 or which are absent and which should be considered in a consolidation review.

SingTel submits that the factors both for and against approval of a consolidation should be consolidated into the one section of the Guidelines.

3.13 Efficiencies

SingTel supports an examination of the efficiencies likely to be achieved by the consolidation itself (section 6.4.2).

SingTel does not believe that an examination of such efficiencies should be limited to “close cases”. The efficiencies likely to be achieved by a consolidation is a clear factor which should be considered as part of any consolidation case. In other jurisdictions it is also considered as part of the “public interest” or “public benefit” test and could similarly be considered by the IDA during that process.

SingTel submits that the benefits of efficiencies should be given greater emphasis as in other jurisdictions and its analysis should not be limited to “close cases”.

3.14 Failing Firms

SingTel supports the IDA's analysis of failing firms (section 6.4.3). SingTel recognises that in the current telecommunications market significant acquisition activity is likely to surround failing

firms. Customers can be significantly disrupted when an operator ceases operation suddenly as a result of the appointment of an administrator or liquidator or the like. In such cases, allowing the consolidation of the failing firm with another entity will in most cases be more consumer friendly than allowing the firm to fail altogether.

SingTel supports the IDA's inclusion of a failing firm defence as contained in other jurisdictions. This is particularly so in the telecommunications industry when customers can be severely inconvenienced by an insolvent telecommunications provider.

3.15 Other Features of the Telecommunications Market

Telecommunication markets are characterised by their dynamism. This is evidenced for example by the ease with which suppliers of services who might not in the ordinary course be described as (or licensed as) telecommunications companies, eg: cable TV operators, might enter the market and offer services more typically associated with common carriers such as residential telephony services. The notion of "convergence" implies that the type of infrastructure used by a supplier of services no longer necessarily places barriers to that supplier competing with operators who use infrastructure typically associated with telecommunications services.

This dynamism is also important when assessing anti-competitive risk in the telecommunications market. As the ACCC Merger Guidelines point out:

"Markets which are growing rapidly are more likely to see new entry and the erosion of market share over time. Markets which are characterised by rapid product innovation may see market leaders rapidly replaced."

Equally the pace with which new delivery mechanisms are introduced requires service providers to continuously re-assess the effectiveness of their strategies and the nature of their offerings to consumers. Consumer choice is greatly expanded in terms of the means by which they can have access to services. This dynamism means that service providers have to be "on their toes" responding to changing market conditions and competitors as quickly as possible in order to keep pace and satisfy consumer expectations. Inflexible approaches to market definition might fail to take account of the context of the telecommunications sector and have a negative impact on the development of services and consumer benefit if consolidation activity is over-regulated. SingTel suggests the expansion of section 6.4.4 of the Guidelines to include a reference to this.

SingTel submits that dynamism, convergence and globalisation are relevant factors to be considered specifically in the telecommunications industry when dealing with consolidations.

Section 6.4.4 should be amended accordingly.

3.16 Public Interest Factors

SingTel supports public interest considerations being taken into account by IDA (section 6.4.5). However, in other jurisdictions public interest factors are more clearly defined (whether inclusively or exclusively) and are only considered if an initial determination has been made that the Consolidation will or is likely to lessen competition.

SingTel does not support public interest being used independently as a mechanism to challenge a Consolidation where there would otherwise be no anti-competitive effect.

SingTel submits that the relevance of public interest in section 6.4.5 should be balanced against any anti-competitive effect but is not to be used as an independent mechanism to challenge a consolidation.

4. COMMENTS ON SPECIFIC SECTIONS

(a) Section 1.1 – IDA’s authority to Review Consolidations Involving Telecommunication Licences

It is currently unclear whether the IDA will apply the Guidelines when assessing a Change in Ownership. The term Consolidation is used throughout the Guidelines. This term appears only to be used in relation to section 9.3 transactions. SingTel believes that the IDA should clarify this aspect in section 1.1.

SingTel favours a position where changes in shareholding which do not constitute changes in control should not be subject to review under the Guidelines. In the absence of control, SingTel believes it is difficult to justify the application of the Guidelines to a small equity investment when a joint venture would not be covered by the Guidelines.

(b) Section 1.3 – The Right to Grant, Deny or Condition Applications Based on Non-competition-related Factors

The purpose of the Guidelines is to clarify the standards that IDA will apply in Consolidation Review processes (section 1.2). Commercial players require this clarity in order to go about their business with a measure of certainty and comfort that commercial activity will not attract undue regulatory attention.

The IDA has imposed a separate independent public interest test. SingTel supports a public interest analysis but only where it is used to balance anti-competitive detriment of a consolidation. It should not be used as an independent mechanism to block a consolidation where there is no other anti-competitive detriment. In this regard see also the comments in relation to section 6.4.5 below.

(c) Section 1.6 – Rules of Construction

It is SingTel's interpretation of section 9.1.1 of the Code, that section 9 only extends to FBO consolidations involving other FBOs. In other words, both the acquirer and the target are to be FBOs. The Guidelines should clarify that they only apply in these situations.

(d) Section 2.1 – Promotion and Preservation of Competition

The concepts expressed in this section, viz: the role of voluntary transactions in attaining efficiencies and the role of IDA promoting and preserving competition are to some extent at odds. It is the role of the Code and the Guidelines to draw an appropriate line between the actions of commercial players and IDA intervention in that activity.

It is SingTel's submission that within the dynamic context of the telecommunications market (however defined) the line for intervention should be drawn as far away as possible from commercial activity. The Guidelines should give express recognition of the benefits of allowing the market to operate and other matters as described in the summary sections above. SingTel also supports the specification of broad objectives of consolidation policy set out in this section.

(e) Section 2.2 – Competitive Concerns Raised by Consolidations

The Guidelines draw a distinction between Horizontal Consolidations (section 2.2.1) and Non-Horizontal Consolidations (section 2.2.2). IDA seems to consider the former more likely to raise competitive concerns than the latter.

SingTel questions whether this discrimination is appropriate. Identifying a potential anti-competitive effect in the dynamic telecommunications market is rapidly becoming a more complex task. It is inappropriate to pre-empt any analysis by expressing assumptions that transactions between parties at different levels are likely to have certain competitive effects.

Furthermore it is important that none of the concerns raised in this section regarding the anti-competitive or other effects of Horizontal or Non-Horizontal Consolidations should operate as definitive statements of economic principle. IDA should be conscious to treat each application on its merits within its peculiar context.

SingTel supports a separate analysis between the two types of consolidation but does not support the presumptions currently contained in the draft Guidelines.

(f) Section 2.2.2 – Concentrated markets

Section 2.2.2 refers to concentrated markets. Concentration factors are used in other jurisdictions in consolidation analysis. However, SingTel believes that the IDA should take a realistic view of concentration in Singapore. Given the size of the Singapore market, highly de-concentrated situations are unlikely to arise. Accordingly, a de-concentrated market is likely to occur where there exist 3 or more competitors in a market. In some cases, SingTel submits that two competitors would also constitute sufficient competition in the telecommunications sector. Accordingly, the IDA should not place too much emphasis on concentration factors in Singapore.

(g) Section 2.3.1 – Prevent Anti-Competitive Consolidations

SingTel wishes to raise two issues regarding this section. The submission is related to SingTel's overall view concerning the degree of intervention appropriate in commercial activities.

(i) Favour consummation of transactions as the default

SingTel agrees that regulation is a poor substitute for operation of the market. SingTel believes that as far as possible IDA should defer from intervening in commercial activities. SingTel also agrees that as far as possible any intervention, especially conditional approvals, should be tailored as narrowly as possible.

However, SingTel questions the view expressed in section 2.3.1 of the Guidelines that because regulation is a poor substitute for operation of the market, where a narrowly tailored remedy is not readily available that the default position shall be that the Consolidation in question will not be approved.

Whilst it is desirable to ensure that the degree of regulatory intervention is kept to a minimum and that conditions imposed on transactions should be as narrowly tailored as possible, this concern should not undermine the fundamental premise that the inability to provide appropriate regulatory intervention should not undermine the consummation of a transaction.

In SingTel's view the default position should be that the Consolidation will be approved unless a clear case is made out why it should be rejected. This approach is supported in other jurisdictions. For example, The Department of Trade and Industry has put it this way: "A

consolidation will be cleared unless the authorities expect it would result in a substantial lessening of competition in any UK market.”²

(ii) What is the test?

It is not clear what the test as articulated in section 9.3 of the Code, viz: “*likely* to unreasonably restrict competition” is intended to convey. Understandably this language is not capable of precise definition, but the Guidelines should offer some clarity in this regard. At the very least it is suggested that a test akin to the Consolidation “being more likely than not” to lessen competition should be included. What is necessary to convey is that the test is rigorous, not fanciful or theoretical, ie: there must be a well-founded basis upon which to conclude that competition will be restricted. This is especially important as section 9.3 of the Code does not include language that requires competition to be “substantially lessened”. This is used in Australian legislation and the relevant codes in the European Union and the United Kingdom. A transaction should not be rejected because of a negligible impact on competition. The Guidelines should be clarified to avoid an overbroad reading of this test.

Further, the term “significant” should be given a meaning consistent with the work “substantial”, that is, the effect on competition should be real and not nominal.

(h) Section 2.3.2 – Allow Consolidations, Subject to Conditions

Once again, it is important that even where it is difficult to impose narrowly tailored conditions regulating structure and/or behaviour, the guiding principles should favour the consummation of commercial process.

(i) Section 3.1 - Application for Approval in Connection with a Proposed Consolidation

The Guidelines require *all* Licensees to follow the application procedures. SingTel believes this is an overly broad requirement. No matter how small or inconsequential the transaction may be, it has to be reported in accordance with the requirements of the Guidelines whether or not it transpires that there are anti-competitive concerns. In most cases, smaller transactions are highly unlikely to raise anti-competitive concerns. In such cases if the parties are forced nonetheless to provide the volumes of information required by the Guidelines, they may be discouraged from pursuing the negotiations. This is an undesirable outcome.

In keeping with the principles of minimum intervention, industry self-regulation and minimum delays, in this section, SingTel believes that IDA should minimise the extent of intervention in

² See Chapter 5 of the White Paper, “Productivity and Enterprise: A World Class Competition Regime”, 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

the commercial activity of all Licensees and to avoid unnecessary delay in commercial process by:

- setting a threshold below which no Consolidation Review is required; and
- including a process for short form approval of certain Consolidation transactions.

SingTel's suggested approach is set out diagrammatically in section 2.

(i) Exempt Consolidations

SingTel is of the view that the only Consolidations that should cause IDA any cause for concern (and in some cases this should only be momentary) are those in which there is a real change in control between competitors. Utilising preventative regulatory measures for other transactions is over interventionist and disincentivises commercial activity.

Exempt consolidations should therefore include:

- any transaction where there is no change in control (where control is defined as above); or
- any transaction where there is a change in control but where:
 - the post Consolidation market shares do not exceed 15%; or
 - the pre-Consolidation turnover or assets of the target are less than a certain amount.

The FTC and the Department of Justice in the United States follow a "size of party" and "size of transaction" test before requiring any notification of a consolidation.³ A similar approach is proposed in the United Kingdom.⁴ As stated above, in the UK acquisitions of assets of less than £70 million or involving turnover of the target company of less than £45 million are exempt from investigation. Clearly, these numbers need adjusting for the Singapore environment but are provided as a guide.

This approach also gives parties to negotiations a much clearer indication of the extent to which their proposed transaction might be subject to scrutiny and their risk of being prevented by IDA.

³ See Chapter 3 of the International Competition Policy Advisory Committee Final Report at <http://www.usdoj.gov/atr/icpac/finalreport.htm>.

⁴ See Chapter 5 of the White Paper, "Productivity and Enterprise: A World Class Competition Regime", 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

It also gives IDA an indication of the greatest possible risk of potentially anti-competitive transactions that could be done by any of the players in the market at a given point in time.⁵

In cases where parties did not seek approval and investigation by IDA in cases where thresholds in question might have been exceeded, then IDA will have the power to Review the Consolidation and where appropriate penalise relevant parties.

If the IDA is not minded to accept a complete exemption, we would suggest the application of a short form approval process in these situations.

(ii) Short form approval

Even in those cases where the thresholds referred to above are exceeded, consideration should be given to amending the Guidelines to include a process for quick approval of transactions which on the face of it do not pose relevant anti-competitive risks. Again this approach will minimise the degree of regulatory intervention necessary and will minimise any delay in consummating a transaction.

SingTel has already suggested a threshold of exempt Consolidations and now suggests further that where the thresholds specified above are all exceeded (ie, both the transaction size and 15% market share tests), IDA then assess the transaction “without significant review” if the market share of the Consolidated entity exceeds 15% but is less than 50 percent.

This is to some extent already acknowledged by IDA inasmuch as the provisions of section 6.2.2 of the Guidelines that deal with analysis of Consolidations under Review make mention of approval “without significant review.”

Consideration should be given to such a review being conducted over a short time period with less rigorous requirements for information. The provisions of section 3.5 (Waiver of Filing Obligations) and section 3.8 of the Guidelines (Informal Guidance Prior to Approval), for example, will need to be consolidated to take account of short form approval cases. As stated above, SingTel does not support a waiver or informal guidance in other situations. This approach of short-form notification is used in the European Union, for example.

The proposals of the International Competition Policy Advisory Committee (“ICPAC”) also support this approach. Although the focus of that study is on international harmonisation for multi-jurisdictional consolidations, the principles as they apply to domestic jurisdictions are relevant, viz review only those transactions that have a nexus to and pose a threat of appreciable

⁵ This approach also raises the question whether telecommunications sector specific intervention in consolidations is required at all. This is probably the subject matter of a separate consultative process.

anti-competitive effects. To paraphrase ICPAC: Once identified, it is still important to avoid imposing unnecessary costs on a transaction and thus a two-stage process should be designed to enable enforcement agencies to identify and focus on transactions that pose anti-competitive issues while allowing those that present none to proceed expeditiously.

(h) Section 3.1.2 – Definition of Consolidation

SingTel agrees with the general statement of changes in control under section 3.1.2 of the Guidelines. SingTel believes some definition should be given to the term “control”. Its standard definition would be where the change in ownership results in:

- an interest of more than 50 percent in; or
- control over the appointment of the majority of directors of; or
- an ability to control the commercial strategy or financial management of,

the company concerned.

(i) Section 3.1.3 – Timing of the Consolidation Application; Procedure for Filing

The requirements of the Guidelines that a binding agreement must be entered into before an application can be lodged, and that a condition precedent must be in the agreement itself as required in terms of section 3.7, do not always conform to commercial reality and disincentivise parties from proceeding with protracted negotiations. This is especially so where the outcome of such negotiations hinges upon a non-commercial outcome, viz: a ruling of a regulatory body.

Thus parties to a proposed Consolidation, whether or not they have concluded a binding agreement, should be permitted to approach IDA, especially in cases where it is likely that “no significant review” will be needed and apply for a short form approval. In such cases the parties are then free to proceed with certainty. Naturally the terms of the final agreement that is concluded must not differ materially from the proposal upon which any short form approval might have been based.

(j) Section 3.2 – Minimum Information Requirements

A key guiding principle should be commercial efficiency and certainty. On the whole the Minimum Information Requirements appear to require a relatively burdensome amount of detail to be gathered before an application may be submitted.

In the case of a short form approval the amount of information required should be streamlined. The kind of information contemplated in section 3.8.1 of the Guidelines (Informal Guidance) should be adequate upon which to base a short form approval.

In particular, SingTel does not believe that business plans should be routinely provided. Most often a consolidation will have the effect of significantly shifting a business plan in any case and its relevance would therefore be questioned.

In cases where short form approval is not appropriate, ie: where the thresholds above are exceeded then further information and a more complete analysis of the proposed transaction should be provided.

In this way commercial efficiency is retained to the extent that only material information needs to be collected and parties may proceed with negotiations secure in the knowledge that important proprietary and confidential commercial information (such as business plans, which are expressly required to be disclosed by the Guidelines in their current form, and which disclosure is wholly inappropriate in most cases) is not routinely required to be furnished. Only in the case where IDA forms a preliminary view that there are anti-competitive concerns raised by the proposed Consolidation and there is a justification for requesting such information should further detailed information be requested.

(k) Section 3.4 – IDA Preliminary Review of Consolidation Application

It is suggested that the contents of this section should be expanded to include the process for short form approvals referred to above.

The proposals of ICPAC also support minimising the amount of information required, especially with regard to consolidations that fall below thresholds for full approval.

(l) Section 3.5 – Waiver of Filing Obligations

SingTel does not support an approach which would allow some parties to obtain a waiver whereas others might not be granted such a waiver. As we have set out above, SingTel supports a more streamlined application process and, in particular, we support exemptions or a shorter form review process for certain Consolidations. A discretionary element to waive return procedures for some but not others in similarly situated circumstances is not supported.

(m) Section 3.7 – Statement that Consolidation Agreement is Subject to IDA Approval

Consideration might be given to amending the Guidelines to permit parties to a proposed Consolidation to move forward with the greatest possible reasonable speed and without the

unnecessary delay of compulsory conditions precedent for regulatory approval. Thus in cases which fall below the relevant thresholds above there is no need for inclusion of clauses which condition the transaction upon regulatory approval.

(n) Section 3.8 – Informal Guidance

SingTel does not support a process of informal guidance where confidentiality is maintained by the party seeking such guidance. In reality, a party granted informal guidance allowing the Consolidation will consider the Consolidation to be approved, irrespective of statements clarifying the position in the Guidelines that such approval is not final.

SingTel believes that any request for guidance, whether formal or informal, should only be met with a response where there is public consultation. If guidance is sought confidentially, then no guidance should be given.

This approach is used by the ACCC in Australia which states in its Merger Guidelines that:

“If the requirements of the parties are that the proposed acquisition is confidential, the Commission is unlikely to be in a position to provide the parties with its finalised view about the acquisition. The Commission’s position is that it requires the views of market participants prior to providing a final response to parties whether it considers that a proposed acquisition of shares or assets may or may not contravene the Act ...

...

The Commission is concerned to ensure that it does not give inappropriate comfort to parties and then, upon undertaking market inquiries, come to the view that the merger would be likely to substantially lessen competition. This will be of particular concern to the Commission for proposals which affect markets in which it has little, or little recent, experience.”

In any case, in light of the suggested short form approval process, the need for inclusion of informal guidance may fall away.

(o) Section 4 – Consolidation Review Period

Fixing a reasonable time period within which decisions should be made requires striking the right balance between the objectives of regulatory intervention and the demands of commercial reality. Minimising the amount of time required to make a decision is a factor of the number of transactions required to be scrutinised as well as the degree of information that is required to be processed. SingTel has attempted to set out a process that strikes this balance, ie: only

transactions that really merit scrutiny should require approval and the amount of information necessary must bear a relation to the degree of scrutiny that the transaction requires. This means that IDA's need to properly analyse Consolidations is balanced against the commercial demands of competitiveness and prompt responses by players to activity in the market place.

In general, SingTel believes that the time periods set out in the Guidelines could be shorter and the amount of information required could be less as set out more specifically below.

(p) Section 4.1 – Consolidation Review Period Does Not Begin Until Receipt of Complete Consolidation Application

This section requires minor amendments in order to make the meaning clearer. The example given conveys the true intention. However the sentences prior to the example do not convey this. The Review period commences upon the date that the application is received. This notwithstanding the fact that the minimum information requirement will only be assessed sometime after receipt of the application. Only in those cases where the minimum information requirement is not satisfied is the commencement date delayed. This is correctly expressed in section 3.4.1 of the Guidelines.

(q) Section 4.2 – Length of Review Period

In accordance with best international practice:

- In the case of short form approvals, SingTel believes the decision should be given within 14 days of application.
- In the case of so-called full approvals, 30 days does not appear to be unreasonable.
- Extensions should be limited to an additional 14 days so that full approvals do not take more than 6 weeks.

(r) Section 5.1.3 – Interviews

SingTel believes that interviews should be limited and that any interviews should be preceded with written questions. As the IDA acknowledges, many Consolidations are complex and it would be reasonable to extend reasonable notice to management of questions they may be asked about complex Consolidations.

(s) Section 5.1.4 – Inspection Requests

The Guidelines should be clarified to include a provision that in respect of any inspections requested by IDA, reasonable prior written notice will be given.

(t) Section 5.2.1 – Public Consultation

SingTel believes that public consultation is the central element of any review. SingTel strongly believes that any view or guidance expressed by the IDA should always be preceded by a public consultation phase. Public consultation is important for the IDA to be informed of the market and the likely impact of the consolidation on the market. Such an analysis is best informed by the market participants themselves. SingTel believes that “where appropriate” should be deleted in this section 5.2.1 as well as section 9.2.

(u) Section 5.2.2 – Private Consultations

SingTel would support private consultation but does not support guidance being given based only on private consultation.

(v) Section 5.4 - Confidentiality

Maintaining confidentiality within any institution is often very difficult and no process for maintaining confidentiality can be guaranteed as foolproof. In the circumstances, especially relating to propriety and important commercial information, greater latitude should be afforded applicants for refusing to disclose information without penalty.

(w) Section 6 – Analytic Framework

Whilst it is acknowledged that the process is not strictly judicial, some clarity should be given in the Guidelines regarding the “onus of proof”.

To the extent that the Guidelines imply that in the absence of adequate information or reasoned justifications the application will not succeed, the onus of proving success is on the applicants. It is undesirable in the context of commercial practice that this is the case. The Guidelines should be clarified to convey that only in clear cases where there is a justification why the Consolidation in question lessens competition should it be rejected. Otherwise as a default, the Consolidation should be approved.

This is the approach proposed in the United Kingdom. The Department of Trade and Industry has put it this way: “A merger will be cleared unless the authorities expect it would result in a substantial lessening of competition in any UK market.”⁶

(x) Section 6.1 – The “Unreasonably Restrict” Standard

The inclusion specifically of the impact of the Consolidation on “future competition” may give undue weight to one of many factors that should be taken into account in an analysis of this nature. SingTel submits that the “substantially” lessening competition test referred to above might be preferable in order to remove the risk that theoretical or economically insignificant cases are rejected.

It is appropriate that the Guidelines recognise that flexibility is required in the application of principles to specific activity within a market place. The standard as articulated in the Guidelines also require some clarification to indicate that pro-competitive outcomes (eg. efficiencies) of the Consolidation are also to be taken into account.

(y) Section 6.2 – Horizontal Consolidations

Given the dynamic nature of the market structure in the telecommunications sector it may not be appropriate to label Horizontal Consolidations as posing the greatest threat to competition. There is no compelling reason why they should be singled out for special treatment. As the Guidelines in fact acknowledge (section 2.2.2), Non-Horizontal Consolidations, may pose as great a threat to competition. The statement in the Guidelines that this is generally the case when one or both of the parties to the Non-Horizontal has significant market power also needs to be reconsidered. Flexibility must be retained to analyse transactions on their merits in the context of the market.

(z) Section 6.2.1 – Market Share Assessment

In assessing the market share of any Consolidated entity, account should be taken of the context of the dynamic nature of the market conditions of the telecommunications sector to ensure that the definitions, tests or standards do not tend towards a narrow market definition.

SingTel is concerned with the IDA’s approach to determining the relevant market in section 6.2.1.1. Product and geography are dimensions of the same market. Together with function (i.e. wholesale/retail) and time, these four dimensions make up the definition of a market. That is, the four dimensions of a market are:

⁶ See Chapter 5 of the White Paper, “Productivity and Enterprise: A World Class Competition Regime”, 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

- product dimension;
- geographic dimension;
- functional dimension; and
- temporal dimension.

SingTel believes that the market analysis should follow the traditional four – dimension analysis.

SingTel is also concerned by section 6.2.1.2 which suggests in its current form that in determining the number of participants in a market only those Licensees that directly compete against or provide substitutes for the applicants' services will be taken into account. This ignores the complexity and subtlety of contemporary market analysis such as, eg: the cross-elasticity of supply and demand, that might result in a legitimately broader definition of the market.

In the current telecommunications sector, market conditions are such that any number of possible participants (local, regional and international) may compete directly or indirectly with the applicants in question. The Guidelines should give some expression to this.

For example, in the FTC and Department of Justice Merger Guidelines, assessment of who the players are in a particular market involves a sophisticated analysis of supply response taking account of switching or extension of assets and other factors pointing to ease of supply response. In the case of the telecommunications sector, this kind of analysis is even more important as the range of potential players is potentially wider than the Guidelines appear to indicate.⁷

Accordingly, section 6.2.1.2 should be removed from the market analysis.

(aa) Section 6.2.2 – Situations in Which Approval Ordinarily Will be Granted Without Significant Review

SingTel supports the 15% threshold as specified above. SingTel has commented above about other applicable exemptions or short form approvals.

(bb) Section 6.2.3 – Assessing the Risk of Anti-competitive Impact

All of the factors mentioned in 6.2.3. have a bearing in assessing the potential risk that a Consolidation might pose. However, there is a presumptuous element in section 6.2.3.1 which is undesirable. In particular, this section tends to suggest that, for example, Consolidation where

⁷ See <http://www.ftc.gov/bc/docs/horizmer.htm>.

the post-Consolidation market share exceeds 35% will be presumed anti-competitive. SingTel does not believe there should be any presumption contained in section 6.2.3.1. The factors in section 6.2.3.1 should be open and contain both positive and negative factors as used in other jurisdictions.

SingTel also believes that a 50% threshold is most appropriate given the Singapore market circumstances.

Further, the Guidelines mention the risk of unilateral anti-competitive conduct or so-called abuse of dominance as one of the factors. SingTel is concerned that because of the wide language used to define the market to be scrutinised, “any Telecommunications market”, the Guidelines may tend towards undermining a party who happens - in the estimation of IDA - to be dominant in one market from legitimate commercial activity in another market. The UK Department of Trade and Industry study suggests that such an approach will result in over-targeting and result in unnecessary cost to applicants.⁸

Any Guidelines must also be conscious of contemporary notions of how dominance is defined. In this regard, especially within the context of the dynamism of the telecommunications market, account should be had, amongst others, of how durable the alleged dominance is, what the range of the products of competitors is, and how strong the customer bases of the players under consideration are, the technology and research and development available to players, the degree of innovation to which the market is subjected, time and cost to enter the market. All of these factors are present in the approach taken in the EU. Factors affecting dominance must be taken together, no-one factor can be determinative.

SingTel therefore believes that dominance should be removed as a test.

SingTel has commented above in relation to the use of concentration factors in sections 6.2.3.2 and 6.3.2. IDA should take a realistic view of concentration in Singapore in particular (ie, 3 or more should be considered unconcentrated, with 2 competitors acknowledged as providing competition in Singapore).

(cc) Section 6.3 – Non-Horizontal Consolidations

Within the dynamic nature of the telecommunications sector, the Guidelines should not suggest “preferential” treatment for non-horizontal Consolidations. At the same time SingTel is concerned that dominance is a stand alone factor for intervening in Non-Horizontal

⁸ See Chapter 5 of the White Paper, "Productivity and Enterprise: A World Class Competition Regime", 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

Consolidations. In general, the tenor of SingTel's submissions concerning Horizontal Consolidations should apply to Non-Horizontal Consolidations as well.

(dd) Section 6.3.2 – Situations in Which Approval Ordinarily Will be Granted Without Significant Review

SingTel supports the inclusion of any provisions in the Guidelines that conduce to minimum intervention. The use of thresholds is useful to weed out unnecessary cases from regulatory scrutiny. SingTel has already indicated how it sees the use of thresholds in the Guidelines (see 3.6 above) and the same should apply in respect of Non-Horizontal Consolidations.

(ee) Section 6.3.3.2 Foreclosure/ Increased Need for Dual – Level Entry by Future Competitors

The IDA should closely consider regulation of upstream facilities and bottlenecks when considering this section. Those parties which control such facilities should not be precluded from engaging in consolidation activity when regulation of upstream inputs is sufficient to deal with the competitive concern.

(ff) Section 6.4 – Considerations Applicable to All Proposed Consolidations

SingTel submits that the considerations set out in this section are in themselves part of the complex process of analysing effect on competition. But, the role of “efficiencies” should not be relegated to assisting in “close cases” as suggested in section 6.4.2 of the Guidelines and should rather be part of an integrated analysis of and competition analysis as is the case in the ACCC Merger Guidelines, the FTC and Department of Justice Merger Guidelines.⁹

As stated by the ACCC:

“The analysis of efficiencies in a s 50 context must be integrated within the framework of competition analysis, rather than being considered as a “trade-off” with competition effects, as might be done in an authorisation context (see Section 6). The relevant question is the effect or likely effect of the merger on firms’ abilities and incentives to compete in the relevant market, including any effect flowing from efficiencies:

The weight and significance accorded to different types of efficiencies should be a function of their magnitude and probability, the degree to which they likely will enable the merged firm

⁹ See <http://www.ftc.gov/bc/docs/horizmer.htm>.

not only to be a better competitor but to enhance (or not lessen) competition and thus benefit consumers, and the delay with which these consumer benefits are to be realized.¹⁰

As set out above SingTel also supports the inclusion of consideration of a “failing firm” in assessing the impact of the Consolidation (section 6.4.3). The Guidelines can perhaps be clarified to ensure that a Consolidation is not rejected on the basis that low barriers to entry mean that any third party could step into the shoes of the failing firm and thus the Consolidation is not necessary to meet the requirement. These provisions for failing firms in the Guidelines are substantially similar to those contained in the FTC and Department of Justice Merger Guidelines. SingTel notes that the bar appears to be set quite high before a failing firm defence will be allowed. Given the vagaries and dynamism of the telecommunications sector, some consideration should be given to permitting a consolidation based on failing firm considerations that are less strenuous than those set out in the Guidelines.

Finally, SingTel believes there should be specific mention of the dynamism of the telecommunications market, the rate of change and the impact of change on market power. Such dynamism is recognised intentionally (eg the ACCC states as follows:

“Whether a market is growing or declining can have significant implications for the potential erosion of market power over time. Markets which are growing rapidly are more likely to see new entry and the erosion of market shares over time. Markets which are characterised by rapid product innovation may see market leaders rapidly replaced. However, in some differentiated product markets, first mover advantages and brand loyalty can resist such advances. Historical information on changing market shares will be informative here.

Regulatory or technological changes may change market boundaries or lower barriers to imports or new entry in the foreseeable future (see paragraphs 3.6 and 3.7).

(gg) All relevant factors

SingTel suggests that all the factors referred to in section 6.2, 6.3 and 6.4 be consolidated into one section clearly with relevant considerations when dealing with a consolidation application.

These factors include:

- the thresholds referred to above;

¹⁰ Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace”, Volume 1, A Report by the Federal Trade Commission Staff, *Antitrust & Trade Regulation Report*, Vol 70 No 1765, Special Supplement, June 6 1996, p S-36.

- the countervailing power of buyers;
- switching costs of customers;
- product and price differentiation;
- innovation and dynamism of the telecommunications market;
- “maverick” Licensees;
- efficiencies derived from the consolidation;
- elimination of a potential future competitor;
- foreclosure or increased need for Dual-level entry;
- other market distortions;
- likelihood of new or expanded entry;
- failing firm defence;
- technological change and new services;
- available substitutes.

(hh) Section 6.4.5 – Other Public Interest Considerations

As indicated above, SingTel believes the inclusion of a catch-all public interest test requires clarification.

SingTel supports a public interest test but, as described above, only as a balance against anti-competitive conduct. It should not be used to block a Consolidation which is not otherwise anti-competitive. Notably in the United Kingdom, there is a movement away from using competition law to pursue non-competition objectives. The Department of Trade and Industry proposes replacing a general public interest test for mergers with a competition based test.¹¹

¹¹ See Chapter 5 of the White Paper, "Productivity and Enterprise: A World Class Competition Regime", 31 July 2001 at <http://www.dti.gov.uk/cp/whitepaper/cm5233.pdf>.

SingTel also believes that some guidance could be given to the breadth of public interest. For example, the ACCC has identified the following which could constitute public benefits:

- economic development, eg in natural resources, through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industrial rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
- industrial harmony;
- assistance to efficient small businesses, such as guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvement in the quality and safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and businesses to permit informed choices in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- development of import replacements;
- growth in export markets; and
- steps to protect the environment.

(ii) Section 7 – Special Situations

SingTel strongly supports consideration of international circumstances when analysing a Consolidation. In cases where a foreign operator proposes a Consolidation and that operator has

rights or privileges that are no longer extended in Singapore, there is considerable risk of extension by that foreign operator of benefits from those rights or privileges to result in anti-competitive activity in Singapore.

SingTel also believes that the IDA should take into account, when a foreign operator comments on a proposed Consolidation in Singapore, the consolidation position in the country of origin of the foreign operator to ensure that such comments are given some context from the country of origin perspective.

(jj) Section 8.3 – Grant of the Application, Subject to Conditions

SingTel's fundamental premise is that a transaction should be allowed as far as possible and that the absence of behavioural safeguards, other than in very clear cases, should not inhibit approval of the transaction.

(kk) Section 8.4 – Consultation With Applicants Prior to Rejection or Imposition of Significant Conditions

To the extent that this section permits an applicant an opportunity to persuade IDA that its likely rejection of the application is incorrect, then this is to be welcomed. However, in all cases based on an application containing relevant material information, IDA should be required to give such indication as early as possible. In cases where such preliminary view indicates rejection of the application subject to the furnishing of further justifications, then due process and natural justice rules should apply.

(ll) Section 9.2 – IDA Solicitation of Public Comments

As specified above, SingTel believes that where the thresholds are exceeded, guidance or approval should only be given by the IDA where there has been public consultation.

Accordingly, the reference to “where appropriate” at the beginning of section 9.2 should be removed. Consultation should always be engaged in when a consolidation is subject to the IDA's review.