

EXPLANATORY MEMORANDUM

This explanatory memorandum explains the notification dated 17 March 2009, issued by the Info-communications Development Authority of Singapore (“**IDA**”) to OpenNet Pte. Ltd. (“**OpenNet**”), notifying OpenNet of the necessary modifications to be made to OpenNet’s proposed Model Confidentiality Agreement (“**MCA**”).

Introduction

1. OpenNet submitted its proposed MCA to IDA for approval on 24 February 2009, whereupon IDA proceeded to conduct a public consultation on the proposed MCA. At the close of the consultation on 9 March 2009, IDA received comments from two respondents.
2. In reviewing OpenNet’s proposed MCA and the comments received from the public consultation, IDA adopted the following approach and principles:
 - a. IDA conducted a general review of OpenNet’s proposed MCA to ensure that the terms and conditions would be fair and reasonable, promote the principles of the NetCo Interconnection Code 2009, and contain reasonable safeguards to protect and govern the preservation of commercially-sensitive information disclosed by parties in the negotiation and implementation of a customised interconnection agreement between the NetCo and potential requesting licensees;
 - b. In striking a balance, IDA is cognisant that the protection afforded under the MCA should be sufficient and adequate to allow the negotiating parties to comfortably disclose confidential information to each other, yet not extend beyond what is necessary to protect the parties’ legitimate commercial interests. In this respect, parties to the MCA should only be subject to obligations that are feasible and practicable, and that neither party should be burdened with any unnecessary or onerous obligations;
 - c. Where respondents submitted comments on specific terms and conditions in the MCA, IDA carefully considered whether these comments were reasonable and necessary, and tended to facilitate the negotiation of, and the efficient and effective implementation of, a NetCo customised interconnection agreement. Where IDA determined that the comments met these requirements, IDA then

reviewed the corresponding terms and conditions in the MCA to determine if any modification was required; and

- d. In considering these comments, IDA took into account that the MCA should only apply in the particular situation where parties are negotiating a customised interconnection agreement, and not where the requesting licensee is clarifying the ICO prior to acceptance. In the latter situation, parties do not need an MCA to safeguard their interests as it is unlikely that parties will be disclosing confidential information to each other at that stage. Once the ICO is in effect, interests in confidential information would be safeguarded by the confidentiality clause in the ICO Agreement.
3. Unless otherwise provided, all capitalised terms used in this explanatory memorandum shall have the same meanings as in the accompanying notification and/or the MCA.

Required modification to clause 9 of the MCA

4. The editorial reference error to “clauses 7(b) and 7(c)” in the existing clause 9 is to be amended to “clauses 8(b) and 8(c)”.
5. IDA agrees with a respondent’s comment that requiring the Receiving Party to provide to the Disclosing Party a written undertaking from the relevant Authorised Person(s) to comply with the terms of the MCA, is impractical and unduly burdensome. Firstly, it is not commercially realistic to expect the Receiving Party’s professional advisors to be willing to give such an undertaking to the Disclosing Party. Secondly, the Receiving Party may not want to disclose the identity of the professional advisors that it has engaged, since such information can be commercially sensitive.
6. In any event, IDA notes that the MCA is drafted with mutualised obligations on either party to inform their respective Authorised Person(s) that he/she is to safeguard the Confidential Information. Furthermore, the appropriate remedy for a Disclosing Party in the event of a breach of the MCA is against the Receiving Party, and not the Authorised Person(s) of the Receiving Party. IDA also notes that a mutualised indemnity clause is already in place, providing the Disclosing Party with an adequate remedy against the Receiving Party for any breach by an Authorised Person. Accordingly, IDA has determined that the obligation to provide further written undertakings from the Authorised Person(s) in favour of the Disclosing Party is unnecessary.
7. In this regard, IDA requires OpenNet to remove from clause 9 the obligation for the Receiving Party to obtain and provide to the Disclosing

Party a written undertaking from the relevant Authorised Person(s) in favour of the Disclosing Party.

8. For OpenNet's reference only, IDA considers the following clause as an acceptable example:

~~*"The Receiving Party hereby agrees to advise the Authorised Person(s) that they are obligated to protect the Disclosing Party's Confidential Information in a manner consistent with this Agreement. The Receiving Party may disclose some or all of the Confidential Information to the Authorised Person(s) provided that prior to a disclosure under clauses 8(b) and 8(c), the Receiving Party shall obtain and provide to the Disclosing Party a written undertaking in favour of the Disclosing Party from the relevant Authorised Person(s) to comply with the terms of this Agreement as if the relevant Authorised Person(s) is a party hereto the Receiving Party must inform the Authorised Person(s) that they are obligated to protect the Disclosing Party's Confidential Information in a manner consistent with this Agreement and shall take reasonable steps to ensure that the Authorised Person(s) safeguard the Confidential Information. In any event, the Receiving Party shall remain liable for any disclosure by the Authorised Person(s) to any other person."*~~

Required modification to clause 14 of the MCA

9. IDA has considered, and agrees with, a respondent's comment that clause 14 should be clarified by adding a proviso to make explicit the Disclosing Party's ability to take pre-emptive measures to mitigate or prevent disclosure of the Confidential Information. To this end, IDA notes that the proposed addition is both reasonable and commonplace in confidentiality agreements.
10. For OpenNet's reference only, IDA considers the following clause as an acceptable example:

"The Receiving Party shall inform the Disclosing Party of any disclosures to third parties under clause 13 by the Disclosing Party prior to any such disclosure, so as to provide, where circumstances reasonably permit, the Disclosing Party with the opportunity to take appropriate actions to mitigate or prevent the disclosure".

Required modification to clause 22 of the MCA

11. IDA has noted the editorial error in the phrase “... *losses arising out of the efforts or either or both parties ...*” in clause 22. OpenNet is to make the necessary editorial amendment in the following manner: “... losses arising out of the efforts of either or both parties ...”.

Exclusion of application of the Contracts (Rights of Third Parties) Act

12. IDA has considered, and accepts, a respondent’s comment to include in the MCA, a clause to clarify that the Contracts (Rights of Third Parties) Act (Cap. 53B) is not applicable. IDA is of the view that the inclusion of this clause lends clarity to the position that the MCA should only be enforceable by and against the contracting parties (i.e. OpenNet and the requesting licensee), consistent with the rights and obligations assumed by the parties under the MCA.
13. Accordingly, IDA requires OpenNet to propose an appropriate clause in the MCA to exclude the application of the Contracts (Rights of Third Parties) Act (Cap. 53B). For OpenNet’s reference only, IDA considers the following clause as an acceptable example:

“A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act (Chapter 53B) of Singapore to enforce any term of this Agreement.”