M1'S RESPONSE TO IDA'S SECOND PUBLIC CONSULTATION PAPER ON THE SECOND TRIENNIAL REVIEW OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES

18 January, 2010

This paper is prepared in response to IDA's consultation document dated 23rd November 2009 and represents M1's views on the subject matter. Unless otherwise noted, M1 makes no representation or warranty, expressed or implied, as to the accuracy of the information and data contained in this paper nor the suitability of the said information or data for any particular purpose otherwise than as stated above. M1 or any party associated with this paper or its content assumes no liability for any loss or damage resulting from the use or misuse of any information contained herein or any errors or omissions and shall not be held responsible for the validity of the information contained in any reference noted herein nor the misuse of information nor any adverse effects from use of any stated materials presented herein or the reliance thereon.

M1'S RESPONSE TO IDA'S SECOND PUBLIC CONSULTATION PAPER ON THE SECOND TRIENNIAL REVIEW OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES

1. M1 has been providing cellular mobile services to the Singapore market since 1 April 1997 and in 2000, we launched our international telephone services. In February 2005, M1 took the lead in launching 3G services in Singapore, followed by our Mobile Broadband service in 2006. We became a fully-fledged broadband player with the introduction of M1 Fixed Broadband service in 2008, transforming M1 from a single-play mobile operator to a dynamic multi-play operator, with interests in both the mobile and fixed sectors.

2. M1 welcomes the opportunity to participate in the second triennial review on the proposed revised code. While we support IDA's position on key issues in the Proposed Revised Code, we seek IDA's measured consideration of our views on the application of cross default protection across different licensed entities. The aim is to safeguard business interests and ensure business continuity, while maintaining consumers' interests.

3. Since key policy issues were already addressed in the previous consultation, we hereby focus only on refining the drafting of the Proposed Revised Code 2009.

Section Reference	**Description**	**Comments**
3.2.4.4	"Notwithstanding Sub-sections 3.2.4.1 and 3.2.4.2 of this Code, a Licensee may not terminate an End User Service Agreement, or suspend the provision of telecommunication service to an End User, on the grounds that the End User has breached any of the terms and conditions in another End User Service Agreement, where: (a) the telecommunication service to be terminated or suspended is a Basic Telephone Service (where "Basic Telephone Service" means a fundamentally plain telephony service provided through a telephone set connected to the public switched telephone system); or	In respect of the drafting of the proposed new Sub-section 3.2.4.4 of the Proposed Revised Code, we note that the opening words "Notwithstanding Sub-sections 3.2.4.1 and 3.2.4.2 of this Code" would likely operate to inadvertently contradict the intent of Sub-section 3.2.4.2. Specifically, we understand that the intent of Sub-section 3.2.4.2 is to permit the Licensee to terminate an EUSA or suspend the provision of telecommunication service, without providing prior notice – in the four scenarios under Sub-sections 3.2.4.2(a), (b), (c) and (d) – <u>irrespective</u> of whether such four scenarios coincided with the situations referenced in Sub-section 3.2.4.1 or the proposed new Sub-section 3.2.4.4. This understanding that the specific enumeration of Sub-sections 3.2.4.4(a) and (b) would not prejudice the operation of Sub-section 3.2.4.2 is consistent with IDA's comment in Paragraph 22 of the 23 November 2009 Consultation Paper (stating that "Licensee may terminate or suspend the provision of a Basic Telephone Service only if an End User has breached the terms and conditions of an EUSA specific to the Basic Telephone Service . . . <u>or if the circumstances in</u>

	(b) the other End User Service Agreement that has been breached is with a different Licensee."	Sub-section 3.2.4.2 of the Proposed Revised Code apply") (emphases added). In contrast, the opening words of Sub-section 3.2.4.4 would likely have the contrary effect that, in the case of Sub-section 3.2.4.4(a) or (b), the Licensee may not exercise its right to terminate the EUSA at issue under Sub-section 3.2.4.2 – even if the End User's breach of the terms and conditions in the other EUSA arises from, for example, the scenario referenced in Sub-section 3.2.4.2(a). Accordingly, in the interest of clarity, we propose that the opening of the proposed new Sub-section 3.2.4.4 be revised, as tracked: "Subject to Sub-section 3.2.4.2 of this Code, ~~N~~notwithstanding Sub-section~~s~~ 3.2.4.1 ~~and 3.2.4.2 of this Code~~, a Licensee may not terminate an End User Service Agreement, or suspend the provision of telecommunication service to an End User, on the grounds that the End User has breached any of the terms and conditions in another End User Service Agreement, where:"
3.2.4.4(b)	"the other End User Service Agreement that has been breached is with a different Licensee."	While we generally agree with and support IDA's stated goal of consumer protection – we respectfully submit that such goal, and the methods for furthering such goal, ought to be carefully weighed and balanced with the legitimate and equally important business interests and rights of Licensees. In this regard, we welcome and agree with IDA's position that cross-default protection may remain available to Licensees, except where the telecommunication service to be terminated or suspended is a Basic Telephone Service, as expressed in the proposed new Sub-section 3.2.4.4(a). However, we are of the view that the proposed new Sub-section 3.2.4.4(b) may not strike the ideal balance. First, as an initial, threshold point, we note that the scenario which Sub-section 3.2.4.4 relates may be inapposite to the goal of consumer protection. Specifically, Sub-section 3.2.4.4 would only be applicable in a scenario where the

		End User has breached the terms and conditions of an EUSA, and has been notified and given reasonable opportunity to remedy the breach, but has failed to so remedy. In such scenario of breach and failure to remedy by the End User, it may appear unclear how consumer protection remains relevant, or why the legitimate business interests of the Licensee – as the non-breaching party – should be superseded. Second – and most importantly – inasmuch as Sub-section 3.2.4.4(b) would operate as a blanket prohibition against cross termination of separate EUSAs involving different Licensees, we are of the view that it does not appear to take into account the fact that the business cases for the services at issues are often and likely linked, especially where the different Licensees in the separate EUSAs may relate as affiliates or subsidiary. For instance, the business case and ability of Licensee A to offer Service A to the End User may depend on Licensee B's provision of Service B to the same End User (whether as result of bundling of services between unrelated Licensees, or permissible cross-subsidisation or bundling of services between related or affiliated Licensees, or otherwise). In such instance, Sub-section 3.2.4.4(b) would prohibit Licensee A from terminating its EUSA or suspending Service A – even where the business case for continued provision of Service A to the End User no longer exists. Sub-section 3.2.4.4(b) may also inadvertently lead to a situation where the End User intentionally breaches (by non-payment) the EUSA for Service B, so as to derive a windfall in respect of Service A (because Service A is subsidised by Service B). Third, we are of the view that the permissibility of cross-default protection should depend on a substantive consideration of the underlying nature of the unremedied breach and its impact on the business case of the Licensee at issue, rather than on the formal consideration of whether the Licensees are distinct entities. An unremedied breach either impacts the business case of the Licensee to the extent requiring counter-measures, or it does not – if it does, then the Licensee ought to have the right to protect its legitimate business

		interests by terminating the EUSA or suspending the service, even where the breach is in respect of the EUSA of another Licensee – if it does not, then the Licensee would not seek to so terminate or suspend anyway, even where such cross termination right is available. In any event, the heightened risks and costs incurred by Licensees as a result of the restraint set forth in Sub-section 3.2.4.4(b) in favour of breaching End Users would likely manifest as higher service charges to be ultimately allocated to and borne by non-breaching and responsible End Users, in conflict with the goal of consumer protection. Accordingly, we propose that Sub-section 3.2.4.4(b) be deleted in its entirety.
3.2.9	Prohibition on Charging for Services Supplied on a Free Trial Basis	We generally agree with IDA's drafting of the proposed new Sub-section 3.2.9, in lieu of a requirement of reminder notice. However, in the interest of clarity, we would like to seek clarification in respect of the exact meaning of the words "express agreement" in Sub-section 3.2.9(b) – especially in light of IDA's comment on the same in Paragraph 29 of the 23 November 2009 Consultation Paper. Specifically, we note that in such Paragraph, IDA stated that "By this, IDA would expect the Licensee to: (a) draw the End User's attention to the prices, terms and conditions applicable to the service after the free trial; and (b) obtain the End User's express agreement to continue the service after the free trial by checking or signing against the relevant clause(s) containing the applicable prices, terms and conditions. The Licensee should also not bury the applicable prices, terms and conditions of the service in fine print within a large EUSA or position them in such a way as to increase the likelihood of the End User overlooking the applicable prices, terms and conditions." (Emphasis added). It may be unclear whether the foregoing is intended by IDA as merely a guide to best practice, or as a specific definition and qualification of the meaning of the words "express agreement" for the purposes of Sub-section 3.2.9.

		If it is intended to be the latter, the foregoing would appear to impose requirements that may be more onerous than the requirement of a reminder notice. We are of the view that the determination of whether the Licensee has obtained the "express agreement of the End User" as referenced in Sub-section 3.2.9 can be made under established principles of contract law in respect of the formation and enforceability of contracts.