Ministry of Information, Communications and the Arts

CONSULTATION PAPER ISSUED BY THE MINISTRY OF INFORMATION, COMMUNICATIONS AND THE ARTS

REVIEW OF THE TELECOMMUNICATIONS ACT (Cap. 323)

27 AUGUST 2010

PART I: INTRODUCTION

1 The Telecommunications Act (Cap. 323) ("TA") was last revised in 2005. It provides, amongst others, for the Info-communications Development Authority of Singapore ("IDA") to grant licences, issue directions, codes of practice and standards of performance in connection with the operation of telecom systems, provision of telecom services, and the conduct of telecom licensees. The TA, together with these other instruments, allows the IDA to establish a robust regulatory framework to promote and preserve a vibrant and competitive telecoms sector.

2 Since the TA was last amended, there have been significant developments in the telecoms industry. Telecom networks have increased in importance as consumers rely on these networks for all forms of communication services, including voice, data, video, Internet access and even television services. This dependence on telecoms is growing everyday. Mobile telephone penetration today stands at 139.7% as of June 2010, whilst the proportion of household with access to broadband grew from 40% in 2003 to 80% in 2009. The growing popularity of smartphones, wireless devices like tablet computers and e-readers, netbooks and the introduction of Internet Protocol Television ("IPTV") are only the tip of what would be an entire array of new services for consumers. The recent initiative by IDA to put in place an effective open access, nationwide fibre-to-the-home Next Generation Nationwide Broadband Network ("Next Gen NBN") will also revolutionise the sector and catalyse a greater variety of innovative and competitive high-speed services to homes and businesses.

3 With the changing industry landscape in mind, the Ministry of Information, Communications and the Arts ("MICA") together with IDA have reviewed the TA to ensure that it remains relevant and sufficient to regulate a fast-changing telecoms sector.

4 This Consultation Document summarises and outlines the areas that MICA has identified for improvement in the TA (presented sequentially based on the sections in the TA), the rationale for the proposed amendments, and the procedures and timeframes for members of the industry and the public to submit their views and comments. The proposed Telecommunications (Amendment) Bill and Telecommunications (Prescribed Transaction) Order 2010 are attached in the **Annex**.

PART II: REVISION TO THE FINANCIAL PENALTY FRAMEWORK

Revision of Maximum Penalty Cap

5 Under section 8 of the TA, IDA may impose a financial penalty administratively, of a sum not exceeding $1 million, for breaches of licence conditions, codes of practice, standards of performance, or directions. This would include breaches of the Code of Practice for Competition in the Provision of Telecommunication Services ("Telecom

Competition Code" or "TCC"), which governs the competitive conduct of telecom licensees.

6 The infocomm industry has been growing steadily over the years, doubling in total industry revenue from S$30.7 billion in 2001, to S$62.7 billion in 2009. Infocomm adoption has been increasing amongst enterprises across all employment sizes, and continues to remain high amongst households and individuals. The size of infocomm projects has also been increasing over time with the growing reliance on infocomm for business and personal use. The Next Gen NBN, for example, is a multi-million dollar project.

7 In comparison, the current ceiling of $1 million for the financial penalty for contravention of the TA, is low and may not be adequate to achieve its original policy objective of providing an effective deterrent to non-compliance with regulatory conditions. In addition, the current financial penalty ceiling is low compared with similar domestic legislation like the Electricity Act (Cap. 89A) and the Gas Act (Cap. 116A), which cap the financial penalty at 10% of the annual turnover of that part of the licensee's business in respect of which the licensee holds a licence, and the Competition Act (Cap. 50B), which caps the financial penalty to 10% or such other percentage of the turnover of the business for each year of infringement, up to a maximum of 3 years.

8 With increasing competition expected in the telecom sector, as well as greater reliance on communication networks and services in future, it is important to ensure that the penalty for non-compliance with IDA's regulation and competition rules is sufficient and serves as an effective deterrent. Therefore, to better align with existing legislation, MICA proposes to revise the maximum financial penalty to 10% of the annual business turnover for licensable services, or $1 million, whichever is higher. Such an approach would enable IDA to levy a proportionately higher penalty on bigger licensees while maintaining sufficient deterrent for smaller licensees.

9 Consequential amendments will be made to section 11 of the TCC to reflect the revised penalty cap.

Administrative action for failure to pay financial penalties

10 The financial penalty imposed under section 8 of the TA is deemed as a debt owed to IDA and recoverable through civil proceedings in court. This process, however, is both inefficient and uneconomical, especially for small amounts. To increase the effectiveness of the financial penalty as a sanction, MICA proposes to empower IDA to be able to suspend or cancel the whole or part of a licence, or to reduce the period for which a licence is to be in force, on a case-by-case basis, in the event of a licensee's failure or refusal to pay a financial penalty within a specified period. Such inclusion serves to enhance the effectiveness of IDA's current enforcement framework.

Question 1: MICA invites views and comments on the proposal to revise the ceiling for the maximum financial penalty that may be imposed by IDA under section 8 of the TA, for breach of licence conditions, code of practice or standards of performance, or directions, to 10% of the annual business turnover of licensable services, or $1 million, whichever is higher.

Question 2: MICA also invites views and comments on the proposal for IDA to be empowered to suspend or revoke a licence, or to reduce the period for which a licence is to be in force, on a case-by-case basis, in the event of a licensee's failure or refusal to pay a financial penalty under section 8 of the TA.

PART III: CLARIFICATION OF THE PRIVILEGES OF A PUBLIC TELECOMMUNICATION LICENSEE

11 Depending on the scope and requirements of their operations, a Facilities-Based Operations ("FBO") licensee may apply to be designated as a Public Telecommunication Licensee ("PTL"). A PTL enjoys certain privileges under the TA, such as statutory protection of its installations, and access to lands or buildings for the purposes of installation or plant, which help to facilitate the installation, maintenance and protection of a PTL's systems used to provide telecom services.

12 Under the Next Gen NBN's vertically-tiered industry structure, the provision of next generation telecom services over the network relies on multiple stakeholders, including the operator for the passive network (the "NetCo"), the wholesale provider for wholesale connectivity services (the "OpCo"), as well as the retail service providers ("RSPs") that will provide the retail services to end users. This differs from the vertically-integrated industry structure of today where typically, the PTL both operates the network and provides the telecom service. Accordingly, there is a need to review the privileges of PTLs accorded under the TA, to ensure that PTLs at each layer of the Next Gen NBN industry structure enjoy statutory protection of their installations and plants, and access rights to deploy telecom systems that are used for the provision of telecom services. In addition, to ensure that PTL rights are exercised judiciously, MICA proposes that PTL privileges under the TA only apply if they are used to fulfil, or to assist a PTL to fulfil, its unique basic PTL obligations.

Question 3: MICA invites views and comments on the proposed modifications to PTL rights and the consequential amendments to sections 9, 12, 13, 14, 18 and 70 of the TA.

PART IV: COMPLIANCE WITH CODES OF PRACTICE

13 The Code of Practice for Info-communications Facilities in Buildings ("COPIF"), issued under section 19 of the TA, specifies the requirements to be observed by building owners and developers on the provision of space and facilities for telecom services, at their own expense. The purpose of the COPIF is to ensure that sufficient space and facilities are provided in buildings to facilitate the rollout of telecom services by operators. To enforce compliance with the COPIF requirements, one solution is to issue the COPIF under section 26(1)(f) of the TA, which would make non-compliance an offence. However, this approach is administratively cumbersome as every technical breach of the COPIF would constitute an offence.

14 An alternate approach is to empower IDA to issue written orders, to a developer or owner of any land or building who is contravening, or has contravened, any provision of the COPIF, as IDA considers necessary for the purpose of securing compliance, failing which such person would be guilty of an offence and liable on conviction to a fine or to imprisonment or to both. A continuing offence would attract additional recurrent fines. This approach best meets IDA's policy objectives for the COPIF by allowing IDA to examine the non-compliance and determine the appropriate orders that should be issued to achieve practical compliance with the COPIF. In the event that IDA's written orders are not complied with, IDA may commence criminal proceedings against such persons. In addition, the snowballing effect of the fine for continued non-compliance would also encourage compliance by building developers and owners.

15 Hence, MICA proposes to amend section 19 of the TA to incorporate the above approach. Consequently, section 26(1)(f) of the TA will be deleted as it is no longer necessary.

Question 4: MICA invites views and comments on the proposal for IDA to be given the power to issue written orders to building owners/developers to require compliance with the COPIF as proposed in section 19 of the TA.

PART V: CONSOLIDATION PROVISIONS

16 Part VA of the TA was introduced in 2005 to govern the control of telecom licensees arising from changes in their ownership interests. Under Part VA, parties seeking to acquire an ownership interest in a Designated Telecommunication Licensee ("Designated Licensees") are required to notify IDA or seek IDA's approval, depending on the percentage of ownership interest that it seeks to acquire in the Designated Licensee. Designated Licensees are also required to seek IDA's approval for the appointments of its chief executive officer, its directors, and the chairman of its board of directors.

17 Since 2005, new concepts relating to mergers and acquisitions have been incorporated in legislation such as the Companies Act (Cap. 50), the Banking Act (Cap.

19), the Electricity Act (Cap. 89A) and the Postal Services Act (Cap. 237A). These new concepts include, among others: (a) requirements to notify or seek the relevant regulator's approval for changes in voting power, in addition to changes in voting shares; and (b) the inclusion of interest in the acquired party held by an acquiring party's associates, in determining the acquiring party's voting shares/voting power in the acquired party. To provide greater clarity on the scope of the consolidation provisions of the TA and to ensure consistency with other legislation, MICA proposes that amendments be made to the TA to include these new concepts. In addition, MICA recognises that new business models such as business trusts and other forms of trusts may be structured to hold and manage telecom assets. Hence, MICA also proposes to incorporate the concept of business trusts and other forms of trusts into the consolidation provisions of the TA.

Voting Shares and Associates

18 To ensure consistency with other legislation, MICA is proposing changes to the TA to include:

(a) The concepts of 'holding of voting shares' and 'control of voting power' in place of 'ownership interest', to take into account an acquiring party's control over a Designated Licensee, through the acquisition of voting shares or the control of voting power; and

(b) The concept of 'associates', which includes persons who may control or influence an acquiring party, or persons who may be controlled or influenced by an acquiring party.

Business Trusts and Trusts

19 A business trust is a type of investment vehicle which may be registered under the Business Trusts Act (Cap. 31A). It is typically created by a trust deed under which the trustee-manager has legal ownership of the trust assets and manages the assets for the benefit of the beneficiaries of the trust (i.e. the unitholders). As such, a business trust is a new model by which telecom licensees may wish to structure ownership of their telecom systems or assets. For instance, instead of incorporating a company which will operate telecom infrastructure and offer telecom services, the owner of the telecom infrastructure may choose to place its telecom infrastructure in a business trust with the trustee-manager (or the trustee-manager's appointed agent) managing and operating the infrastructure for the benefit of the unitholders. The owner may be the only unitholder, or one of the unitholders.

20 As the sector regulator, IDA has the responsibility of ensuring that the acquisition by any person of control over a telecom licensee or telecom system does not result in a substantial lessening of competition in any telecom market, or harms the public interest. To enable IDA to oversee acquisitions involving telecom systems that have been placed in business trusts or other forms of trusts, MICA proposes to subject such trusts to IDA's

regulatory oversight. To minimise business uncertainty, only a business trust or trust that is established in respect of a telecom system operated by a telecom licensee may be designated under the TA for the purpose of enabling IDA to monitor ownership changes in the relevant business trust or trust (herein referred to as "Designated Business Trust" and "Designated Trust" respectively).

21 Designated Business Trusts or Designated Trusts and their trustee-manager or trustee respectively would in turn be subject to the following obligations under Part VA of the TA:

(a) Duty for the trustee-manager/trustee to notify IDA in the event that any person holds or controls between 5% and 12% of the voting shares or voting power respectively in a Designated Business Trust/Designated Trust;

(b) Duty for the acquiring party to seek IDA's approval for transactions that result in it holding or controlling 12% and 30% of the voting shares or voting power respectively in a Designated Business Trust/Designated Trust; and

(c) Duty for the acquiring party to seek IDA's approval if he has effective control of a Designated Business Trust/Designated Trust; and

(d) Duty for the acquiring party to seek IDA's approval where he acquires the business of the Designated Business Trust/Designated Trust as a going concern.

22 It is also proposed that Part VA of the TA be amended to include the following additional powers for IDA:

(a) Power to obtain information from the trustee-manager/trustee of a Designated Business Trust/Designated Trust or any holder of an equity interest of a Designated Business Trust/Designated Trust for the purpose of assessing an acquisition application; and

(b) Powers to initiate disenfranchise mechanisms where the transaction poses competition or public interest concerns. These include directing the trustee-manager/trustee to restrict the exercise of voting rights or voting power by specified persons, restrict the issuance or offer of units in the trust, and restrict the payment of dividends to specified persons, as well as directing the acquiring party to transfer or dispose of any units in the Designated Business Trust/Designated Trust within a specified period.

23 The incorporation of the business trust, 'voting shares', 'voting power' and 'associates' concepts into the TA is in line with the other legislation like the Companies Act, the Electricity Act, as well as the recently amended CAAS Act 2009. This will help

to update the current framework for the telecom sector and ensure consistency with other economic sectors. In addition, consequential amendments are also proposed to section 69B of the TA to incorporate these new concepts.

Enforcement

24 Under Part VA, IDA may approve with conditions or deny an acquisition if it raises competition or public interest concerns. IDA may enforce its decision by directing the acquiring party to divest its voting shares in the Designated Licensee, and/or directing the Designated Licensee to restrict voting powers, shares or dividends of the acquiring party. While failure by Designated Licensees to comply with IDA's direction attracts a penalty under section 8 of the TA, there is no explicit penalty in cases where acquiring parties who are non-licensees fail to comply with IDA's direction. MICA therefore considers it appropriate to strengthen the current enforcement framework for Part VA by introducing penal sentences for acquiring parties who are non-licensees, where relevant. For Designated Licensees, they would continue to be subject to the penalty framework under section 8 of the TA. The above changes will similarly be applied to the Designated Business Trust/Designated Trust.

Question 5: MICA invites views and comments on the proposal to incorporate new concepts such as "voting shares", "voting power", "associates", business trust and trust, and the strengthened penalty framework in Part VA of the TA.

Consequential Amendments to the Telecom Competition Code

25 The proposed Part VA of the TA sets out the general obligations to be observed by Designated Licensees, Designated Business Trusts and Designated Trusts for ownership changes. Once the amendments have been incorporated into the TA, consequential amendments will be made to section 10 of the TCC, which specifies the procedural requirements to be followed by affected licensees. IDA will separately seek comments from the public on the proposed amendments to section 10 of the TCC when ready.

PART VI: POWERS TO ENSURE CONTINUITY OF TELECOMMUNICATION NETWORKS AND SERVICES AND TO ENABLE OPERATIONAL/STRUCTURAL SEPARATION

26 Under the TA, the Minister for Information, Communications and the Arts ("Minister") has certain powers to ensure the proper functioning of the telecoms sector for the public and national interests. These include the powers under section 58 of the TA for the Minister to issue directions to any telecom licensee where deemed appropriate by the Minister in the public interest or in the interests of public security, and under section 69B of the TA to order remedial actions to be taken where a person acquires the assets, business or shares of a telecom licensee if the Minister has

concerns as to whether that person is a fit or proper person, or has national interest concerns.

27 Our telecom networks are a key infrastructure today and a source of Singapore's competitive advantage. Since the liberalisation of the telecoms market in 2000, IDA has put in place various policy and regulatory frameworks to remove barriers to entry and facilitate access to bottleneck infrastructure. However, despite these efforts over the past decade, there have been little investments by new entrants towards building an alternative nationwide wireline network. With increasing convergence of IT, telecoms and broadcast, it is possible that communication services of the future (such as telephony, broadband and television) will be carried over one or a very small number of wireline telecom networks, controlled by one or a few operators. This increases the economic and social importance of such networks, and thus it is critical that the TA continues to provide either the Minister or IDA with the powers to promote and preserve effective competition in the provision of telecom services, and safeguard national and public interests with respect to the continuity of key telecom networks and services. To this end, MICA is proposing to amend the TA to strengthen the Minister's powers in two key areas.

Inclusion of Special Administration Order

28 A Special Administration Order ("SAO") is an order of the Minister directing the takeover of control of a licensee's affairs, business and property by another person, to ensure that a key telecom network or service continues to be functional. In general, the SAO provisions enable the Minister to manage licensees and their property in specific situations where public interests are put at risk, but in a manner where the interests of shareholders and creditors of the licensee are protected.

29 Today, there are limitations to the Minister's powers under the TA to ensure the reliability of a telecom network and continued provision of telecom service in cases of insolvency of and abandonment of the network by a licensee. However, there are some situations where the continued running of a network, or provision of certain telecom services, is essential in the public interest, even if a licensee is no longer commercially able to operate the network or provide the services. This could arise for instance where the network is relied upon for the provision of important telecom services and where there are no reasonable substitutes to the network, or in the case of an extensive network serving a large subscriber base whereby the cessation of service would cause major disturbance and inconvenience to the public and the economy.

30 To safeguard the public interest in the event of a liquidation or cessation of service of a telecom licensee, MICA proposes to include an SAO provision in the TA. The SAO provision will enable the Minister to direct the takeover of the telecom network and business to achieve specific policy objectives, such as ensuring the security and reliability of the supply of telecom services and the carrying out of functions which have been vested in the licensee pending the transfer of ownership.

31 MICA proposes that the SAO provision be applied only to Public Telecommunication Licensees ("PTLs"), operators who control Critical Support Infrastructure ("CSI"), and other licensees which may be designated by the Minister in the public interest. PTLs control nationwide networks that many subscribers and other telecom licensees are dependent on, whereas CSI operators control essential infrastructure which are depended upon by other operators and cannot be replicated. Hence, it is in the public interest to ensure reliability of network and continued provision of service by these operators.

32 MICA is cognisant that the SAO provision needs to be exercised with great care to provide investment certainty and protect the interests of shareholders and creditors of the abovementioned operators. Hence, the proposed provision explicitly limits the circumstances under which the Minister may exercise a SAO, to cases where:

a. The telecom licensee is unable to continue to hold its licence;

b. The telecom licensee is or is likely to be unable to pay its debts;

c. The Minister considers it in the interest of the security and reliability of supply of telecom services in Singapore; or

d. The Minister considers it in the public interest.

33 Nonetheless, in circumstances where the telecom licensee is insolvent or facing insolvency (i.e., where it is unlikely to be able to pay its debts), MICA recognises that there are existing regimes under the Companies Act (Cap. 50) which can be leveraged upon to rehabilitate the licensee. Such regimes, specified in section 210 and Part VIIIA of the Companies Act, allow opportunities for private sector resolution to save the failing telecom licensee. Hence, where feasible, the Minister will refrain from intervention and allow the market to rely on existing regimes to ensure the continued business operations and provisioning of services by telecom licensees. The proposed SAO provision therefore allows for applications to the Court to place the telecom licensee under the regimes specified in section 210 and Part VIIIA of the Companies Act, subject to the applicant giving 14 days' prior notice to IDA. During the 14 days' notice period, if it is assessed, *inter alia*, that there are no, or unlikely to be any, disruptions to the continuity and reliability of the telecom licensee's networks or services, the Minister may decide not to exercise the SAO. However, MICA acknowledges that there could be exceptional circumstances where, for example, the telecom licensee's networks or services start to lapse during the proceedings under section 210 or Part VIIIA of the Companies Act. In the event that such circumstances cause, or are likely to cause, disruptions to the continuity, reliability or security of the key telecom networks or services, the Minister may decide to issue the SAO at that juncture to ensure the reliability of the networks and continued provision of the services for consumers and businesses.

34 In addition, the proposed SAO provision provides for Minister to determine the compensation payable to the telecom licensee where its property, rights or liabilities have been transferred under a SAO.

Question 6: MICA invites views and comments on the proposal to provide the Minister with the power to make Special Administration Orders under the newly introduced Part VB in the TA.

Powers for the Minister to direct separation of a telecom licensee

35 One of the key enablers for vibrant competition in the provision of telecom services to consumers, particularly in areas where choice of alternative telecom systems or wholesale services is lacking, is the ability of multiple telecom service providers to access the telecom network systems, wholesale services and other upstream inputs at reasonable and non-discriminatory prices, terms and conditions. However, the provision of such upstream services may not be in line with the commercial incentives of a vertically integrated operator that controls the network and participates in both the wholesale and retail services markets. This operator is likely to have the incentive to discriminate against its competitors when providing them with wholesale products, in order to gain an advantage for itself or its downstream affiliates that are in the same business as its competitors. Such ability and incentive to discriminate in the provisioning of services in or to markets that have yet become fully competitive, especially in non-price aspects of service provisioning, have been cause for concern among many regulators.

36 Regulators have traditionally taken the approach of regulating the behaviour of vertically integrated operators with significant market power to prevent discrimination and provide a level playing field. Such regulations include price control, network unbundling, mandated wholesale and accounting separation to ensure non-discriminatory access to wholesale products by competing operators. However, behavioural regulation is recognised to have its limitations in effectively monitoring and preventing price and non-price discrimination. As such, structural remedies such as structural or operational separation have been suggested as alternate approaches to effectively remove incentives for wholesale operators to discriminate against their competitors and ensure effective open access to their network systems and wholesale services. Operational (or functional) separation typically requires a vertically-integrated operator to establish a separate business entity, along with operational rules, to establish arms-length, stand-alone treatment between this new business entity and the operator's other operations. Structural (or ownership) separation, a stronger form of separation, further removes any incentive to discriminate by requiring the vertically-integrated operator to divest that particular business.

37 The use of separation has been adopted in a few jurisdictions. For instance, the Office of Communications' ("Ofcom") investigations into British Telecom ("BT") and their alleged discriminatory practices eventually led to the voluntary undertaking by BT to operationally separate its access and backhaul networks to a separate unit known as

Openreach in 2006. Similarly in New Zealand, the incumbent operator, Telecom New Zealand, was required under law to operationally separate its wholesale and retail businesses to facilitate non-discrimination and equality of access to wholesale telecom products. It did so in 2008 by separating itself into three divisions that respectively operated the network infrastructure, wholesale and retail businesses. In November 2009, the European Commission also highlighted the need for national regulators to be equipped with the power to introduce functional separation (or operational separation) when necessary, in order to ensure that competing operators have access to infrastructure without discrimination. Structural separation has been proposed in Australia's Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, which sought to allow Telstra to voluntarily submit an enforceable undertaking to structurally separate or face the imposition of a stronger functional separation framework by the Government.

38 In Singapore, the Government has ensured effective open access to the Next Gen NBN by requiring separation of both the passive network operator, NetCo, and the wholesale service provider, OpCo, from each other, and from the retail players, the RSPs, in the telecoms market[1]. Such separation is intended to remove or dilute the commercial incentives and ability of the NetCo or OpCo to discriminate in favour of its downstream arms. This is particularly important because the Next Gen NBN is envisaged to be the communications highway for Singapore in the future. As a ubiquitous, high-speed nationwide network, it will be heavily relied upon for the delivery of next generation communication services in the long-term. The Next Gen NBN is also unlikely to be replicated to the same extent and scale, because of the high costs associated with such a deployment. Therefore, effective open access to the Next Gen NBN was deemed necessary to ensure vibrant downstream competition.

39 Outside of the Next Gen NBN project, the Government has also considered whether legislative powers to impose structural and/or operational separation of vertically integrated operators controlling essential upstream inputs or wholesale products should be included in the regulatory toolkit. This issue was considered in a consultation paper on "Industry Structure for Next Generation Access Networks", issued by IDA on 17 April 2008.

40 The responses to the consultation were varied. The industry on the whole was divided on whether separation should be used as a regulatory tool. Out of the seven respondents, four of them supported the inclusion of separation powers in the regulatory toolkit. One respondent opined that it was not necessary to prescribe the powers in advance but to consider the comparative benefits of different forms of separation if and when it arises. Another respondent strongly objected to the suggestion, on the grounds that there was already a high level of network-based competition in Singapore and that separation of existing networks would be disproportionate as a regulatory measure. Most of the respondents pointed out the need for detailed analysis of the market before

[1] Currently, structural separation is imposed on the NetCo, OpenNet, while operational separation is imposed on the OpCo, Nucleus Connect.

implementation of any separation, and that the decision should be made on a case-by-case basis with a proper review of the appropriate costs versus benefits of such a move.

41 MICA and IDA have jointly reviewed the responses to the consultation. The assessment is that while it is unlikely that separation would be required for existing legacy networks if there is a successful Next Gen NBN providing effective open access to multiple RSPs, the possibility of new economic bottlenecks forming in other parts of the telecom service value chain cannot be discounted. The common theme throughout most of the responses is that structural or operational separation is one of the solutions to address such bottlenecks in the market, especially when they are effectively controlled by a vertically integrated operator which would have the incentive to discriminate against other operators seeking access to these bottlenecks. Empowering the Minister with powers to enable structural or operation separation would allow for necessary intervention to ensure effective open access by multiple RSPs to these economic bottlenecks, facilitate competition and in turn contribute to the long-term benefits of our economy and end-users.

42 MICA therefore proposes that the Minister be given powers to impose structural or operational separation on a vertically-integrated operator controlling networks or wholesale services that are important or necessary for the effective functioning of a competitive market. However, MICA recognises that separation of an operator imposes significant cost and may introduce inefficiency to the operator, and thus this should be exercised only in very limited circumstances, and to a very limited group of operators. MICA therefore proposes that separation of an operator should be subject to two sets of conditions being met, setting out (i) the criteria on <u>who</u> may be identified for separation, and (ii) <u>when</u> the Minister considers it necessary to direct separation of the identified operator.

43 **Who may be subject to separation**. MICA recognises that it is not reasonable or beneficial to require separation in all circumstances, and on all operators. Specifically, separation should only be considered where the ability of a licensee to leverage its position (in terms of control of facilities or market power) in an upstream market is significant enough to negatively influence competition in downstream markets. If a licensee does not possess such control of upstream facilities or market power in the upstream markets, it would be subject to competitive constraints in the market, and would be unlikely to be in a position to significantly harm competition in the downstream markets. It is proposed therefore that an operator ("Relevant Licensee") must meet the following criteria before it can be subject to separation:

(a) The Relevant Licensee operates a telecom system that is required by other telecom licensees for the provision of telecom services and such a telecom system is so costly or difficult to replicate by an efficient competitor such that requiring the competitor to do so would create a significant barrier to market entry;

OR

(b) The Relevant Licensee has the ability to exercise Significant Market Power ("SMP") in a market for telecom service ("Relevant Service") where the Relevant Service is required by other telecom licensees for the provision of telecom services, AND it is so costly or difficult to provide the Relevant Service such that requiring an efficient competitor to do so would create a significant barrier to the provision of competitive telecom services by the competitor.

44 **When to direct separation**. Upon satisfying the above criteria, it is proposed that the Minister imposes separation on the Relevant Licensee only if he considers it necessary in the public interest, having regard to any one or more of the following:

(a) To promote and maintain fair and efficient market conduct and effective competition between persons engaged in commercial activities connected with telecom technology in Singapore;
(b) To promote the efficiency and international competitiveness of the telecom industry in Singapore;
(c) To eliminate or reduce barriers to competition arising from the control of any telecom system, or the possession of significant market power, by the Relevant Licensee; and
(d) To promote transparency, non-discrimination, and equivalence of supply in relation to the provision of telecom services in Singapore.

45 The objectives of imposing separation on vertically-integrated operators to achieve non-discriminatory supply and promote competition have international precedence. The effect of separation on competition in the market is also internationally recognised to be a key factor in determining whether to impose separation in the first place.

46 **Scope of Separation Powers**. It is proposed that the Minister may impose structural or operational separation on a vertically-integrated operator if the above criteria are met. MICA notes that there may be differences in severity and impact between structural separation which is likely to entail some form of ownership separation, and operational separation which allows the operator to retain ownership of the business to be separated but implement operational rules and safeguards (to ensure that the ability and incentive for the operator to discriminate against its competitors is reduced). These differences will vary on a case-by-case basis, depending on the network or business to be separated.

47 That being the case, MICA is of the view that Minister should take into consideration the following in determining the type of separation to be imposed:

(a) The contestability of the relevant market for telecom services; and
(b) The effectiveness of the separation and operational rules and safeguards in minimising incentives and opportunities for the Relevant Licensee to act in a discriminatory manner in the future.

48 The Minister may also determine the points of separation, including any portions of the Relevant Licensee's network or business to be separated, based on different separation models in consideration of the network technology and architecture, the technical feasibility and the economic sustainability of the separated entity.

49 Compensation may be granted to the Relevant Licensee depending on the reason for which the separation was imposed. Specifically, if the separation was imposed as a form of remedy for proven anti-competitive conduct, no compensation would be payable, which is in line with competition and anti-trust regimes internationally. However, when separation is imposed by the Minister in the public interest where the abovementioned conditions are satisfied, the Minister may consider making a grant to offset damages caused by such separation.

Question 7: MICA invites views and comments on the proposal to provide the Minister with power to require structural or operational separation under the newly introduced section 69C in the TA.

PART VII: OTHER ISSUES

Numbering Resources

50 Today, IDA manages the National Numbering Plan, and controls and regulates the allocation and use of telephone numbers. For greater clarity, MICA intends to issue Regulations to govern the number allocation framework under the revised section 74 of the TA.

Licensing of Satellite Orbital Slots

51 IDA has a duty under the IDA Act to exercise licensing and regulatory functions with regard to satellite orbital slots. IDA is also the national administration overseeing the coordination of satellite orbital slots under the International Telecommunication Union ("ITU") framework for the global coordination of frequencies and use of satellite orbits. To ensure that IDA is fully empowered to carry out its functions under the IDA Act and to meet Singapore's international obligations with regard to satellite orbits and coordination with the international community, MICA intends to clarify IDA's powers with regard to the licensing of satellite orbital slots under the newly introduced section 5B.

52 Other miscellaneous and consequential amendments are also proposed in the TA for housekeeping issues and to ensure consistency in legislative language. These include amendments in sections 2, 7, 21, 26, 27 and 69.

PART VIII: PROCEDURES AND TIMEFRAME FOR SUBMITTING COMMENTS

53 MICA would like to seek the views and comments from the industry and members of the public on the above issues.

54 Parties that submit comments on this Consultation Document should organise their submissions as follows: (a) cover page (including their personal/company particulars and contact information); (b) table of contents; (c) summary of major points; (d) statement of interest; (e) comments; and (f) conclusion. Supporting material may be placed in an annex.

55 All submissions should be clearly and concisely written, and should provide a reasoned explanation for any proposed revisions. Where feasible, parties should identify the specific provision of the TA on which they are commenting and explain the basis for their proposals.

56 All submissions should reach MICA **before 24 September 2010, 5pm**. Comments must be submitted in both hard and soft copy (in Microsoft Word format). All comments should be addressed to:

Mr Muhd Hanafiah
Director (Industry Division)
Ministry of Information, Communications and the Arts
140 Hill Street #02-02
MICA Building
Singapore 179369
Fax: 6837 9444

AND

Please submit your soft copies, with the email header "Consultation of the Telecommunications Act", to this e-mail: mica_ta_public_consultation@mica.gov.sg

57 MICA reserves the right to make public all or parts of any written submission and to disclose the identity of the source. Commenting parties may request confidential treatment for any part of the submission that the commenting party believes to be proprietary, confidential or commercially sensitive. Any such information should be clearly marked and placed in a separate annex. If MICA grants confidential treatment it will consider, but will not publicly disclose, the information. If MICA rejects the request for confidential treatment, it will return the information to the party that submitted it and will not consider this information as part of its review. As far as possible, parties should limit any request for confidential treatment of information submitted. MICA will not accept any submission that requests confidential treatment of all, or a substantial part, of the submission.