M1'S RESPONSE TO MICA'S CONSULTATION PAPER ON REVIEW OF THE TELECOMMUNICATIONS ACT (CAP. 323)

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1. M1 is a leading integrated communications service provider in Singapore, providing a full range of voice and data communications services over its network. Since 1 Apr 1997, M1 has made significant inroads into the local mobile communications market, gaining considerable brand presence and market share. In 2000, we launched our international telephone services and in February 2005, M1 took the lead in launching 3G services in Singapore. M1 was also the first to launch Singapore's first true island-wide wireless broadband service, M1 Broadband Service, in 2006. We became a full-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. On 1 Sep 2010, M1 launched its high-speed fibre broadband service of up to 1 Gbps on the new national fibre network and fixed voice service.

2. M1 welcomes the opportunity to provide our comments on MICA's proposed amendments to the Act ("Amendments"). We support the Government's on-going, proactive review of regulations to keep pace with the changes and realities of the marketplace in the rapidly evolving info-communications industry. The challenge is to achieve a balanced approach between protection of consumer interests and the need to maintain flexibility and competitiveness of the industry. Thus, we urge the Government to proceed in a way that provides guidance to the market without hindering commercial incentives for investments and innovation, and in turn inhibit the telecom sector development as a whole.

3. M1's comments on the Amendments are set out below.

(I) Revision to the financial penalty framework

4. The proposed increase in the amount of financial penalty from a maximum of $1 million to up to 10% of the annual turnover is a substantial increase. The actual imposition of a penalty based on annual turnover will have significant effect on the operator financially and can cause market disruption, especially for listed entities.

5. Firstly, M1 is of the view that the current ceiling of $1 million is a sufficient deterrent to non-compliance with regulatory conditions. To our best knowledge, there has not been an instance where the maximum penalty was imposed for any non-compliance in Singapore's telecom sector. Hence, there is really no compelling reason to raise the current financial penalty cap. Moreover, a stiffer fine only serves to transfer investible resources to the government and in turn, slow down technology/infrastructure deployment by the operator to rectify its non-compliance, particularly in respect of meeting Quality of Service Standards (QoS) or ensuring availability of network services. With such delay, end users will further suffer.

6. Secondly, instead of emphasizing the punitive approach through stiffer penalties, M1 suggests an alternative sanction which allows the regulator to direct the non-compliant operator to invest up to 10% of its annual business turnover for the telecommunication service that does not meet the QoS. Such an alternative approach may better deal with the particular circumstances, by removing the regulatory censure whilst allowing for more effective rectification of the non-compliance. A financial penalty should be imposed only for instances of intentional non-compliance.

7. Thirdly, M1 is of the view that it would be harsh to apply the enhanced financial penalties in the case of first time contraventions. We note that the contraventions are in respect of a breach of any of the conditions of the license or any provision of any code of practice, with no thresholds of materiality. If enhanced penalties are to be adopted, it will be fairer to apply the enhanced penalties only for recurrent contraventions. This principle is consistent with MICA's own intent of imposing 'additional recurrent' fines (for continuing contraventions of COPIF), as stipulated in Paragraph 14 of the paper.

8. The Amendments also seek to introduce a new Section 8(6) (A) to include the right of the IDA to terminate the license if an operator does not pay the enhanced financial penalty within the specified period. Section 8(2) (a) of the current Act already prescribes the termination of the license in the event of a likelihood of a repeat contravention of the license. This Section has not been deleted under the Amendments, and accordingly the new amended Section 8(6) (A) needs not apply.

9. In the light of the above, we propose that Section 8(1) (ii) be amended to refer to two scenarios: (i) for first time intentional or negligent contraventions, the maximum fine of $1 million to be retained, and (ii) for repeat intentional or negligent contraventions, an enhanced limit to apply, with Section 8(2) (a) continuing to apply to allow the IDA to terminate the license in such case.

10. If the enhanced penalties are to be adopted, then the appeal provisions under the Act should also be amended. Currently, although there is an appeal process in the Act (should the licensee be aggrieved by the IDA's decision to impose a financial penalty), there is generally no right to a stay of execution of the imposition of the financial penalty in light of Section 69(15) of the Act. Accordingly, any termination of the license for failure to pay a financial penalty, pending appeal, may render the effect of a successful appeal nugatory.

11. Taking guidance from the Competition Act, the following options may also be considered if the enhanced penalties are to be adopted:

a. Under Section 69(3) of the Competition Act, the Competition Commission may only impose a financial penalty if it is satisfied that the contravention has been committed intentionally or negligently. This appears not to be the case under our

current Act or the Amendments. The submission is that the enhanced penalties under the Amendments should only apply to a culpable contravention of the Act.

b. Under Section 69(5) of the Competition Act, the Commission is required, in any direction requiring the payment of a financial penalty, to specify the date of payment of the penalty, which date cannot be earlier than the end of the period of time to file an appeal. Under Section 71(2) of the Competition Act, an appeal against the imposition of a financial penalty can suspend the payment of the penalty, pending appeal. This appears not to be the case under our current Act or the Amendments.

(II) Clarifications of the privileges of a public telecommunication licensee ("PTL")

12. We support the proposal that the PTL privileges under the Act shall only apply if they are used to fulfil, or to assist a PTL to fulfil, its unique basic PTL obligations, so as not to provide any undue advantage to the PTL or opportunity to misuse such privileges to benefit its business operations at the expense of other service providers and stifle competition in the market.

(III) Building owners' and developers' compliance with COPIF

13. Under Section 19 of the Act, any developer or owner of a building who requires any telecommunication service of a telecommunication licensee shall provide at his expense, and in accordance with such specifications as the IDA may publish, such space and facilities within or on the building and access thereto, as may be necessary for the operation of any installation or plant to be used in providing the telecommunication service.

14. M1 supports the Amendments to give more teeth to COPIF by imposing criminal penalties on third party owners or developers who do not comply with the provisions. A more critical and pressing need, however, is to empower IDA to require building owners and developers / MRT and road tunnel owners to provide space at no cost to facilitate rollout of equipment for Mobile Telecom Services in such buildings/tunnels. Accordingly, mobile operators should be able to use MDF Rooms in buildings/MRT and road tunnels to house their mobile equipment for the provision of mobile telecommunication services.

(IV) Powers to ensure continuity in provision of telecommunication services (Special Administration Order or "SAO"); and power to prescribe structural and/or operational separation on licensees

15. Under Section 32I of the Amendments, one of the effects of the SAO is to transfer the specified telecommunication licensee's ("SL") business or undertaking to other persons to enable the continued provision of telecommunication services. Under Section 32K of the Amendments, this appears to involve a transfer of 'title' of the property, rights and liabilities of the SL to the third party. It is not entirely clear as to how the interests of shareholders and creditors will be protected in such case, though compensation may be payable to the SL.

16. Although it appears that the SAO provision can only be used sparingly, its effect will be to protect the SL to ensure continuity of operations, though it may significantly curtail the rights of shareholders and creditors. Accordingly, the SAO provisions may have an impact on the industry in a broader sense, i.e. an increase in finance costs to the licensee, and an impact to market prices.

17. Besides setting out the circumstances under which the Minister may exercise that power, there needs to be a due process to ensure that the interests of the SL and its various stakeholders have been consulted and considered, prior to the SAO. This process may be stipulated in subsidiary legislation promulgated under the provisions of the Act. The consultation should begin with senior management of the SL and its auditors to review whether the grounds for an SAO have been met prima facie. Thereafter, the other stakeholders, such as shareholders and financiers, should be consulted and their views considered, in arriving at the optimal way to achieve the intents of an SAO with mitigated impact to such stakeholders' interests. For example, transfer of the property of the SL, if any, can be made to the third party acting as a trustee, with the stakeholders remaining as principal beneficiaries. As there may be aggrieved stakeholders nonetheless, they ought to be allowed the benefit of an application to the courts, within specified timelines, with a view to protecting their interests. The process for making such commercially sensitive decisions needs to allow adequate time for due process. The decision making process should also be documented. The due process may be applied not only in the case of an SAO, but also prior to the imposition of structural or operational separation, particularly where the property of the SL needs to be 'hived off' to achieve such separation.

18. The Amendments also seek to introduce a new Section 69(C) empowering the Minister, in limited circumstances, to impose an order for structural or operational separation of a relevant licensee ("Separation Order") who is vertically integrated and who controls networks or wholesale services.

19. M1's view is that government moves (such as unbundling requirement and accounting separation) may not always be effective and regulatory surveillance is difficult. Dominant incumbents are still generally able to leverage tighter coupling of business assets (vertical integration) to compete more effectively against new market entrants even in a transparent disbursement mechanism. We see structural separation as a policy tool that may gain increasing relevance in the future, although we acknowledge that its adoption will have a wide effect across the industry.

20. Hence, M1 recommends that structural separation be used only when other regulatory options have first proved inadequate, and after the due process of public consultation and conduct of a comprehensive cost-benefit analysis covering the effects on investments, the transition costs of structural modifications and the economic and public benefits. Careful consideration of the implications is critical as once decided, it would be an extremely difficult policy to reverse.

Conclusion

21. Effective regulatory management should be premised on efficiency, transparency and accountability. M1's comments on the proposed amendments to the Telecommunications Act are summarised as follows:-

a. There is no necessity to increase the maximum financial penalty cap and alternative method of sanction should be explored;

b. If enhanced penalties are to be adopted, it will be fairer to apply the enhanced penalties only for recurrent contraventions and only if they have been committed intentionally or negligently. Suspension of payment of the penalty should be allowed pending an appeal against the enforcement;

c. IDA should be empowered to require building owners and developers / MRT and road tunnel owners to provide space at no cost to facilitate rollout of equipment for Mobile Telecom Services in such buildings/tunnels; and

d. There needs to be greater clarity on how the SAO provision will be applied and the prescription of a due process to ensure that the interests of the SL and its various stakeholders have been consulted and considered, prior to the SAO. Such due process should also be applied prior to the imposition of structural or operational separation.