EXPLANATORY MEMORANDUM ISSUED BY
THE INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY OF SINGAPORE

ISSUANCE OF ADVISORY GUIDELINES GOVERNING

(I) PETITIONS FOR RECLASSIFICATION AND REQUESTS FOR EXEMPTION; AND (II) ABUSE OF DOMINANT POSITION, UNFAIR METHODS OF COMPETITION AND AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION

UNDER THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES 2012

11 APRIL 2014

ISSUANCE OF ADVISORY GUIDELINES GOVERNING (I) PETITIONS FOR RECLASSIFICATION AND REQUESTS FOR EXEMPTION; AND (II) ABUSE OF DOMINANT POSITION, UNFAIR METHODS OF COMPETITION AND AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION

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PART I: INTRODUCTION

1. On 9 April 2012, IDA issued the Code of Practice for Competition in the Provision of Telecommunication Services 2012 ("**Code**").

2. In connection with the revisions to the Code, IDA has reviewed all the advisory guidelines under the Code. The revised Advisory Guidelines Governing Consolidation Review and Tender Offer Process under Section 10 of the Code were issued on 9 April 2012. IDA has since reviewed the other two advisory guidelines under the Code:

   (i) the Advisory Guidelines Governing Petitions for Reclassification and Requests for Exemption under Sub-sections 2.3 and 2.5 of the Code ("**Reclassification and Exemption Guidelines**"); and

   (ii) the Advisory Guidelines Governing Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition under Sections 8 and 9 of the Code ("**Telecom Competition Guidelines**").

3. On 25 March 2013, IDA released a public consultation paper on the proposed amendments to the Reclassification and Exemption Guidelines and the Telecom Competition Guidelines (collectively referred to herein as "**Guidelines**") to seek the public's comments on the proposed amendments ("**Public Consultation**").

4. Upon closure of the Public Consultation on 24 April 2013, IDA received comments and feedback from Singapore Telecommunications Limited and StarHub Limited. IDA thanks the two respondents for their comments.

5. IDA has given careful consideration to the views received. The next section discusses the key issues raised and sets out IDA's responses and decision on these issues.

PART II: SUMMARY OF RESPONSES AND IDA'S DECISION

A. RECLASSIFICATION AND EXEMPTION GUIDELINES

The "SSNIP" Test

6. Paragraph 2.4.1 of the Reclassification and Exemption Guidelines sets out the general principles that IDA will use in defining a relevant market for a service in order to determine if a Licensee has Significant Market Power ("**SMP**") in that market. The Reclassification and Exemption Guidelines provide, at paragraph 2.4.1(a)(i) that to define the relevant market(s), IDA may apply the small but significant, non-transitory increase in price ("**SSNIP**") test.

7. A respondent proposed that IDA should specifically identify in its Reclassification and Exemption Guidelines what methods it intends to use in the event that it considers that the "SSNIP test" may not yield an accurate market definition, for instance, in cases where the current prices of the relevant service are above competitive levels.

8. IDA notes that notwithstanding the limitation of the SSNIP test in certain cases (as IDA has acknowledged in paragraph 2.4.1(a)(i) of the revised Reclassification and Exemption Guidelines), the SSNIP test continues to provide useful principles to guide IDA's approach towards assessing substitution effects in the market. For example, services that can be excluded in the market definition at the prevailing prices would very likely be excluded at a lower competitive price.

9. In any case, IDA would like to assure the respondent that, as stated in the Reclassification and Exemption Guidelines, the SSNIP test is just one of the possible tests that IDA may use in defining the market. If IDA considers that the SSNIP Test may not yield an accurate market definition under the circumstances, IDA may rely on other methods for market definition, such as considering whether other product offerings can be considered a reasonable substitute for the service in question because they have a similar function, characteristic or customer base (please refer to paragraph 2.4.1(a)(ii) of the Reclassification and Exemption Guidelines).

Bundled Products/Services

10. In its Public Consultation, IDA had proposed to revise the Reclassification and Exemption Guidelines to clarify that it will consider the concepts of bundles, chain substitutes and complements, where appropriate, in defining the relevant market.

11. A respondent urged IDA to further clarify that, while considering bundles as part of its market definition exercise, it will also conduct the necessary analysis of the bundles and the individual components, to accurately define the relevant product markets.

12. IDA agrees that it is possible that there is a relevant market for the supply of a bundle of products/services and separate relevant markets for the supply of

the individual components of the bundle. However, IDA is of the view that bundling does not change the guiding principles underlying market definition although it increases the number of products/services that need to be considered as potential competitive constraints on each other.

13. In conducting an analysis of the relevant market(s), IDA will assess the potential substitutes for the focal product, be it the individual components separately and/or alternative bundles of products/services available.

Two-Sided Markets

14. In its Public Consultation, IDA had proposed to revise the Reclassification and Exemption Guidelines to clarify that it will consider whether the relevant market is a one-sided or a two-sided market to properly assess any competition issues. Two-sided markets are markets in which a Licensee provides a platform that enables two distinct but related groups of Customers to obtain products or services. The two sides of the platform are linked, with interdependent prices and output and intertwined strategies.

15. While welcoming IDA's decision to consider the complexity and dynamics of modern telecommunication markets in its competition assessment, a respondent requested for further clarity and "granularity" on how IDA will undertake an analysis of such market, particularly in the case of fast moving two-sided markets.

16. The general approach that IDA will take towards assessing market power in a two-sided market is set out in paragraph 2.4.2(a)(vi) of the revised Reclassification and Exemption Guidelines. In addition to price level, IDA may take into consideration the relative price levels on the two sides of the market and the profit maximising strategy of the Licensee, and the relative demands and costs of the two sides of the market.

17. As the analysis of a two-sided market very much depends on the specific facts and circumstances of each case, it is not feasible for IDA to provide further and more specific details on its approach beyond the general approach set out in paragraph 2.4.2(a)(vi) of the revised Reclassification and Exemption Guidelines. When making submissions involving two-sided markets, parties are encouraged to make representations on how the nature of the market would constrain the exercise of significant market power by a Licensee.

Market Share Assessment

18. A respondent submitted that IDA should remove the presumption contained in paragraph 2.4.2(a)(iv) of the Reclassification and Exemption Guidelines, i.e., that a Dominant Licensee is presumed to have SMP if it has a market share of more than 40%, "*so that all factors relevant to the assessment of SMP, such as price competition, will, at all times, be given appropriate weight in the IDA's assessment processes*". The respondent raised concerns that the weight of IDA's decision-making in respect of determining whether a Licensee has SMP falls heavily in favour of an assessment of market shares and that IDA does

not take sufficient and appropriate account of other factors once it has established that the presumptive market share threshold for dominance has been met. The respondent urged IDA to ensure that price competition (rather than market share) is given primary consideration in determining whether a Dominant Licensee has SMP in a market.

19. IDA would like to clarify that the Reclassification and Exemption Guidelines already provides that the 40 per cent market share threshold is only an initial presumption of SMP and that it may be rebutted by evidence that the Licensee is, in fact, subject to effective competition (e.g., there are low barriers to entry and strong countervailing buyer power). IDA reiterates that its assessment of the competitiveness of the market is guided by many factors and price competition is one of the factors considered, along with market share.

20. The respondent also urged IDA not to ignore market share indicia based on revenue or subscriber numbers in favour of market shares based on capacity. The respondent highlighted certain limitations with the use of capacity as a measure of market share. According to the respondent, market share based on capacity should be treated comparably with other measures, such as market share based on revenue and subscriber numbers.

21. IDA would like to clarify that it is not the intention of IDA to rely solely on capacity as a measure of market share. As paragraph 2.4.2(a)(i) of the Reclassification and Exemption Guidelines clearly states, IDA will use the unit of measurement (e.g., revenues, unit sales or capacity) that best reflects the characteristics of the market. Paragraph 2.4.2(a)(ii) of the Reclassification and Exemption Guidelines merely elaborates that capacity may be a more reliable measure in certain markets (e.g., upstream markets) where self-supply accounts for a significant portion of the market.

Barriers to Entry

22. The respondent further requested that IDA amends paragraph 2.4.2(b)(i)(2) of the Reclassification and Exemption Guidelines to make it clear that:

    (a) a Dominant Licensee's control of a wholesale "input" should not, in itself, be considered to an "access barrier" to entry, particularly where that input is subject to regulation in respect of access to that wholesale input;

    (b) the requirement for the Dominant Licensee to provide Interconnection Related Services ("**IRS**") and Mandatory Wholesale Services ("**MWS**") under a Reference Interconnection Offer ("**RIO**") is sufficient to negate any "access barrier" to entry that may exist or SMP that a Dominant Licensee may have in the relevant wholesale market; and

    (c) IDA will take account of the regulation of IRS and MWS in its decision-making in respect of exemption requests and the positive impact such

regulation will have on the state of competition in the relevant market over the foreseeable future.

23. IDA would like to highlight that paragraph 2.4.2(b)(i)(2) of the Reclassification and Exemption Guidelines is intended to identify the five broad (but non-exclusive) categories of barriers to entry. The points raised by the respondent are already addressed in Appendix 1 which provides that in assessing the existence of access barriers, IDA will consider the extent to which existing regulation ensures that new entrants have access to infrastructure that is required to provide a competitive telecommunication service on just, reasonable and non-discriminatory prices, terms and conditions. IDA is therefore of the view that there is no further need to amend paragraph 2.4.2(b)(i)(2) of the Reclassification and Exemption Guidelines.

Pro-competitive Benefits

24. A respondent urged IDA to "add balance" to its consideration of whether granting an exemption will have any pro-competitive benefits by including, in paragraph 2.5 of the Reclassification and Exemption Guidelines, whether such benefits could outweigh any potential anti-competitive effects or harm that would arise from the grant of an exemption request.

25. IDA would like to clarify that any "balancing" in its assessment of an exemption request would have been carried out in its analysis under paragraph 2.4.2 of the Reclassification and Exemption Guidelines. In this regard, paragraph 2.5 provides for IDA to consider any other factors that will bring along pro-competitive benefits beyond those considerations in paragraph 2.4.2. As such, IDA is of the view that a "balancing test" is not applicable to the assessment in paragraph 2.5.

Application of Exemption to New Services

26. A respondent submitted that IDA should grant exemptions in general terms (rather than in relation to specific types of products or services) so that all future products or services that are offered by the Dominant Licensee in the "exempted market" are automatically exempt from the obligations imposed on Dominant Licensees without the need for notification to and approval by IDA.

27. Under the current framework, for new services that a Dominant Licensee introduces in the market for which IDA has granted an exemption, the Dominant Licensee is required to provide a written notification describing the basis on which it contends that the new service falls within the exempted market and obtain IDA's prior written confirmation. IDA is of the view that this is not unreasonably burdensome and is necessary to ensure that a Dominant Licensee does not intentionally or mistakenly classify new services under the exempted markets.

IDA's Procedures for Review of Requests for Exemption and Petitions for Reclassification

28. **Preliminary Review**. A respondent requested IDA's clarification on circumstances under which IDA would deem a request or petition as plainly lacking merit under paragraph 4.1(a)(ii) of the Reclassification and Exemption Guidelines.

29. Whether a request or petition "plainly lacks merit" depends on the facts and circumstances of each case. The respondent had provided an example in which a Licensee has already submitted a prior exemption request, which had been rejected, and fails to prove that any relevant changes to market conditions have taken place since its previous request. IDA is likely to consider such a request or petition to be plainly lacking merit. A further example may be where supporting information provided by the requestor or petitioner to IDA is clearly misleading or inaccurate such that the request or petition is unsubstantiated. However, it would not be practicable for IDA to exhaustively list out all circumstances under which it would consider a request to be without merit.

30. **Procedures to Obtain Additional Information**. A respondent submitted that IDA should amend the Reclassification and Exemption Guidelines to set out IDA's expectations of the type of responses it expects from industry participants during the consultation process, including IDA's requirements in relation to verifiable data. The respondent submitted that to the extent that an industry participant does not meet the basic requirements for "verifiable data", IDA should not attribute weight or significance to any such submission.

31. As a general approach towards all reviews that it undertakes, IDA will evaluate the comments received from a public consultation, and will only consider those comments that are valid and well-substantiated. Where there are any specific requirements as to the type of responses sought, IDA will make these clear in the relevant consultation. In this regard, IDA considers that the Reclassification and Exemption Guidelines have already set out IDA's approach adequately.

32. **Timing**. A respondent urged IDA to ensure that its decision-making process in relation to requests for exemption is as efficient and streamlined as possible to minimise the time periods that a Dominant Licensee is subject to regulation in respect of otherwise competitive markets. The respondent suggested that instead of the current timeframe in the Code of 90 days from the close of public submissions to the issuance of a decision, this timeframe should be reduced to 30 days.

33. IDA assures the industry that it will strive to be as efficient and streamlined in its review as possible. Notwithstanding, the 90 days' timeframe is set out in the Code and, therefore, a review of the timing is not within the scope of the current review of the Reclassification and Exemption Guidelines, which set out the framework that IDA will use in applying the Code. IDA considers that this (and some other comments received in respect of the review of the

Guidelines, as described below) would be more appropriately considered in the context of a review of the Code. Nonetheless, given the significance of exempting a Dominant Licensee from its Dominant Licensee obligations in a specific market, IDA believes sufficient time should be given to the industry and IDA to consider the Dominant Licensee's exemption request and in this regard, IDA believes the 90 days' timeframe is reasonable and not unduly long.

Entity-Based Approach

34. A respondent suggested that, instead of an entity-based approach, IDA should embark on a comprehensive analysis of telecommunication markets in Singapore so as to identify those markets where structural competition problems may persist and where some form of *ex ante* regulation of those markets may be relevant. The respondent urged IDA to set out a more forward-looking approach to market analysis that takes into consideration foreseeable and relevant market developments such as the Next Generation Nationwide Broadband Network in Singapore.

35. As the entity-based approach is specified in the Code, IDA will not consider this point further under this review for the same reason set out in paragraph 33. IDA would encourage respondents to raise these comments as part of the next review of the Code for IDA's assessment/consideration.

36. As for the respondent's comment on taking a more forward-looking approach to market analysis, IDA has committed to undertake a longer-term and more forward-looking approach to market analysis where appropriate. This is reflected in IDA's amendment under paragraph 2.4.1 of the revised Reclassification and Exemption Guidelines to clarify that "*IDA may also take into account the appropriate time frames where defining the relevant market*".

B. TELECOM COMPETITION GUIDELINES

Application of Section 8 of the Code to Licensees with Significant Market Power

37. A respondent submitted that the presumption that any Dominant Licensee has SMP for the purpose of Section 8.2 of the Code is flawed and contrary to the requirements of the Code on the basis that "*IDA is not actually determining, at any point in the application of Section 8.2, whether the Dominant Licensee does, in fact, have SMP in a telecommunications market*".

38. As mentioned in IDA's Public Consultation document, the decision to amend the Code to apply Section 8 to any licensees who, through the course of an investigation, are found to have SMP even though they may not yet be classified by IDA as Dominant Licensees was undertaken as part of the last Code review. IDA will therefore not consider this point further under this review. Importantly, IDA would like to reiterate that the presumption of SMP is a rebuttable presumption for the purpose of Section 8.2 of the Code. The Dominant Licensee may rebut this presumption by demonstrating that at the

time the alleged abuse occurred, the Dominant Licensee no longer had SMP in the market in which the alleged abuse occurred.

Abuse of Dominant Position in the Singapore Market

39. A respondent urged IDA to provide more clarity on the circumstances in which IDA may engage in public consultation once it has decided to proceed with enforcement action. The respondent suggested that IDA may wish to clarify that:

    (a) a public consultation would only be undertaken once initial inquiries are made and it is established that a prima facie case to be answered exists; and

    (b) a public consultation would not be undertaken where the Licensee has provided IDA with conclusive evidence that a credible case does not exist.

40. As provided in paragraph 3.2(h)(iii) of the revised Telecom Competition Guidelines, IDA may undertake a public consultation, particularly in instances where complex and novel issues are raised. This is important to ensure that IDA, as a responsible regulator, has considered all relevant comments and views before reaching its decision. As such, IDA considers that it is necessary for IDA to retain the ability to conduct public consultations where it deems such an exercise to be necessary. As to the circumstances in which public consultation may be conducted, this will depend on the facts and circumstances of the case.

Pricing Abuses

41. With regard to paragraph 3.2.1 of the Telecom Competition Guidelines which discusses IDA's assessment of pricing abuses, a respondent submitted that IDA should make it clear that IDA will not take action against a Dominant Licensee for an abuse of a dominant position in respect of tariffs that have been approved by IDA under Section 4.4.3.1 of the Code. The respondent argued that if IDA had approved a tariff having proper regard to the review criteria in Section 4.4.3 of the Code, it cannot reasonably allege that such pricing constitutes an abuse of a dominant position.

42. IDA does not agree with the respondent's assertion. Section 4.7 of the Code makes clear that IDA's decision to allow a tariff to go into effect creates a presumption that the prices are just, reasonable and non-discriminatory. However, as market conditions change, effective tariffs may not remain just, reasonable and non-discriminatory. As such, the Code provides IDA with the right to periodically review any effective tariff as well as provides an avenue for any persons to petition IDA to undertake such a review. Further, the actual implementation of an effective tariff may also give rise to competition concerns and, as such, it is imperative that IDA is able to take the necessary enforcement action in such cases.

Predatory Pricing

43. A respondent submitted that the use of the term "a sustained period" in paragraph 3.2.1.1(a) of the Telecom Competition Guidelines, which explains how IDA will assess predatory pricing behaviour, appears to suggest that selling services below costs for "a limited period", but long enough to drive efficient rivals from the market, is acceptable. The respondent suggested that IDA simply prohibits any below-cost pricing that drives efficient rivals from the market (regardless of the time period over which the below-cost pricing took place) by removing the term "a sustained period".

44. In assessing whether a pricing abuse has taken place, IDA will, *inter alia*, consider the effect(s) of the pricing conduct in question and consider whether such pricing for the period/duration in question drives or will drive efficient rivals from the market. IDA notes that it is unlikely that short-term below-cost pricing will have an effect of driving efficient rivals from the market. In this regard, and to provide better clarity so as not to unnecessarily deter an entity from pricing below cost where there are legitimate reasons/objective justifications for pricing below cost for the short term (such as a short-term promotion, as provided for under section 3.2.1.1(a) of the Telecom Competition Guidelines), IDA has decided to retain the use of the term "sustained period".

45. A respondent submitted that in other jurisdictions, the test of whether pricing above average variable cost but below average cost constitutes predatory pricing depends on satisfying more than one particular cost measure. Therefore IDA should, similarly, take account of: (a) multiple cost measures (rather than the single measure currently proposed by the IDA), where appropriate; and (b) other factors that may point in favour or against the ability of the Dominant Licensee to drive efficient competitors out of the market or to discourage market entry, such as direct evidence of intention, whether the conduct makes commercial sense and other behavioural evidence of intention.

46. It is provided in Section 8.2.1.1 of the Code that IDA will find that a Licensee (with SMP) has engaged in predatory pricing and, therefore, has abused its dominant position if:

    (a) the Licensee is selling its service and equipment at a price that is less than average incremental cost;

    (b) the Licensee's pricing is likely to drive efficient rivals from the market or deter future efficient rivals from entering the market; and

    (c) entry barriers are so significant that, after driving rivals from the market or deterring entry, the Licensee could impose an increase in prices sufficient (in amount and duration) to enable the Licensee to recoup the full amount of the loss that it incurred during the period of price cutting.

47. The use of "average incremental cost" measure is provided in the Code and therefore not within the scope of this review. Nonetheless, paragraph 3.2.1.1(c) of the Telecom Competition Guidelines clearly explains why IDA considers the "average incremental cost" measure to be the appropriate measure to be used in its assessment. As for the request for IDA to consider other factors in its assessment, paragraphs 3.2.1.1(d) and (e) of the Telecom Competition Guidelines already provide that IDA will consider all relevant factors to determine if, having priced its service or equipment below average incremental cost, the Licensee is likely to drive efficient rivals out of the market or deter future efficient rivals from entering the market and whether entry barriers are significant enough, before concluding that the Licensee has engaged in predatory pricing.

48. A respondent raised concerns that certain factors identified by IDA as constituting barriers to entry in paragraph 3.2.1.1(e) of the Telecom Competition Guidelines cannot reasonably be considered to be such barriers, including advertising costs and retail distribution costs.

49. IDA disagrees that advertising costs cannot reasonably be considered a barrier to entry. High advertising costs where a Licensee advertises heavily to increase the demand of its product(s) may be considered a source of a strategic barrier to entry. As noted in the Competition Commission of Singapore ("**CCS**") Guidelines, in markets where brand image is important, a new entrant may have to invest heavily in advertising before it can attain a viable scale. However, even where advertising expenditure is a sunk cost, this does not necessarily mean that entry barriers are high. For example, incumbents may have had to establish their brands and may also have to advertise heavily to maintain them, and so will not necessarily have a cost advantage over potential entrants. Therefore, whether advertising costs constitute a barrier to entry would depend on the facts and circumstances of the case. Nonetheless, given that it could potentially be a barrier to entry, IDA will retain high advertising costs as a relevant factor for consideration.

50. On the other hand, IDA accepts that distribution costs typically constitute a normal part of the operational costs of a business in contrast to limited access to distribution outlets which can constitute a barrier to entry. However, IDA is of the view that there may be exceptional situations where retail distribution costs may become a commercial barrier. On balance, IDA will remove "retail distribution costs" as an ***example*** of commercial barriers but it should be noted that where applicable, IDA may assess whether retail distribution costs serve as a barrier to entry. The corresponding change has been made to paragraph 2.4.2(b)(i)(2) of the Reclassification and Exemption Guidelines.

Price Squeezes

51. Paragraph 3.2.1.2(e) of the Telecom Competition Guidelines provides that IDA generally will assess whether the input price imposed by a Licensee with SMP is so high that its downstream business or Affiliate could not profitably sell its service or products by using one of two stated methodologies. A respondent requested for clarification from IDA on how it intends to: (a) define

the retail product being sold; and (b) determine the profitability of the product being sold.

52. As noted by the respondent that the services sold could differ significantly depending on the ancillary services packaged together, it would not be practical for IDA to provide the further details requested as the definition of the retail product and an assessment of the profitability of the product depend on the facts and circumstances of the case. In this regard, IDA has already provided in paragraph 3.2.1.2 of the Telecom Competition Guidelines the guiding principles in respect of its assessment of price squeezes.

53. A respondent urged IDA to delete paragraph 3.2.1.2(e)(ii) of the proposed revised Telecom Competition Guidelines, which provides for an assessment based on whether an equally efficient non-affiliated service provider in the downstream market would be able to obtain a commercially reasonable profit, on the basis that it "*incorrectly provides for the IDA to apply the price squeeze test against the cost structure of a third party, which is not how the equally efficient operator has been applied in the jurisprudence of leading competition law jurisdictions*".

54. Paragraph 3.2.1.2(e)(ii) of the Telecom Competition Guidelines provides an alternative assessment methodology for IDA to assess a situation where the full purchase price of the input may not be fully passed on to the Customers in determining whether there is indeed a case of price squeeze. In terms of how IDA will apply the price squeeze test on the basis of "equally efficient non-affiliated service provider", IDA assures the respondent that IDA will take into consideration international best practices and will, generally consider the cost structure of the downstream business or Affiliate of the Licensee with SMP to be the appropriate reference point. As explained in IDA's Public Consultation document, the proposed change from "reasonably efficient" to "equally efficient" in the revised paragraph 3.2.1.2(e)(ii) of the Telecom Competition Guidelines was in recognition that the Licensee can in practice only determine its own costs and prices as a benchmark, rather than those of a hypothetical efficient or reasonably efficient downstream competitor, in determining whether or not it has breached the Code. It is therefore intended that IDA will generally consider the cost structure of the downstream business or Affiliate of the Licensee with SMP to be the appropriate reference point.

55. The respondent also requested for clarification of the phrase "commercially reasonable profit" in paragraphs 3.2.1.2(e)(i) and (ii) of the Telecom Competition Guidelines.

56. To clarify, in determining the "commercially reasonable profit", IDA will assess the normal profit or the general level of profit in similar industry needed for the downstream business or Affiliate of the Licensee with SMP or an equally efficient non-affiliated service provider to continue operating in the market.

57. A respondent submitted that when assessing price squeezes, IDA should have due regard to the effect that access regulation of a service designated

as an IRS or MWS has on a market and not assume that the Dominant Licensee has complete control over the pricing of wholesale inputs.

58. In response, IDA notes that there may be situations in which a Dominant Licensee may not have complete control over the pricing of wholesale inputs and assures the respondent that IDA will take account of the regulation of IRS and MWS in its decision-making in respect of assessing price squeezes.

59. A respondent submitted that IDA's test for price squeeze may be inappropriate where the service is offered as part of a "bundle" and IDA "*should clarify that it may be unsuitable to calculate whether a service provider is profiting from a single activity in circumstances where that activity is only an input into one of several products or services that are provided as part of a 'bundle'*".

60. IDA is of the view that the general principles set out in paragraph 3.2.1.2 of the Telecom Competition Guidelines would apply in assessing a price squeeze, even where the case involves a bundle of services downstream. However, IDA notes that a more complex assessment may be necessary in cases involving multiple service offerings bundled together. IDA would assess each case on its specific facts and circumstances.

Predatory Network Alteration

61. A respondent submitted that IDA should recognise that a Dominant Licensee would not obtain any benefit from increasing the costs of another Licensee through network alteration if the costs it incurred in effecting the alteration exceeded the costs imposed on a Licensee. Further, where the network alteration results in benefits to the Dominant Licensee and End Users but results in the imposition of costs upon an individual Licensee, such an alteration should not constitute an abuse of dominant position.

62. IDA will weigh the associated costs and benefits when considering whether the alteration constitutes an abuse of dominance. As already clarified in paragraph 3.2.2.2(c) of the Telecom Competition Guidelines, amongst other considerations, IDA will view the network alteration as abusive if the adverse impact of its actions on interconnected Licensees was grossly disproportionate to the benefit to itself and its End Users.

Anti-competitive Discounts and Tying

63. A respondent raised concerns that the Telecom Competition Guidelines do not sufficiently address the issue of when discounting or tying will constitute anti-competitive behaviour and when it may not, and how IDA intends to deal with the tension between the pro- and anti-competitive effects of such actions.

64. IDA is of the view that the Telecom Competition Guidelines has provided sufficient detail for these two areas, particularly in relation to when discounts and tying will raise competition concerns. Paragraph 3.2.3(b) of the Telecom

Competition Guidelines sets out the circumstances and considerations IDA may take in considering whether a discount by a Licensee with SMP may constitute an abuse of a dominant position. For tying, as stated in paragraph 3.2.3(c) of the Telecom Competition Guidelines, a Licensee with SMP that requires a customer that purchases a "non-competitive" service to purchase other services (typically "competitive" services) may foreclose competition in the relevant market and therefore be found to have abused its dominant position.

65. In terms of how IDA will consider the pro- and anti-competitive effects of such activities, paragraph 2.5(b) of the revised Telecom Competition Guidelines explains that in determining whether an action constitutes an unreasonable restriction in contravention of the Code, IDA may consider if a Licensee with SMP is able to objectively justify its conduct or is able to demonstrate benefits arising from its conduct in its assessment. To emphasise this approach, IDA has also revised paragraph 3.2(h) further to clarify that IDA may also dismiss an enforcement proceeding if a Licensee has demonstrated to IDA's satisfaction that its conduct is or may be objectively justified or that it gives rise to benefits, and that the Licensee has behaved in a proportionate manner in defending its legitimate commercial interest.

Utilisation of the Term "Grossly Disproportionate"

66. Paragraph 3.2.2.2(c)(ii) of the Telecom Competition Guidelines states that IDA will find that "*a Licensee with Significant Market Power has no legitimate business, operational or technical reason for altering its network interface when … the adverse impact of its actions on interconnected Licensees was grossly disproportionate to the benefit to itself and its End Users*". Paragraph 3.4.2(a)(ii) of the Telecom Competition Guidelines provides that IDA will find that a Licensee has no legitimate business, operational or technical reasons for taking an action that has the effect of degrading the availability or quality of another Licensee's service or equipment or raising the other Licensee's cost where "*the adverse impact of the Licensee's actions on other Licensees was grossly disproportionate to the benefit to the Licensee and its End Users*". A respondent suggested that IDA removes the term "grossly disproportionate" in paragraphs 3.2.2.2(c)(ii) and 3.4.2(a)(ii) of the Telecom Competition Guidelines as it is not defined and is not used in the Code.

67. IDA has decided to retain the use of the term "grossly disproportionate" in paragraphs 3.2.2.2(c)(ii) and 3.4.2(a)(ii) of the Telecom Competition Guidelines as IDA believes that a Licensee should still have the ability to undertake legitimate commercial initiatives or practices which result in benefits to itself and its End Users although the onus will be on the Licensee to satisfy IDA that it has acted in a manner to minimise the adverse impact on other Licensees. In assessing whether the adverse impact of the Licensee's actions was grossly disproportionate to the benefit to itself and its End Users, IDA will consider, amongst other things, the object of the Licensee's conduct and the extent to which the Licensee behaved in a proportionate manner even where there may be a legitimate business, operational or technical basis for the network alteration.

Agreements involving Licensees that Unreasonably Restrict Competition

68. A respondent submitted that paragraph 4.2(e)(iii) of the Telecom Competition Guidelines on agreements that unreasonably restrict competition does not provide guidance on the elements that must exist or threshold issues that must be satisfied for IDA to establish the existence of a "tacit agreement".

69. IDA agrees that more clarity can be provided in respect of its determination of whether a tacit agreement exists and has further revised paragraph 4.2(e)(iii) of the Telecom Competition Guidelines to provide further details on when IDA would find a concerted practice to exist. Please refer to the revised paragraph 4.2(e)(iii) of the Telecom Competition Guidelines.

70. A respondent submitted that IDA should be cautious of assuming that practices outlined in paragraph 4.3.1.1(c) of the Telecom Competition Guidelines are "*automatically reflective*" of attempts at price fixing or output restrictions. For example, "*operators may, for the benefit of the industry, actually have discussions and agreements on minimum service levels or maintenance components that should be made available to customers*".

71. IDA notes that paragraph 4.3(a) of the Telecom Competition Guidelines already provides that some agreements between competitors, such as voluntary standards-setting agreements, may promote competition. Paragraph 4.3(b) of the Telecom Competition Guidelines continues to state that certain agreements, such as price fixing or output restrictions agreements, are *per se* prohibitions, and presumed to unreasonably restrict competition, without the need for IDA to assess the actual or likely competitive effect of such agreements. IDA regards that the practices outlined in paragraph 4.3.1.1(c) constitute examples of indirect price-fixing.

Leniency Programme

72. A respondent submitted that given the importance and potential impact of the leniency programme established by IDA as set out in paragraph 5 of the revised Telecom Competition Guidelines ("**Leniency Programme**"), a separate set of guidelines on the Leniency Programme and an industry-wide information campaign may be necessary to ensure that the industry is provided with the appropriate information in relation to the Leniency Programme.

73. IDA is of the view that it is sufficient to include the guidelines on the Leniency Programme under the Telecom Competition Guidelines, as the Leniency Programme is meant to address infringements of Section 9 of the Code. However, IDA agrees that it is useful to engage the industry further on the Leniency Programme and may consider arranging a briefing to Licensees on this at a later stage.

Other General Comments

74. **Regulatory principles**. A respondent suggested that IDA should take the opportunity of the review of the Telecom Competition Guidelines to identify the specific regulatory principles that it is applying in its decisions with respect to an alleged contravention of Section 8 or 9 of the Code.

75. IDA is of the view that this suggestion will not value-add to IDA's decision making or the Licensees' understanding of IDA's decisions, given that the regulatory principles provide the foundation for the entire Code and guides IDA's implementation of the Code and the Telecom Competition Guidelines in its decisions.

76. **Jurisdiction**. A respondent noted that in the case of IDA's spectrum auctions (please refer to paragraph 4.3.1.2 of the Telecom Competition Guidelines), the registered bidders may not be Licensees at the point of bid submission. The respondent queried whether IDA can take enforcement action against: (a) non-Licensees colluding to rig bids; or (b) Licensee(s) and non-Licensee(s) colluding to rig bids. If such behaviour is outside IDA's purview, the respondent asked whether CCS would be able to investigate such cases under Section 34 of the Competition Act (Cap. 50B) ("**Competition Act**").

77. To respond to the respondent's questions on jurisdiction, if the matter involves non-Licensees, then it should fall under CCS' purview, notwithstanding that the spectrum auction is called by IDA.

78. The respondent further highlighted that it appears that both the Media Development Authority of Singapore ("**MDA**") and CCS prohibit behaviour which has the "object" of preventing, restricting or distorting competition. However, IDA does not appear to consider the "object" of a particular behaviour. The respondent requested that IDA provides clarification on this matter, as well as any other potential differences in terms of the thresholds for anti-competitive behaviours between the competition regimes in the telecom, media and ancillary markets.

79. IDA would like to stress that while the prohibitions may be phrased differently across the competition regimes in the telecoms, media and ancillary markets, the application of the concepts is generally similar while taking into account the specific regulatory and administrative requirements and circumstances arising in the respective sectors. The "object" approach in the relevant CCS and MDA competition provisions refers to strictly prohibited or "hard-core" anti-competitive agreements for which the authorities do not have to incur resources to prove the adverse effects of these agreements to find an infringement. In the same way, IDA, in paragraph 4.3(b) of the Telecom Competition Guidelines, sets out a similar approach, albeit that IDA does not use the term "object", and the list of prohibited agreements set out in 4.3.1 is very similar to those listed by CCS and MDA.

80. The respondent requested IDA to provide clarity on how cross-jurisdictional competition cases will be handled by the various competition agencies. Specifically, the respondent asked: (a) how parties can make complaints about cross-jurisdictional competition cases; (b) which frameworks will be applicable (as there is currently no standardised timelines/procedures for how the different competition agencies deal with competition issues); and (c) how information is to be gathered, i.e., whether the companies involved can expect to receive a single request for information from a co-ordinating agency, or multiple requests for similar information from each of the agencies involved

81. As noted in CCS' Guidelines on the Major Prohibitions, on cross-sectoral competition cases, CCS will work out with the relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator. CCS will work closely with other regulators where necessary to prevent double jeopardy and minimise regulatory burden in dealing with the case. This has also been the approach taken in other jurisdictions with a sectoral carve-out.

82. Given the sectoral carve-out model, there is no overlap in the areas of jurisdictions across the various agencies. In response to the specific issues raised, parties can submit their complaints to the agency that they believe has the legal powers to handle their complaints. Nonetheless, if the agency that has received the complaint does not have the authority to handle the complaint, operationally, it would inform the applicants and seek their consent to refer their complaint to the appropriate agency. The appropriate agency will handle the matter and the follow-up according to its legal and regulatory frameworks.

83. **Imposition of financial penalty**. A respondent submitted that IDA should provide further clarity on how it intends to calculate financial penalties for the various frameworks that it has in place.

84. IDA is of the view that it is not necessary to issue a separate set of guidelines at this juncture. The general principles that IDA will consider in deciding the quantum of financial penalties include consideration of the aggravating and mitigating factors that are already stated in Section 11.4.4.4 of the Code.

85. **Application of the Code**. A respondent requested clarification from IDA on the circumstances under which either Section 4 or Section 8 of the Code would be applicable. The respondent raised an example of a case in which a Dominant Licensee discriminates in favour of its Affiliate, and queried whether the case will be subject to enforcement under one or both of Sections 4 and 8 of the Code.

86. As the respondent has correctly pointed out, Section 4 is administered on an *ex ante* basis while Section 8 is on an *ex post* basis. In general, a Dominant Licensee (which is subject to *ex ante* regulation under Section 4 of the Code) and which is presumed to have SMP (and, therefore, subject to *ex post* regulation under Section 8 of the Code) will have to comply with both Section

4 and Section 8 of the Code concurrently. The Section 4 provisions in the Code on non-discrimination generally apply in relation to a tariff.

87. Therefore, in the example raised by the respondent, if a Dominant Licensee discriminates in favour of its Affiliate in the provision of a service pursuant to an effective tariff, this will generally be enforced under Section 4 of the Code; otherwise, it will be enforced under Section 8 of the Code. Whether Section 4 or Section 8 of the Code applies will, therefore, depend on the circumstances of the case.

PART III: CONCLUSION

88. Pursuant to Section 28 of the Telecommunications Act (Cap. 323), IDA hereby issues the revised Reclassification and Exemption Guidelines and the Telecom Competition Guidelines.

89. These Guidelines will come into effect on 25 April 2014.