



**CONSULTATION PAPER ISSUED BY  
THE INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY OF SINGAPORE**

**REVIEW 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**

**25 MARCH 2013**

<b>PART I</b>	<b>:</b>	<b>INTRODUCTION</b>
<b>PART II</b>	<b>:</b>	<b>PROPOSED REVISIONS TO RECLASSIFICATION AND EXEMPTION GUIDELINES</b>
<b>PART III</b>	<b>:</b>	<b>PROPOSED REVISIONS TO TELECOM COMPETITION GUIDELINES</b>
<b>PART IV</b>	<b>:</b>	<b>PROCEDURES AND TIMEFRAME FOR SUBMITTING COMMENTS</b>

## CONSULTATION DOCUMENT

### REVIEW 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 was 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. This consultation paper seeks the public's comments on the proposed amendments to the Reclassification and Exemption Guidelines and the Telecom Competition Guidelines (collectively referred to herein as "**Guidelines**"). IDA believes that the principles, concepts and methodologies embedded in the current Guidelines remain sound and relevant and should largely be retained. Nonetheless, IDA is proposing amendments to the Guidelines to align with the revisions to the Code and provide more clarity on how IDA will implement the relevant sections of the Code, taking into account IDA's experience in implementing the Code as well as best practices from other jurisdictions, including the Competition Commission of Singapore ("**CCS**"), where relevant. In addition, IDA has proposed some editorial changes to improve the clarity and organisation of the Guidelines.
4. Unless otherwise defined, capitalised terms used herein shall have the same meanings assigned to them in the Code.

## **PART II: PROPOSED REVISIONS TO RECLASSIFICATION AND EXEMPTION GUIDELINES**

5. The Reclassification and Exemption Guidelines provide the analytical framework that IDA will adopt for the classification and reclassification of Licensees as Dominant or Non-dominant and for exempting a Dominant Licensee from any of the special regulatory requirements which they are subject to. IDA does not propose to make any substantive changes to the Reclassification and Exemption Guidelines.

### **General Amendments Arising from Changes to the Code**

6. Section 8 of the Code, which covers prohibitions against abuse of dominant positions, was amended to apply not only to Dominant Licensees but to any Licensees who, through the course of an investigation, are found to have Significant Market Power, even though they may not yet be *classified* by IDA as Dominant Licensees. This change stemmed from the recognition that a Licensee may not possess Significant Market Power at the point of its licensing – and therefore, will not be classified as a Dominant Licensee – but may subsequently acquire and abuse its Significant Market Power. In such cases, there may be a lag between the time at which the Licensee acquires Significant Market Power, and the time IDA reclassifies the Licensee as a Dominant Licensee. During this period, the Licensee could engage in activities amounting to an abuse of its dominant position. Given the potentially substantial harm to the market that an abuse of dominance may cause, the Code was amended to allow IDA to take appropriate enforcement action against such a Licensee, even though IDA has not yet reclassified it as a Dominant Licensee.
7. In light of this change, where the prohibitions against abuse of dominant position in Section 8 of the Code no longer apply only to licensees classified as Dominant Licensees, a Dominant Licensee will not be allowed to seek exemption from these provisions pursuant to Sub-section 2.5.1 of the Code. Correspondingly, the current paragraph 2.6 of the Reclassification and Exemption Guidelines, which provides for IDA to consider requests by a Dominant Licensee that seek exemption from the prohibitions contained in Section 8 of the Code, will no longer be relevant.
8. In order to clarify the existing regime, IDA also proposes to make clear that the analytical framework relevant to the consideration of any request to exempt a Licensee from any regulatory requirement applicable to Dominant Licensees (see paragraphs 2.4.1 and 2.4.2 of the Reclassification and Exemption Guidelines) will also apply in the assessment of whether a Licensee has Significant Market Power under Section 8 of the Code (see further elaboration in subsequent paragraphs).

## **Amendments to Specific Parts of the Guidelines**

### **Market Definition (paragraph 2.4.1)**

9. While the “SSNIP Test” is an internationally recognised yardstick used to define markets, it is also recognised that this approach presents some challenges. Other than the difficulty in obtaining the market data necessary to define a market in strict accordance with the “SSNIP Test”, it is well-known and generally accepted that the SSNIP Test has an analytical limitation in dominance cases where current prices of a product are above competitive levels such that buyers would replace it with other products which should not typically be considered as substitutes upon a small but significant, non-transitory increase in price (“**SSNIP**”). This would tend to result in the relevant markets being defined too broadly and misleading finding that the market power of the Licensee is lower than it actually is. This problem is known as the “cellophane fallacy” after a US case involving cellophane products<sup>1</sup>. IDA therefore proposes to clarify this section to recognise the existence of the cellophane fallacy.
10. IDA also proposes to clarify that it will take into account the appropriate time frames when the defining the relevant market.
11. In addition, IDA proposes to clarify that it will consider the concepts of bundles, chain substitutes and complements, where appropriate, in defining the relevant market.

### **Assessing Competitiveness (paragraph 2.4.2)**

12. IDA recognises that the retail market can in some circumstances place a sufficient competitive constraint on wholesale prices, and therefore limit the ability of a Licensee with Significant Market Power to abuse its market power in the wholesale market. IDA therefore proposes to clarify that it will consider whether the ability of a Licensee to exercise its market power in a relevant market is constrained by another related market. For example, a Licensee with Significant Market Power in the upstream (wholesale) market may find it difficult to exploit its market power due to the existence of a strong buyer in the downstream (retail) market.
13. IDA will also consider whether the relevant market is a one-sided market or a two-sided market to provide an integrated framework for understanding the interactive relationships between dominance, conduct and effect so as 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

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<sup>1</sup> The “cellophane fallacy” problem is named after the US Supreme Court’s antitrust decision against Du Pont in 1956. Du Pont was the company selling cellophane, a plastic wrapping material, and was under investigation for monopolising the cellophane market. Failing to recognise that Du Pont was already setting the price of cellophane so high that consumers would consider replacing it with inferior substitutes, the US Supreme Court called for an overly-wide definition of the market to include other flexible wrapping materials and thereby incorrectly concluding that Du Pont did not have market power.

platform are linked, with interdependent prices and output and intertwined strategies. For two-sided markets, in addition to price level, IDA may take into consideration price structure, as well as the demands of Customers of both sides, the interrelationship between these demands, the costs directly attributable to each side and the costs of running the platform.

### **PART III: PROPOSED REVISIONS TO TELECOM COMPETITION GUIDELINES**

14. The Telecom Competition Guidelines provide explanation on the standards IDA will use to assess abuse of dominant position, unfair methods of competition and agreements that unreasonably restrict competition. This section provides an overview of the substantive changes proposed for the Telecom Competition Guidelines.

#### **General Amendments Arising from Changes to the Code**

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

15. As earlier mentioned, in light of the change to Section 8 of the Code, all references to “Dominant Licensee” in the Telecom Competition Guidelines have been changed to “Licensee with Significant Market Power.”
16. In assessing whether a Licensee has Significant Market Power in a telecommunication market in Singapore, IDA will generally first determine the relevant service, geographic and functional markets (i.e., relevant market(s)) within which the Licensee provides its service. Thereafter IDA will conduct a competitiveness assessment, including assessing the level of existing competition, the extent of barriers to entry, the existence of supply substitutability and countervailing buyer power (see paragraphs 2.4.1 and 2.4.2 of the proposed Reclassification and Exemption Guidelines). IDA will presume, absent evidence to the contrary, that a Dominant Licensee that has been classified as a Dominant Licensee under Section 2 of the Code has Significant Market Power in every telecommunication market in which it provides telecommunication service pursuant to its licence.

##### **Application of Section 8 of the Code to Telecommunication Equipment Dealer Licensees**

17. Section 8 of the Code had been amended to apply to Telecommunication Equipment Dealer Licensees. Previously, only Section 9 of the Code apply to these licensees. Correspondingly, the Telecom Competition Guidelines have been revised to include “equipment” in addition to the term “services”, given that the reference to “Licensees” under Section 8 now includes Telecommunication Equipment Dealer Licensees.

## **Amendments to Specific Parts of the Guidelines**

### **The “Unreasonably Restricts Competition” Standard (paragraph 2.5(b))**

18. IDA proposes to clarify that in determining whether an action constitutes an unreasonable restriction of competition, IDA will also consider whether the conduct may be objectively justified (in cases of alleged abuse of dominance) or whether it produces offsetting efficiencies that outweigh the anti-competitive effect (in the case of agreements).

### **Price Squeezes (paragraph 3.2.1.2)**

19. IDA proposes to clarify that in establishing whether a Licensee with Significant Market Power has engaged in a price squeeze, IDA will assess whether the price that the Licensee charges downstream competitors for the input allows an *equally efficient* non-affiliated service provider in the downstream market to obtain a commercially reasonable profit for such activity. This is 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. IDA notes that many other jurisdictions have moved towards or adopted an “equally efficient competitor” test to establish price squeeze.
20. The corresponding proposed change has been made to paragraph 3.3.3 of the Telecom Competition Guidelines.

### **Refusal to Supply (paragraph 3.2.3 (a))**

21. The proposed revisions clarify when refusal to supply might be considered an abuse of dominant position: a refusal to supply will constitute an abuse of dominant position if there is evidence of (likely) substantial harm to competition and there is no objective justification for the behaviour of the Licensee with Significant Market Power. This is also the position taken in the CCS’ Section 47 Prohibition Guidelines<sup>2</sup>.

### **Pricing Fixing / Output Restrictions (paragraph 4.3.1.1)**

22. There are many ways in which prices can be fixed. It may involve fixing either the price itself or the components of a price such as a discount and indirectly affecting the prices to be charged. Under part (b), IDA proposes to provide examples of indirect price fixing, which would constitute a contravention of sub-section 9.3.2.1 of the Code.

### **Market and Customer Divisions (paragraph 4.3.1.3)**

23. IDA proposes to clarify that it will generally not consider arrangements that involve licensees sharing facilities because of economic efficiency

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<sup>2</sup> Paragraph 11.26 of CCS’ Section 47 Prohibition Guidelines state that “... in certain circumstances, a refusal to supply by a dominant undertaking may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified...”

considerations, or to address technical constraints, or a shortage of facilities, to contravene sub-section 9.3.2.3 of the Code. This sub-section will also not apply to arrangements in which IDA mandates that a Licensee shares the use of infrastructure with other Licensees pursuant to section 7 of the Code.

### **Leniency Programme: Lenient Treatment For Licensees Coming Forward With Information On Cartel Activity (paragraph 5)**

24. Given the secret nature of cartels, IDA proposes to introduce a leniency programme under the Guidelines as part of its enforcement strategy to give Licensees participating or which have participated in cartels an incentive to come forward and inform IDA of the cartel's activities. Leniency programmes have been found to be effective in other competition law regimes.
25. Under IDA's leniency programme, IDA will grant a Licensee total immunity from financial penalties if it is the first to provide IDA with evidence of the cartel activity before an investigation has commenced by IDA, provided that IDA does not already have sufficient information to establish the existence of the alleged cartel activity. The Licensee may benefit from a reduction in the financial penalty of up to 100 percent if it is the first to come forward but only does so after IDA has started an investigation but before IDA issues a decision that Section 9 of the Code has been contravened. Licensees which are not the first to come forward but which provide evidence of cartel activity before IDA issues the decision, may be granted a reduction of up to 50 percent in the amount of the financial penalty which would otherwise be imposed. In all cases, the Licensee must provide IDA with *all* the information, documents and evidence available to it regarding the cartel activity and the information provided by the Licensee must provide IDA with a sufficient basis for taking forward a credible investigation or add significant value to IDA's investigation. The Licensee must also maintain continuous and complete co-operation throughout the investigation and refrain from further participation in the cartel activity (except as directed by IDA). It must not have been the one to initiate the cartel or taken any steps to coerce another Licensee to take part in the cartel activity.
26. The Licensee making a leniency application should immediately provide IDA with all the evidence relating to the suspected infringement available to it at the time of the submission. If it is unable to do so, it may apply to IDA for a marker to secure a position in the queue. A marker protects a Licensee's place in the queue for a given limited period of time and allows it to gather the necessary information and evidence in order to perfect the marker. IDA will provide instructions to the Licensee on the process and timing by which the marker must be perfected. If the Licensee fails to perfect the marker, the next Licensee in the marker queue will be allowed to perfect its marker, to obtain immunity or a reduction of up to 100 percent in financial penalties.
27. Leniency given by IDA under the leniency programme applies only in respect of any penalty which may be imposed for a breach of Section 9 of the Code and does not provide immunity from any penalty that may be imposed on the Licensee under any other part of the Code or any other laws.

**PART IV: PROCEDURES AND TIMEFRAME FOR SUBMITTING COMMENTS**

28. IDA would like to seek the views and comments from the industry and members of the public on the proposed Reclassification and Exemption Guidelines and Telecom Competition Guidelines.
29. Parties that submit comments regarding the issues identified in 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 materials may be placed in an annex.

30. 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 proposed Guidelines on which they are commenting. In any case in which a party chooses to suggest revisions to the text, the party should clearly indicate the specific changes in language that they propose.
31. All submissions should reach IDA before **12 noon on 24 April 2013**. Comments must be submitted in both hard and soft copy (preferably in Microsoft Word or PDF format). All comments should be addressed to:

**Ms. Aileen Chia**  
**Deputy Director General (Telecoms & Post)**  
**Infocomm Development Authority of Singapore**  
**10 Pasir Panjang Road**  
**#10-01 Mapletree Business City**  
**Singapore 117438**  
**Fax: (65) 6211 2116**

Please submit your soft copies, with the email header "Consultation on Review of Code Guidelines", to this e-mail: **IDA\_Consultation@ida.gov.sg**.

32. IDA 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 IDA grants confidential treatment, it will consider (but will not publicly disclose) the information. If IDA 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. IDA will not



accept any submission that requests confidential treatment of all, or a substantial part, of the submission.