SingTel

SINGAPORE TELECOMMUNICATIONS LIMITED

SUBMISSION TO THE INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY OF SINGAPORE

IN RESPONSE TO THE

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

DATE OF SUBMISSION: 24 APRIL 2013

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SUBMISSION TO THE 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

1 BACKGROUND

1.1 Singapore Telecommunications Limited (**SingTel**) is licensed to provide telecommunications services in Singapore.

1.2 SingTel has a comprehensive portfolio of services that includes voice and data services over fixed, wireless and Internet platforms. SingTel services both corporate and residential customers and is committed to bringing the best of global communications to its customers in the Asia Pacific and beyond.

1.3 SingTel welcomes the opportunity to respond to the Info-communications Development Authority of Singapore's (**IDA**) review of its advisory guidelines governing:

- Petitions for Reclassification and Requests for Exemption (**Reclassification and Exemption Guidelines**); and
- Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition (**Telecom Competition Guidelines**).

1.4 This submission is structured as follows:

- Section 2 – Executive Summary of major points
- Section 3 – General comments in relation to the Reclassification and Exemption Guidelines
- Section 4 – General comments in relation to the Telecom Competition Guidelines

2 EXECUTIVE SUMMARY

Reclassification and Exemption Guidelines

2.1 The entity-based approach to dominance testing is fundamentally broken and should be abandoned, particularly given the recent amendments to Section 8 of the Code of Practice for Competition in the Provision of Telecommunications Services 2012 (the **Code**). The recent amendments to the Code have highlighted the pressing need for the IDA to undertake a thorough review of its approach to the assessment of dominance.

2.2 The entity-based approach has been inherently flawed from its inception and its continued use places an unnecessary regulatory burden on regulated telecoms operators in Singapore. This element of the Code should be reviewed as soon as possible and the IDA should embark on a sector wide review of telecoms market to determine dominance within those markets.

2.3 If the entity-based approach to dominance testing is maintained, the IDA should at least ensure that its decision making process in relation to Exemption Requests is as efficient and streamlined as possible to minimise the time that SingTel would be subjected to Dominant Licensee regulation in respect of otherwise competitive markets.

2.4 The timeframes in the Code should be shorter and mandatory to allow the finalisation of requests for exemption to take 4 months rather than the approximately 8 months it takes under the timeframes currently set out in the Code.[1] This is to address the extensive periods of time taken by the IDA in relation to previous exemption requests.

2.5 SingTel welcomes the IDA's clarification with regard to its approach to the SSNIP test and the limits of that test due to the effect of the 'cellophane fallacy'. However, greater clarity is needed from the IDA as to how it will deal with the problems which arise as a result of the identified analytical limitation.

2.6 SingTel generally supports the IDA's decision to take into consideration the complexity and dynamics of modern telecommunications markets in its competitive assessments, including by incorporating an evaluation of the countervailing power of retail buyers and whether the market has two-sided characteristics. However, the IDA should provide greater guidance to industry participants as to the approach the IDA intends to

[1] See Code of Practice For Competition in the Provision of Telecommunication Services 2005, s. 2.5.2.

take to such assessments, given the difficulty associated with applying many of the standard competition law concepts mentioned in the IDA's guidelines, particularly in the context of two-sided markets.

2.7 SingTel also submits that:

(a) The IDA should not automatically presume that a firm with a market share in excess of 40 per cent has Significant Market Power (**SMP**). International best practice has moved away from the use of presumptive tests of market share to measure whether a firm has SMP in non-merger cases.

(b) The IDA should place primary emphasis on price competition in its assessment of whether a Dominant Licensee has SMP in a market, as evidence of price reductions demonstrate the existence of a competitive market (i.e. a SSNIP would most likely be defeated).

(c) The IDA should not unduly favour "capacity" as a means of measuring market share and should place greater emphasis on market share based on revenue and subscriber numbers.

(d) In its consideration of barriers to entry, the IDA should have greater and more explicit regard to the positive effect that access regulation of a service through designation of an IRS or MWS will have on competition in a market over the foreseeable future.

(e) The IDA should not attribute weight or significance to any submission that opposes a request for exemption if it lacks verifiable data or makes unsubstantiated assertions or allegations. The IDA should also, where necessary, obtain its own verifiable data in determining whether the removal of Dominant Licensee regulation is justified.

(f) The IDA should grant exemptions in general terms (rather than in relation to specific products or services) so that all future services that are offered by the Dominant Licensee in the exempt market are automatically exempt from Dominant Licensee regulation without the need for notification to, and approval by, the IDA.

Telecoms Competition Guidelines

2.8 Despite the removal of all references to Dominant Licensee under Section 8 of the Code, the IDA in its discussion of the proposed Telecoms Competition Guidelines continues to assert that a Licensee classified as a Dominant Licensee under Section 2 of

the Code will nevertheless still be presumed to have SMP in every telecommunications market in which it provides telecommunication services pursuant to its licence.

2.9 The decision that any Dominant Licensee is presumed to have SMP for the purpose of Section 8.2 of the Code is flawed. As a consequence of the IDA's entity-based approach towards designating dominance, there is actually no assessment whatsoever as to whether the Dominant Licensee has or still has SMP. A Dominant Licensee, like SingTel, is not objectively assessed for evidence of SMP; it is simply presumed to be dominant in every market until such time it requests an exemption and the IDA grants an extension in respect of a specific market.

2.10 This differs from the test in Section 8.2 of the Code where a licensee is deemed to have breached Section 8.2 only if it is dominant in a specific market by way of having SMP (i.e. it must then pass the tests outlined by the IDA in paragraphs 16 of its Consultation Document).

2.11 The decision to simply assume that a Dominant Licensee has SMP in respect of an alleged abuse of its position in Section 8.2 of the Code leads to distorted outcomes as compared to other licensees who are first assessed for SMP before there is an assumption of an abuse on grounds of its behaviour and thereafter the review of whether that assumption holds true based on the Telecom Competition Guidelines.

2.12 The issue of whether a Dominant Licensee has SMP in a market must be decided on a case-by-case-basis, having regard to the facts and merits of the particular case. A market-based analysis is needed to decide whether any licensee has dominance and/or SMP. A failure to do so would be inconsistent with the IDA's role as a decision maker.

2.13 The regulatory principles set out in Section 1.5 of the Code should explicitly inform and underpin the IDA's decision making with respect to alleged contraventions of Section 8 and 9 of the Code

2.14 The IDA should better clarify the circumstances in which it may engage in public consultation once it has decided to proceed with enforcement action. For example, public consultation should only be undertaken when there is a prima facie case to be answered, or where the case is not otherwise dismissed by the IDA after initial inquiries.

2.15 Where the IDA approves a tariff by having proper regard to the review criteria in

Section 4.4.3 of the Code, it cannot reasonably allege or suggest that such pricing constitutes an abuse of dominant position. Licensees that submit their tariffs to the IDA for approval must have a reasonable level of certainty that the IDA has reviewed the tariff sufficiently to meet the requirements of the Code.

2.16 SingTel remains concerned by the IDA's use of a single cost measure (i.e. average incremental cost) for the purposes of determining whether a Dominant Licensee is likely to drive efficient competitors out of a market or deter future entry for the purposes of satisfying sub-section 8.2.1.1(b) of the Code. The use of a single cost measure is inconsistent with international best practice, such as the approach adopted in jurisdictions such as Australia and the European Union.

2.17 The issue of whether a Dominant Licensee can recoup its losses once it has successfully driven efficient competitors out of the market and prevented re-entry will ultimately depend on the existence of barriers to entry in the relevant market. Only factors that genuinely constitute a barrier to entry should be considered by the IDA in its determination of whether recoupment is possible.

2.18 SingTel is concerned that certain factors identified by the IDA as constituting barriers to entry in Appendix 1 of the current Reclassification and Exemption Guidelines cannot reasonably be considered to be such barriers, including advertising costs and retail distribution costs.

2.19 Price squeezes need to be assessed against the cost structure of the vertically integrated entity that has been accused of abusing its dominant position, not the cost structure of other equally efficient non-affiliated operators. The overwhelming jurisprudence from Europe confirms that it is necessary to look at the dominant entity's internal cost structure. The IDA should also adopt the same approach.

2.20 The IDA has maintained its commentary in relation to what is described as "predatory network alteration" in paragraph 3.2.2.2 of the Telecom Competition Guidelines. SingTel submits that:

(a) the 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 itself in effecting the alteration exceeded the costs imposed on a Licensee (or Licensees), which would be difficult to quantify in any event; and

(b) 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 alternation should not constitute an abuse of dominant position. The costs incurred by an individual Licensee may be an unintended consequence of network upgrades and could not reasonably be said to result in damage to "competition" in the relevant market.

2.21 In addition, SingTel is concerned that the IDA's revisions to paragraph 3.2.3 of the Telecom Competition Guidelines do not provide sufficient guidance in relation to the types of conduct that the IDA may regard as an abuse of a dominant position. While the types of conduct identified in the guidelines may comprise anti-competitive conduct, they may equally represent justifiable and pro-competitive conduct. For instance, discounting is often used by telecoms operators on a temporary basis to encourage customer loyalty or reward commitment. In these circumstances, these actions may, in fact, evidence a functional competitive environment, where rewards and discounts are required by operators as a legitimate response to competitive threats.

2.22 SingTel submits that the Telecom Competition Guidelines should be amended to provide industry participants with more detailed guidance on when discounting or tying will constitute anti-competitive behaviour and when it may not, and how the IDA intends to deal with the tension between the pro- and anti-competitive effects of such actions.

2.23 The IDA should provide guidance on the elements that must exist, or threshold issues that must be satisfied, for the IDA to establish the existence of a "tacit agreement".

2.24 The IDA should exercise flexibility in reviewing practices in relation to price fixing / output restrictions as some of these practices present genuine benefits to customers.

2.25 SingTel is supportive of the introduction of a leniency programme to apply to telecoms industry participants under the Code but considers that the regime could benefit from a separate and more detailed guideline and an industry-wide information campaign.

3 GENERAL COMMENTS IN RELATION TO THE RECLASSIFICATION AND EXEMPTION GUIDELINES

The IDA should abandon the entity-based approach to dominance testing and undertake a thorough analysis of relevant telecommunications markets in Singapore

3.1 The recent amendments to Section 8 of the Code have highlighted the pressing need for the IDA to undertake a thorough review of its approach to the assessment of dominance in telecommunications markets in Singapore.

3.2 SingTel submits that the IDA's approach of assessing market dominance at a 'licensed entity' level is fundamentally broken and should be abandoned.

3.3 The recent amendments to Section 8 of the Code operate to extend the prohibitions against abuse of dominant positions and unfair methods of competition under Section 8 to all Licensees rather than just those Licensees classified as Dominant Licensees. As noted by the IDA, these changes stemmed from the recognition that a Licensee may not possess SMP at the point of its licensing but may acquire and abuse its SMP at some time subsequently.[2] The amendments aim to address the potential for any lag between when a Licensee may acquire SMP and the time when the IDA reclassifies that Licensee as dominant.

3.4 Recent amendments to the Code underscore the need for the IDA to re-assess its approach to the assessment of market dominance. This approach has been inherently flawed from its inception and its continued use after 13 years of full liberalisation only places an unnecessary regulatory burden on Dominant Licensees such as SingTel. Such a burden impacts upon SingTel's ability to compete effectively in an increasingly competitive market and should therefore be abandoned.

3.5 The IDA should instead 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.

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[2] IDA (2013) 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, Consultation Paper, Paragraph 6, p.3.

3.6 In 2002, the European Parliament established a common regulatory framework with the aim of reducing *ex ante* sector-specific rules progressively as competition in the market developed.[3] In accordance with that framework, the European Commission issued a Recommendation in 2003 with the purpose of identifying those product and service markets in which *ex ante* regulation may be warranted.[4]

3.7 The Recommendation employed competition law principles to set 18 markets which it considered were those that national regulatory authorities should analyse. The Commission noted that:[5]

> *"... the identification or selection of defined markets for ex ante regulation depends on those markets having characteristics which may be such as to justify the imposition of ex ante regulatory obligations."*

3.8 The effectiveness of this approach was demonstrated in 2007 when the European Commission adopted a new Recommendation, reducing the number of relevant markets from 18 to 7. The European Commission noted that the limited number of relevant markets "simplifies the regulatory environment and reduces the burden on regulators and industry".[6]

3.9 The IDA should adopt a similar approach to what has been adopted by the European Commission and comprehensively assess the competitive dynamics across the whole telecommunications sector in Singapore and identify the specific telecommunication markets where *ex ante* regulation may be warranted.

3.10 Once such an assessment is undertaken, the IDA could move to withdraw Dominant Licensee regulation from those markets that are considered to be competitive:[7]

> *"In particular, regulation cannot be imposed or must be withdrawn if there is effective competition on these markets in the absence of*

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[3] European Union, *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services*. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0033:EN:PDF>

[4] Commission of the European Communities, *Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*, 2nd edition, 2007. Available at <http://ec.europa.eu/information_society/policy/ecomm/doc/library/proposals/rec_markets_en.pdf >

[5] Commission Recommendation, *op cit*., above 7, paragraph 3, p.2.

[6] See <http://ec.europa.eu/information_society/doc/factsheets/tr9-listofmarkets.pdf>

[7] Commission Recommendation, *op cit*., 7 above, Paragraph 18, p.6.

regulation, that is to say, if no operator has SMP."

3.11 A thorough market review will provide both established market players and new entrants with greater certainty as to how the IDA views the competitive dynamics in the telecommunications sector and, therefore, the scope of regulatory intervention which may be applicable across the sector.

3.12 In summary, that the amendments to Section 8 of the Code underscore the impracticality of the IDA continuing to employ the entity-based approach to dominance. Consequently, SingTel proposes that the IDA commence a thorough market-by-market analysis of the telecommunications sector in Singapore to identify those markets where structural competition problems may persist and where some form of *ex ante* regulation may be warranted.

IDA should ensure Exemption Requests are determined as efficiently and quickly as reasonably possible

3.13 As indicated above, the IDA's entity-based approach to dominance is flawed and should be replaced with a market based assessment of dominance at the earliest possible opportunity. However, in the event that it remains in place, the IDA should at least ensure that its decision making process in relation to Exemption Requests is as efficient and streamlined as possible to minimise time periods that SingTel is subject to Dominant Licensee regulation in respect of otherwise competitive markets

3.14 In SingTel's experience, the time taken by the IDA to finalise decisions in relation to Exemption Requests has unfairly prolonged the application of disproportionate regulation on SingTel in respect of otherwise competitive markets. Such delay ultimately harms competition and consumers as it imposes additional compliance costs, ultimately preventing SingTel from competing as vigorously or effectively as it otherwise would.

3.15 For instance, the IDA took over 13 months to make its final decision for SingTel's Exemption Request in respect of International Capacity Services - from the date of SingTel's request in March 2004 to the IDA's decision in April 2005.

3.16 Unfortunately, the IDA's timeframes have not improved over time. For instance, the IDA took well over 18 months to finalise its decision with respect to SingTel's Exemption Request for the Business and Government Customer Segment and Individual Markets – with the IDA accepting SingTel's submission in November 2007 but not making its final decision until June of 2009. This 18 month timeframe does not include the over 7 months of protracted discussions which occurred between the IDA and SingTel from SingTel's first submission in March 2007 to the IDA's acceptance in November 2007. Including this period, this Exemption Request took more than 2 years to complete.[8]

3.17 Given the likelihood that a particular market would already enjoy effective competition at the point of an Exemption Request, SingTel maintains its view that unnecessary delays in the process of determining such a request creates disproportionate regulation in respect of the applicant for the period of that delay.

3.18 While SingTel appreciates the process of conducting market inquiries and determining an Exemption Request is often time-consuming and complex, SingTel submits that the time frames provided under the Code are too long. The timeframes in Section 2.5.2 should be both shorter and mandatory.

3.19 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 a 30 day period. SingTel is considers that the IDA's total decision-making period in respect of Exemption Requests should be reduced from the current (purported) 8 months (as calculated using the timeframes in the Code) to around 4 months.

3.20 Consequently, the IDA should introduce a new paragraph in the Reclassification and Exemption Guidelines that:

(a) provide for the IDA to have regard to the regulatory principle of "avoidance of unnecessary delay" set out in Section 1.5.7 of the Code in its decision making in respect of Exemption Requests;

(b) provides for the IDA to use its best endeavours to finalise its decision in respect of an Exemption Request within SingTel's proposed timeframe (but in any event, certainly

[8] See SingTel's Exemption Request for the Business and Government Customer Segment and Individual Markets, available at <http://www.ida.gov.sg/policies-and-regulations/consultation-papers-and-decisions/completed/SingTels-Exemption-Request-for-the-Business-and-Government-Customer-Segment-and-Individual-Markets>

no later than the timeframes envisaged under the Code); and

(c) provide a stage-by-stage breakdown of the time the IDA will take to consider and finalise its decision in respect of an Exemption Request.

IDA should clarify how it intends to account for the problems associated with the SSNIP test and the 'cellophane fallacy'

3.21 SingTel welcomes the IDA's clarification with regard to its approach to the SSNIP test and the limits of that test due to the effect of the 'cellophane fallacy'.

3.22 However, SingTel is concerned that merely recognising the existence of the 'cellophane fallacy' does not necessarily clarify how the IDA intends to deal with the problems which arise as a result of the identified analytical limitation.

3.23 The limitation on the SSNIP test exposed by the 'cellophane fallacy' is that while the SSNIP test is normally based on the assumption that prevailing prices constitute the appropriate benchmark for competition analysis, this doesn't hold for dominance cases. In dominance cases the appropriate benchmark is competitive pricing which may or may not equate to prevailing prices.

3.24 The important question in these instances, however, is what alternative to a SSNIP test could be employed to solve the issue revealed by the 'cellophane fallacy'.

3.25 While the Directorate-General for Competition at the European Commission does identify some additional tools to assist in checking whether a particular market has been too widely defined, for instance attempting to reconstruct the competitive price, the process involves a great degree of difficulty and a low degree of accuracy.[9]

3.26 As concluded by National Economic Research Associates in a report prepared for the Office of Fair Trading in the UK (our emphasis):[10]

> *"Indeed, neither the OFT guidelines nor any EC communication has described what the alternative to the SSNIP test might be. Any statement to the effect that SSNIP is just one example of how to*

[9] DG Competition discussion paper, *Op cit*., above 3, p.8.

[10] National Economic Research Associates, *A report prepared for the Office of Fair Trading, The role of market definition in monopoly and dominance inquiries*, Economic Discussion Paper 2, 2001, p.19. <http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft342.pdf>

> *define a relevant market without clearly specifying what the alternative to SSNIP might be,* ***clearly runs the risk of a return to a process of market definition by ad hoc reference to product characteristics****. Of course, the SSNIP test does not fully resolve all of the competitive issues raised in a case and may not even fully capture all relevant aspects of demand and supply-side substitution, notably in cases where products are differentiated. Nonetheless, demand and supply side substitution – concepts at the heart of the SSNIP test – will always be key and the SSNIP test provides a useful framework on which to build the remainder of the competitive analysis.* ***In short we do not believe that an alternative sensible methodology to the SSNIP test exists****."*

3.27 In these circumstances, the IDA should specifically identify in its Reclassification and Exemption Guidelines what methods it intends to use in the event that it considers the SSNIP test imperfect, for instance, if it fears prevailing pricing may differ from competitive pricing.

IDA should clarify how it intends to account for the problems identified with market analysis in two-sided markets

3.28 SingTel welcomes the IDA's decision to take into consideration the complexity and dynamics of modern telecommunications markets in its competition assessments, including by incorporating an evaluation of the countervailing power of buyers and whether the market is two-sided.

3.29 In relation to two-sided markets, the IDA has stated:

> *"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".*

3.30 SingTel considers that the above mentioned factors provide a good starting point for analysis, but considers that greater guidance should be provided to industry participants as to how it will undertake assessments in this area. Further clarity about how the IDA will undertake such analysis in the case of fast moving two-sided markets would also

be welcome. This guidance does not need to be definitive or binding on the IDA but a higher level of granularity will be potentially important for upcoming exemptions requests and for the industry generally.

3.31 It is a well-known problem that market analysis involves a level of complexity in markets which display characteristics of two-sided markets. The European Commission identified the issue in 2009 (our emphasis):[11]

> *"Two-sided platforms present certain practical problems. The complexity primarily arises from the presence of two (or more) unique, but interdependent, classes of agents or customers. The analysis needs to account for (1) the responses of two (or more) distinct sets of agents to platform owners (2) platform owners responses to two sets of agents, and (3) the responses of one set of agents to changes in the others' behaviour and vice versa - particularly as demand conditions change on each side.* ***This pattern of cross responses will generally affect each step of standard antitrust analysis, from product market definition, the competitive assessment, entry, efficiencies, etc".***

3.32 An independent expert report to the European Commission also highlighted the areas of concern with regard to market analysis in relation to two-sided markets or platforms (**2SP**):[12]

> *"When applying market definitions to 2SPs one has to be particularly careful to avoid mechanical applications of usual concepts because of the possible intricate relationship between the various sides. When dealing with a 2SP, one has to evaluate if network effects (i.e., links between the two sides) are: (a) present, and (b) limit the extent to which a price increase on either side is profitable. This exercise is tricky as it mixes several things: which price should one increase? Who pays for this increase? What is the*

[11] OECD Directorate for Financial and Enterprise Affairs (2009) Competition Committee Roundtable on Market Definition, Note by the Delegation of the European Union, paragraph 8, p. 4. Available at <http://ec.europa.eu/competition/international/multilateral/2009_jun_twosided.pdf>

[12] Martin Cave, Ulrich Stumpf and Tommaso Valletti (2006) Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to ex ante Regulation: An Independent Report, p. 25. Available at <http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/review_experts/review_regulation.pdf>

starting level for the price increase? Would the firm re-adjust its entire structure of prices when only one price changes?"

3.33 In its 2009 note to the Roundtable on Two-Sided Markets, the European Commission concluded that:

> *"In sum, the implication from the literature is not that two-sided platforms cannot have market power but, rather, that a great deal of caution has to be exercised in inferring such market power from standard indicia of market power".*[13]

3.34 In the background note to the Roundtable on Two-Sided Markets, the OECD noted that:[14]

> *"Applying the standard tools of competition analysis to markets where two-sided platforms operate is a delicate issue, particularly regarding pricing abuses."*

3.35 Given these complexities, the IDA should amend the Reclassification and Exemption Guidelines so as to provide industry participants with greater granularity on how the IDA intends to approach the issue of two-sided markets in its competition analysis.

IDA should take a forward looking, prospective view of telecommunication markets for the purposes of assessing market dynamics

3.36 In SingTel's Exemption Request for the Business and Government Customer Segment and Individual Markets, the IDA had stated that:[15]

> *"To the extent that IDA considers likely future developments, such as competitive entry, it is to assess whether they constrain the Dominant Licensee's current ability to act anti-competitively. IDA anticipates that the Next Gen NBN will bring competition to the "last mile" for government and business customers. Once this happens, IDA will make any appropriate reductions to the level of*

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[13] OECD Market Definition Op Cit., 11, above p,13.

[14] OECD Directorate for Financial and Enterprise Affairs Competition Committee (2009) Two-sided Markets, p, 37. Available at <http://www.oecd.org/daf/competition/44445730.pdf>

[15] SingTel's Exemption Request for the Business and Government Customer Segment and Individual Markets, Paragraph 91, p.41.

regulation. However, the future deployment of the NGN does not constrain SingTel's current ability to exercise market power. Therefore, IDA must retain regulatory requirements necessary to prevent anti-competitive conduct."

3.37 SingTel disagrees with the IDA's approach.

3.38 SingTel considers that the IDA should conduct its market analysis on a forward looking basis, especially given the advent of the Next Gen NBN in Singapore. It is regulatory practice both in Europe and other leading jurisdictions, such as Australia, that market analysis for ex-ante regulation is undertaken on a prospective basis to account for foreseeable and relevant market developments in the market under consideration.

3.39 For example, the European Commission's 2002 guidelines on market analysis stipulates that (our emphasis):[16]

"In carrying out the market analysis under the terms of Article 16 of the framework Directive, NRAs will conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions. NRAs should determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable, ***by taking into account expected or foreseeable market developments over the course of a reasonable period."***

3.40 It is uncontested that Singapore's Next Gen NBN will have a profound impact on the telecommunications sector in Singapore over the foreseeable future.

3.41 As of 30 June 2012, 95% of Singapore's residential and non-residential premises can

[16] European Commission (2002) Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, Paragraph 20. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>

access the Next Gen NBN.[17] At present, there 8 OpCos[18] and 24 RSPs[19] acquiring active services from Nucleus Connect over the Next Gen NBN.

3.42 The IDA itself fully appreciates the Next Gen NBN's transformative effects:[20]

> *"Besides enabling Singapore to exploit new economic opportunities and enhancing the vibrancy of the infocomm sector, the network will also offer effective open access to retail service providers to bring about a more competitive broadband market. This is expected to spark off the creation of a wider range of next generation services for end-users. A competitive and globally recognised infrastructure, coupled with a high level of adoption by the nation, will result in greater productivity gains and enable new possibilities to transform the way we live, learn, work and interact".*

3.43 There is little doubt that over the foreseeable future the Next Gen NBN will have a significant impact on every facet of the infocomm sector, including across traditional telecommunication markets. Since the current Reclassification and Exemption Guidelines were published in September 2005, the total number of broadband connections in Singapore has gone from 605,300 subscribers[21] to over 10.3 million today.[22]

3.44 As a result of these developments and the dynamic nature of the Singapore infocomm landscape, the IDA should take the opportunity in the review of the Reclassification and Exemption Guidelines (but also in the future application of these guidelines) to set out a more forward-looking approach to market analysis that takes into consideration foreseeable and relevant market developments such as the Next Gen NBN in Singapore.

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[17] OpenNet media release available at <http://www.opennet.com.sg/press/opennet-completes-initial-roll-out-of-singapore%E2%80%99s-nationwide-fibre-network/>

[18] IDA, OpenNet's ICO Agreements. Available at < http://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Next-Gen-NBN/OpenNets-ICO-Agreements>

19 IDA, Nucleus Connect's ICO Agreements. Available at < http://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Next-Gen-NBN/Nucleus-Connects-ICO-Agreements>

[20] IDA Next Gen NBN web page, available at <http://www.ida.gov.sg/Infocomm-Landscape/Infrastructure/Wired/What-is-Next-Gen-NBN>

[21] IDA, Statistics on Telecom Services for 2005 (Jul-Dec). Available at <http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures/Telecommunications/Statistics-on-Telecom-Services/Statistics-on-Telecom-Services-for-2005-Jul-Dec>

[22] IDA, Statistics on Telecom Services for 2013 (Jan-Jun). Available at <http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures/Telecommunications/Statistics-on-Telecom-Services/Statistics-on-Telecom-Services-for-2013-Jan-Jun>

IDA should remove the presumption that firm with a market share in excess of 40 per cent has SMP.

3.45 SingTel maintains its view that the IDA should not automatically presume that a firm with a market share in excess of 40 per cent has SMP, as is stated in paragraph 2.4.2(a)(iv) of the current Reclassification and Exemption Guidelines.

3.46 As SingTel has consistently argued, regulators across the world have been operating for a number of years on the basis that the existence of market shares above certain percentage thresholds is merely indicative of the possibility of a dominant position and should not therefore operate to presume dominance in a given market.[23]

3.47 As recently noted by the delegation of the European Union to the OECD's Roundtable on Market Definition in 2012 (our emphasis):[24]

> *"In most cases market definition and market shares give a good first overview of the competitive situation and a proxy of the market power enjoyed by firms. Therefore, it is an important starting point in the assessment.* ***However, this by no means implies that the market definition should be understood as constituting the full assessment of the competition between the companies****. The EU competition analysis in antitrust and merger cases is not limited to market definition and market shares, but is a fact specific process using also other economic tools to complement and refine the analysis where appropriate".*

3.48 In its "Recommended Practices", the International Competition Network's Unilateral Conduct Working Group also provide guidance on the effective use of market shares (our emphasis):[25]

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[23] For examples, see EC decision FI/2004/0082, Access and Call Origination on Public Mobile Telephone Networks in Finland, 5 October 2004; the UK's Office of Fair Trading, Assessment of Market Power, Competition Law Guideline, December 2004, paragraph 2.11; and the European Commission, Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications network and services, 2002/C 165/03, paragraph 78.

[24] OECD, Directorate for Financial and Enterprise Affairs, Competition Committee Roundtable on Market Definition, Note by the Delegation of the European Union, paragraph 2, p.2.

[25] International Competition Network, Unilateral Conduct Working Group, Dominance/Substantial Market Power, Analysis Pursuant to Unilateral Conduct Laws, Recommended Practices, Paragraph 2,Comment 2, p.2.

> *"**The analysis of dominance/substantial market power includes but does not stop with the assessment of market shares**. At a minimum, conditions of entry and expansion (affecting the durability of market power) should also be assessed. Agencies should, where appropriate, also take into account other criteria such as buyer power, economies of scale and scope/network effects, and access to upstream markets/vertical integration".*

3.49 While the IDA has recently contended that it is acting in accordance with international best practice and that the presumption acts only as a "first step" to the analytical approach it uses to assess an Exemption Request,[26] SingTel is concerned that the weight of IDA's decision making falls heavily in favour of an assessment of market shares and that the 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.

3.50 This is aptly demonstrated by the IDA's reasoning expressed in the Final Decision to SingTel's Exemption Request with regard to Business and Government Customer Segment and Individual Markets, where the IDA specifically noted that in cases in which SingTel has a market share in excess of 40 per cent "*the evidence failed to overcome the presumption that SingTel is not subject to effective competition in that market*".[27] As is clear in this statement, in such cases the presumption of SMP holds as a result of the 40 per cent market share, with the burden of proof shifting to other factors to, where possible, surmount and override this presumption. By its very nature, such an approach places far greater weight on the presumption of 40 per cent market share than for other relevant factors in the assessment of SMP.

3.51 Given SingTel's genuine and ongoing concern on this issue, SingTel submits that the IDA should take the opportunity of the review of the Reclassification and Exemption Guidelines to remove the presumption contained in paragraph 2.4.2(a) of the current guidelines 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

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[26] IDA (2009) Explanatory Memorandum Issued by the Info-Communications Development Authority of Singapore Final Decision on the Request by Singapore Telecommunications Limited For Exemption from Dominant Licensee Obligations with Respect to the Business and Government Customer Segment and Individual Markets, 2 June, Paragraph 48(c), p. 24. Available at <http://www.ida.gov.sg/policies-and-regulations/consultation-papers-and-decisions/completed/SingTels-Exemption-Request-for-the-Business-and-Government-Customer-Segment-and-Individual-Markets>

[27] *Ibid*., paragraph 48(f), pp.24-25

processes.

3.52 In the event that the IDA maintains the presumption, the IDA should set out in its Reclassification and Exemption Guidelines how it will ensure other factors are provided with appropriate weight. This is especially important given the nature of the regulatory regime which applies to SingTel as a Dominant Licensee. As recently noted in the International Competition Network's "Recommended Practices":[28]

> *"In jurisdictions in which the presumption shifts the burden of proof to the firm under investigation to provide evidence of why it is not dominant, the agency should remain receptive toward evidence that may overcome the presumption (e.g., that the market operates competitively)".*

IDA should place primary emphasis on price competition in its assessment of whether a Dominant Licensee has SMP in a market.

3.53 As set out above, SingTel is of the view that the IDA places too much emphasis on market shares as a basis for determining whether a Dominant Licensee has SMP. This view is, in part, exacerbated by the IDA's continued reluctance to indicate any weighting for an individual SMP criterion when making a determination with respect to the existence of SMP in a market.

3.54 While the IDA maintains that assigning a precise mathematical weight to each criterion is not possible,[29] SingTel submits that price competition should form the basis of, and be the primary consideration in, determining whether a Dominant Licensee has SMP in a market.

3.55 Market share does not necessarily provide a practical or 'real world' indicator of the state of competition in a market. Evidence of price competition in contrast provides actual evidence of "the market at work".

3.56 Price competition provides consumers with the most immediate and tangible benefit associated with competition, that is, lower prices.

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[28] International Competition Network, Unilateral Conduct Working Group, Dominance/Substantial Market Power, Analysis Pursuant to Unilateral Conduct Laws, Recommended Practices, Paragraph 2,Comment 2, p.2.
[29] IDA Explanatory Memorandum, *Op cit*., above 24, Paragraph 48(e), p.24

3.57 Evidence of price reductions demonstrate the existence of a competitive market, as it would not be possible for a Dominant Licensee to impose a SSNIP in relation to the relevant product or service without the customer switching to a substitute product or service.

3.58 On this basis, SingTel considers that the IDA should take the opportunity of the review of the Reclassification and Exemption Guidelines and amend paragraph 2.4.2 of the guidelines to ensure that price competition (rather than market share) is given primary consideration in determining whether a Dominant Licensee has SMP in a market.

IDA should not use "capacity" as a means of measuring market share.

3.59 In its 2009 Final Decision in relation to the Exemption Request with regard to Business and Government Customer Segment, the IDA maintained its view that "…capacity is a better measure of market share than revenue, given the inclusion of self-use"[30].

3.60 SingTel disagrees with this approach and considers that the IDA should not blindly use "capacity" as a means of measuring market share. Such an approach ignores the purpose for which capacity is used and the price, terms and conditions on which it is provided. If capacity is to be used as a measure, it should be one of several measures that are used, along with revenue and subscriber numbers.

3.61 If market shares based on revenue or subscriber numbers show that a market is competitive, the IDA should not simply ignore these indicia in favour of market share based on capacity, which may show higher levels of concentration due to factors that may not necessarily be relevant to the competitive process.

3.62 For example, the use of capacity may result in artificially high market shares being attributed to a Dominant Licensee where there is excess capacity in a market (e.g. immediately following the "roll out" of additional capacity) or where a significant proportion of that capacity involves self-supply. This is notwithstanding the fact that the additional capacity may result in lower prices to consumers.

3.63 On this basis, SingTel maintains its view that the IDA should amend paragraph 2.4.2(a) of the Reclassification and Exemption Guidelines to ensure that the IDA does not attribute special importance to market shares based on "capacity". Market share based

[30] IDA Explanatory Memorandum, *Op cit*., above 24, Paragraph 72, p.34.

on capacity should be treated comparably with other measures, such as market share based on revenue and subscriber numbers, and should be used carefully in light of the limitations associated with such a measure.

IDA should take full account of regulatory framework when assessing 'access barriers' under the Code.

3.64 SingTel considers that the list of barriers to entry set out in paragraph 2.4.2(b)(i)(2) of the current Reclassification and Exemption Guidelines is generally appropriate.

3.65 However, SingTel submits that the IDA's statements in relation to "access barriers" should take account of the regulatory framework applicable to SingTel and other Dominant Licensees and the impact that these measures have on reducing potential access barriers.

3.66 The fact that SingTel provides IRS and MWS to Requesting Licensees in accordance with the prices, terms and conditions set out in the its Reference Interconnection Offer (**RIO**) should be explicitly taken into account by the IDA as a constraint on SingTel in attaining SMP.

3.67 SingTel considers that the provision of IRS and MWS under the its RIO is sufficient to negate or significantly reduce any barrier to entry that may exist or SMP that SingTel may have as a consequence of its control of a wholesale "input". SingTel believes that this should be explicitly acknowledged in the IDA's commentary on access barriers.

3.68 Consequently, SingTel considers that the IDA should amend paragraph 2.4.2(b)(i)(2) 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 as an IRS or MWS;

(b) the requirement for SingTel to provide IRS and MWS under the SingTel 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
- remove any ability it may have to leverage any SMP it may have at a

wholesale market level into the downstream retail market; and

(c) the IDA must 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.

The IDA should ensure that all parties to an Exemption Request have an obligation to provide verifiable data

3.69 While SingTel supports the IDA's need to consider all submissions it receives that oppose a request for exemption, the IDA should amend the guidelines to set out its expectations of the type of responses it expects from industry participants during the consultation process, including the IDA's requirements in relation to verifiable data. To the extent that an industry participant does not meet these basic requirements, then the IDA should not attribute weight or significance to any submission that opposes a request for exemption.

3.70 While SingTel does not expect other industry participants to always agree with SingTel in relation to exemption requests, parties that choose to oppose an exemption request should still be able to objectively support their views and requests.

3.71 The purpose behind SingTel's comment is to encourage higher levels of quality in the submissions that industry participants make during the public consultation process in relation to exemption requests, which to date have lacked sufficient evidence and do not necessarily adhere to the IDA's guidance in relation to market analysis and competition assessment. Just as SingTel is held to a high standard when it submits an exemption request and is required to justify its request, industry participants should also be held to a corresponding standard when opposing such a request.

3.72 Such an approach with the guidelines would better condition industry participants and entail more objective assessments.

The IDA should grant exemptions in general terms (rather than in relation to specific products or services)

3.73 The IDA should grant exemptions in general terms (rather than in relation to specific types of products or services) so that all future services that are offered by the Dominant Licensee in the exempt market are automatically exempt from Dominant Licensee regulation without the need for notification to and approval by the IDA.

4 GENERAL COMMENTS IN RELATION TO THE TELECOMS COMPETITION GUIDELINES

The IDA should abandon the entity-based approach to dominance testing

4.1 Despite the proposed replacement of all references to Dominant Licensee with Licensees with SMP in Section 8, the IDA in its discussion of the proposed Telecoms Competition Guidelines nonetheless continues to assert that a Licensee classified as a Dominant Licensee under Section 2 of the Code will nevertheless still be presumed to have SMP in every telecommunications market in which it provides telecommunication services pursuant to its licence.

4.2 The presumption that any Dominant Licensee has SMP for the purpose of Section 8.2 of the Code is flawed. It is contrary to the requirements of the Code on the basis the 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. This is due to the fact that the IDA entity-based approach towards designating dominance is not based on, as a starting point, any assessment of SMP. Therefore, if the designation of a licensee as a Dominant Licensee is to be retained, then it is not legally permissible for the IDA to simply assume that the entity has SMP for the purposes of Section 8 of the Code.

4.3 The decision to simply assume that a Dominant Licensee has SMP in respect of an alleged abuse of its position in Section 8.2 of the Code leads to distorted outcomes as compared to other licensees who are first assessed for SMP before there is an assumption of an abuse on grounds of its behaviour and thereafter the review of whether that assumption holds true based on the Telecom Competition Guidelines.

The IDA should have regard to the regulatory principles set out in Section 1.5 of the Code

4.4 SingTel maintains its long-held view that the Telecom Competition Guidelines would benefit from an overarching framework which informs and underpins the IDA's decision making under Sections 8 and 9 of the Code.

4.5 In that regard, when the IDA makes a decision with respect to an allegation of abuse of dominant position or agreement that unreasonably restricts competition in a market, the

IDA should explicitly identify the regulatory principles which it is applying.

4.6 SingTel submits that the regulatory principles set out in Section 1.5 of the Code should explicitly inform and underpin the IDA's decision making with respect to alleged contraventions of Section 8 and 9 of the Code.

4.7 In particular, with regard to its decision making under Sections 8 and 9 of the Code, SingTel considers that the IDA should have specific regard to the following regulatory principles:

(a) reliance on market forces (sub-section 1.5.1);

(b) promotion of effective and sustainable competition (sub-section 1.5.2);

(c) transparent and reasoned decision making (sub-section 1.5.6);

(d) avoidance of unnecessary delay (sub-section 1.5.7); and

(e) non-discrimination (sub-section 1.5.8).

4.8 The need for such a framework is made clear by the example of continued delays in the decision making for Exemption Requests. As set out above, it is particularly important that unnecessary delay is avoided in circumstances where a Dominant Licensee is operating on the incorrect assumption that it has SMP in a particular market. In this regard, the IDA should be compelled to conduct its decision making in accordance with the regulatory principles above and the Telecom Competition Guidelines should be clear on its obligation to do so.

4.9 On this basis, SingTel believes that the IDA should take the opportunity of the review of the Telecom Competition Guidelines to insert a new paragraph which specifically acknowledges these regulatory principles as forming the basis for the IDA's analytical approach for decision making. This recognition should:

(a) explicitly acknowledge and repeat the regulatory principles set out in sub-section 1.5 of the Code;

(b) ensure that the regulatory principles will inform and underpin the IDA's analytical approach and decision making with respect to alleged contraventions of Sections 8 and 9 of the Code; and

(c) require the IDA to identify the specific regulatory principle that it is applying in its decisions with respect to an alleged contravention of Section 8 or 9 of the Code.

Public consultations should be deferred in cases where a Licensee has provided credible evidence that it does not possess SMP in a market which is the subject of an allegation of an abuse of its dominant position

4.10 Under paragraph 3.2(h) of the Telecom Competition Guidelines, the IDA may, after it initiates enforcement proceedings, dismiss the enforcement proceedings if the Licensee conclusively demonstrates it does not have SMP, seek additional information or conduct a public consultation.

4.11 While public consultation has an important role to play in any enforcement action, SingTel considers that the more clarity is needed in the Telecom Competition Guidelines around the circumstances in which public consultation may be used.

4.12 For example, the IDA may wish to clarify that:

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

(b) public consultation would not be undertaken where the Licensee has provided the IDA with conclusive evidence that it does not have SMP in that market, or the IDA otherwise decides that a credible case does not exist.

4.13 Put another way, the IDA should first assess the evidence appropriately and then make a determination as to whether a prima face case exists to be answered. If it was determined that a prima facie case did exist, then the IDA should then, and only then, call a public consultation to address any "complex and novel" issues that may have arisen in relation to that contravention.

4.14 SingTel submits that Section 3.2(h) of the Telecom Competition Guidelines should be amended so as per SingTel's recommendations above.

The IDA should not allege or suggest that pricing approved under a tariff could constitute an abuse of dominant position.

4.15 Under paragraph 3.2.1 of the current Telecom Competition Guidelines, the IDA comments that "even if IDA has allowed a tariff to go into effect, IDA may subsequently determine that the Dominant Licensee has priced its services in a manner that constitutes an abuse of its dominant position."[31]

4.16 SingTel remains perplexed as to how, under circumstances where the IDA has approved a tariff submitted by a Dominant Licensee under Section 4.4.3 of the Code, the IDA could subsequently determine that such a tariff adopts pricing at a level that constitutes an abuse of dominant position under Section 8.2 of the Code. If the IDA approves a tariff having proper regard to the review criteria in Section 4.4.3 of the Code, it cannot reasonably allege or suggest that such pricing constitutes an abuse of dominant position.

4.17 The possibility that the IDA may contradict an *ex ante* decision in the application of *ex post* regulation creates significant regulatory uncertainty for a Dominant Licensee.

4.18 On this basis, SingTel considers that the IDA should take the opportunity afforded by the review of the Telecom Competition Guidelines to make it clear that the IDA will not allege or take action against a Dominant Licensee for an abuse of dominant position in respect of tariffs that have been approved by the IDA under sub-section 4.4.3.1 of the Code.

The IDA should use multiple cost measures when determining claims of predatory pricing

4.19 SingTel remains concerned by the IDA's use of a single cost measure (i.e. average incremental cost) in paragraph 3.2.1.1(d) of the current Telecom Competition Guidelines for the purposes of determining whether a Dominant Licensee is likely to drive efficient competitors out of a market or deter future entry for the purposes of satisfying sub-section 8.2.1.1(b) of the Code.

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[31] IDA (2005) 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 of Practice for Competition in the Provision of Telecommunication Services 2005, Paragraph 3.2.1, p.8.

4.20 The fact that a firm may be pricing a product or service below a particular measure of cost would not, in itself, necessarily provide a conclusive basis for finding that the firm will drive efficient competitors from the relevant market or be said to be engaging in predatory pricing. As has been held 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.

4.21 SingTel considers that the IDA should amend paragraph 3.2.1.1 of the Telecom Competition Guidelines to recognise that while the test of "average incremental cost" is the relevant test of whether a Dominant Licensee is selling its service below cost for the purposes of sub-section 8.2.1.1(a) of the Code, in determining whether pricing conduct is likely to drive efficient competitors from a market or discourage future market entry under sub-section 8.2.1.1(b) of the Code and paragraph 3.2.1.1(d) of the Telecom Competition Guidelines, the IDA will 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.

Only factors that genuinely constitute a barrier to entry are considered by the IDA in its determination of whether recoupment is possible

4.22 The issue of whether a Dominant Licensee can recoup its losses once it has successfully driven efficient competitors out of the market and prevented re-entry will ultimately depend on the existence of barriers to entry in the relevant market. Therefore, only factors that genuinely constitute a barrier to entry should be considered by the IDA in its determination of whether recoupment is possible. SingTel is concerned that certain factors identified by the IDA as constituting barriers to entry in paragraph 3.2.1.1(e) of the Guidelines cannot reasonably be considered to be such barriers, including advertising costs and retail distribution costs.

4.23 In respect of allegations of predatory network alteration:

(a) the 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 itself in effecting the alteration exceeded the costs imposed on a Licensee (or Licensees); and

(b) 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 alternation should not constitute an abuse of dominant position. The costs incurred by an individual Licensee may be an unintended consequence of network alteration and could not reasonably be said to result in damage to "competition" in the relevant market.

The IDA should further clarify its approach to the assessment of price squeeze in 3.2.1.2 and 3.3.3

4.24 For the purposes of assessing price squeeze, the IDA has stated that it will either assess whether there has been a price squeeze by looking at the costs structure of the entity that is alleged to have engaged in in the price squeeze, or the cost structure of an equally efficient non-affiliated competitor.

4.25 However, SingTel wishes to clarify that while the equally efficient competitor test is the correct one that should be applied by the IDA, it is contrary to international best practice for this test to be applied by reference to the cost structure of a non-affiliated operator.

4.26 The 'equally efficient operator' test provides that a price squeeze exists if the downstream arm of a vertically integrated player that is dominant in supply of an upstream input could not trade profitably on the basis of the price of the upstream input. Properly applied, the test does not consider the cost structure of a non-affiliated entity.

4.27 For example, the European Commission's guidance note on margin squeeze highlights the importance of ensuring that an undertaking is not required to assess or determine a competing undertaking's cost structure to assess the lawfulness of its own activities (our emphasis):[32]

[32] European Commission (2009) Margin Squeeze Guidelines, *Op cit*., above 4.

> *"The CFI in Deutsche Telekom established that it follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is to be* ***determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors****. This is because any other approach could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure – information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the lawfulness of its own activities.*[33]

4.28 This approach of assessing the price squeeze against the dominant entity's own cost structure has been applied in virtually all instances under Article 82 of the EC Treaty and equivalent national laws in EU countries.

4.29 The table below provides a high level summary of the reasoning applied in various decisions that are relevant to the telecoms sector:

Authority	Test	Manner of application of EEO
European Commission, "Pricing Issues in Relation to Unbundled Access to the Local Loop"	EEO	"Provided retails services are strictly comparable, a price squeeze occurs where the incumbent's price of access combined with its downstream costs are higher than its corresponding retail price."
European Court of Justice, *Deutsche Telekom vs European Commission*	EEO	A margin squeeze would occur where competing services were comparable and "the spread between DT's retail and wholesale prices is either negative or at least insufficient to cover DT's downstream costs."

[33] *Ibid*.

Authority	Test	Manner of application of EEO
Ofcom, "Investigation by the Director-General of Telecommunications into alleged anticompetitive practices by BT's in relation BT Openworld's consumer broadband products"	EEO	"In considering whether an undertaking is engaging in price squeezing in breach of the *Competition Act*…consider whether the dominant undertaking would be profitable in the relevant downstream market if it had to pay the same input prices as its competitors."
Ofcom, "Suspected margin squeeze by Vodafone, O2, Orange and T-Mobile"	EEO	"In considering whether there is margin squeeze, Ofcom has analysed whether on the basis of the mobile operator's own retail costs, the mobile operators would be profitable in the downstream market if they had to pay the same upstream input price as they charge to third-party operators in that market.
BSkyB Case (UK Office of Fair Trading)	EEO	"the correct test…should determine whether an undertaking as efficient in distributing as BSkyB can earn a normal profit when paying the wholesale prices charged by BSkyB to its distributors, and that this should be tested by reference to BSkyB's own costs of transformation."

4.30 On this basis, SingTel strongly submits that paragraph 3.2.1.2(e)(ii) of the Telecom Competition Guidelines should be deleted, as 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.

4.31 Further:

(a) the 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;

(b) if the IDA is to retain the ability to measure a price squeeze against the cost structure of a non-affiliated equally efficient competitor, the use of the phrase "commercially

reasonable profit" as set out in paragraph 3.2.1.2(d)(ii) needs to be clarified. It is highly ambiguous and makes it difficult for SingTel to interpret how, in practice, the IDA will approach the issue of input pricing for downstream competitors; and

(c) the IDA's test for price squeeze may be inappropriate where the service that is subject to the alleged price squeeze is offered as part of a 'bundle'. The IDA should address the bundling scenario in its guidance of price squeezes. It 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.

IDA should clarify the operation of the prohibition against predatory network alterations

4.32 SingTel remains concerned with the IDA's commentary in relation to what it describes as "predatory network alteration" in paragraph 3.2.2.2 of the proposed Telecom Competition Guidelines.

4.33 In particular, SingTel is concerned with paragraph 3.2.2.2(b) of the guidelines which states that it will find that a Dominant Licensee has abused its dominant position if the evidence demonstrates that the Dominant Licensee:

(a) has altered the physical or logical interfaces of its network in a manner that imposes significant costs on any interconnected Licensee; and

(b) has no legitimate business, operational or technical justification for doing so.

4.34 The issue of whether network alteration imposes "significant costs on any interconnected Licensee" is not a sufficient criteria, as it does not require the IDA to consider the costs incurred by a Dominant Licensee in effecting the relevant network alteration.

4.35 A Dominant Licensee would not obtain any benefit from such conduct if its costs exceeded the costs imposed on a Licensee (or Licensees) as a consequence of the network alteration. The IDA should amend the Telecom Competition Guidelines to make it clear that it is unlikely to consider that a Dominant Licensee has engaged in "predatory network alteration" where the costs associated with effecting an alteration exceed the costs such an alteration would impose on a Licensee (or Licensees) interconnected at the relevant point of interconnection.

4.36 The IDA's comments in paragraph 3.2.2.2(c) of the Telecom Competition Guidelines are also insufficient. The IDA should also recognise that, notwithstanding the potential imposition of specific costs on an individual Licensee, the efficiencies gained by network alteration may not just accrue to SingTel and its own end-users, but may also accrue to other Licensees and their end-users.

4.37 SingTel submits that where the network alteration results in benefits to the Dominant Licensee, other Licensees and end-users (i.e. competition generally) but results in the imposition of costs upon an individual Licensee, such an alternation should not constitute an abuse of dominant position. In such a case, the costs incurred by that individual Licensee may be an unintended consequence of network alteration. Such an outcome could not reasonably be said to result in damage to "competition" in the relevant market, as it would result in efficiencies to all other Licensees and their end-users. SingTel considers that network alteration in such an instance would be technically and operationally justified.

Paragraph 3.2.3 of the Telecom Competition Guidelines should make clear the difference between conduct that is anti-competitive and that which is pro-competitive

4.38 SingTel is concerned that paragraph 3.2.3 of the Telecom Competition Guidelines do not provide sufficient clarity as to what would need to be shown to establish that action by a Licensee with SMP in a telecommunications market would result in a situation "that unreasonably restricts, or is likely to unreasonably restrict, competition".

4.39 Paragraph 3.2.3 of the guidelines sets out a number of actions which the IDA will consider as being conduct which raises competition concerns. These include, refusal to supply, anti-competitive discounts and tying.

4.40 SingTel is concerned that, while the types of conduct identified in the guidelines may comprise anti-competitive conduct, they may equally represent justifiable and pro-competitive conduct in certain circumstances. For instance, discounting is typically undertaken on a temporary basis by telecoms operators to encourage customer loyalty or reward customer commitment and this is usually pro-competitive.

4.41 In these circumstances, discounting conduct may, in fact, evince a properly functioning competitive environment, where rewards and discounts are used by operators as a legitimate part of the competitive process. The subtle differences between anti-competitive and pro-competitive actions, particularly with regard to discounting, are

not sufficiently dealt with in the IDA's guidelines.

4.42 It is also often the case that tying and bundled discounts are often pro-competitive, providing cost efficiencies, the opening up of markets to more consumers and quicker dissemination of technology.[34]

4.43 The tension between the competitive effects of discounting and tying is well known in the European context. The UK's Office of Fair Trading points out that:[35]

> *"The balancing of the pro- and anti-competitive effects is not an easy task as tying and bundling practices may be ambiguous, potentially having both benefits for customers and an adverse effect on competition".*

4.44 The primary competitive concerns with regard to tying or bundled discounting are seen to be related to:[36]

- the maintenance of SMP or dominance;
- the distortion or harm to competition;
- the exploitation of consumers;
- the exclusion of competitors; and
- price discrimination.

4.45 Prior to an abuse case being made out in relation to discounting, some jurisdictions require that a dominant firm first be found to have had the intention to distort competition by its conduct. For instance, in Canada, tying will only be considered anti-competitive by the Competition Bureau if it is demonstrated that the firm's purpose "is an intended negative effect on a competitor that is exclusionary, disciplinary or predatory."[37]

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[34] See discussion in International Competition Network (2009) Report on Tying and Bundled Discounting Prepared by The Unilateral Conduct Working Group, section 6, p.23. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf>

[35] As quoted in ICN Report on Tying and Bundled Discounting, *Op Cit*. Above. 38, section 6, p.16.

[36] *Ibid*., section 2, p.10. <http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf>

[37] This analysis applies exclusively in the context of assessing conduct under s. 79 of the Competition Act, the Abuse of Dominance provision. See discussion in *Ibid*., section 6, p.16.

4.46 In summary, SingTel is concerned 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 the IDA intends to deal with the tension between the pro- and anti-competitive effects of such actions.

4.47 SingTel submits that the Telecom Competition Guidelines should be amended to provide industry participants more detailed guidance on these issues.

The IDA's approach to assessing the existence of a "tacit agreement" in paragraph 4.2 (e) (iv) of the Telecom Competition Guidelines

4.48 The IDA's commentary on agreements that unreasonably restrict competition has not provided any guidance on the elements that must exist or threshold issues that must be satisfied for the IDA to establish the existence of a "tacit agreement".

The IDA should exercise flexibility in reviewing practices in relation to possible price fixing / output restrictions in paragraph 4.3.1.1 of the Telecom Competition Guidelines

4.49 The 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 / 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. By a strict reading of paragraph 4.3.1.1 (c), these practices would have to cease.

The IDA should ensure that the proposed leniency programme is well understood and reflects international best practice

4.50 SingTel is supportive of the introduction of a leniency programme to apply to telecoms industry participants under the Code.

4.51 However, SingTel is concerned to ensure that the leniency programme is well developed, sufficiently robust and capable of providing significant guidance to industry participants about how the process will work, including in relation to how the immunity will operate in relation to a cartel. In particular, the regime could benefit from a separate and more detailed exposition of the programme, for instance, in a separate, programme-specific guideline and information campaign.

4.52 Leniency programs are employed in a number of jurisdictions and typically apply on an economy-wide basis. The rationale for leniency programs is ostensibly to enable easier detection of cartel conduct in an environment where such conduct is difficult to detect. The types of cartels which leniency programs are intended to detect typically involve conduct which is both hidden and maintainable in the long run.[38]

4.53 While there is a question as to whether the telecommunications market is sufficiently complex or large enough to enable an effective cartel to operate over the long term, SingTel acknowledges that a sector-specific leniency program may nevertheless benefit the sector. Although the CCS has initiated a leniency regime which applies across the other parts of the Singapore economy, regulated telecoms operators are specifically excluded from its scope due to the operation of the exemptions under the third schedule of the Competition Act.

4.54 SingTel notes the CCS regime operates to grant total immunity from financial penalties if all of the following 2 conditions are satisfied:[39]

- The undertaking is the first to provide the CCS with evidence of the cartel activity before an investigation has commenced, provided that the CCS does not already have sufficient information to establish the existence of the alleged cartel activity;

- The undertaking:

    - provides the CCS with all the information, documents and evidence available to it regarding the cartel activity;

    - maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by the CCS arising as a result of the investigation;

    - refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCS (except as may be directed by the CCS);

    - must not have been the one to initiate the cartel; and

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[39] Competition Commission of Singapore, *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases*, 2009, p.4. <http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/GuidelineLenienceProgramme220109final.pdf >

- must not have taken any steps must not have taken any steps to coerce another undertaking to take part in the cartel activity.

4.55 The key features of leniency regimes in other jurisdictions as compared to the IDA's proposed Leniency Programme are set out in the table below:

IDA's proposed regime	Australia[40]	EU[41]
100% immunity for financial penalties	Partial or full immunity depending upon substance of information	100% immunity for financial penalties
First company to inform regulator of undetected cartel before an investigation has commenced and provided that IDA does not have enough information to establish existence of cartel	Company comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings	First company to inform Commission of undetected cartel If Commission already had information in relation to cartel, the evidence must prove the cartel

[40] ACCC, *ACCC Immunity Policy for Cartel Conduct*, July 2009. <http://transition.accc.gov.au/content/item.phtml?itemId=879795&nodeId=f66a352b170982e5308039195ba68521&fn=Immunity%20policy%20for%20cartel%20conduct.pdf>

[41] European Commission, *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, 2006. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>

IDA's proposed regime	Australia[40]	EU[41]
In all cases, company must provide the IDA all evidence in its possession and must provide a sufficient basis for taking the investigation further or add "significant value". Company must provide continuous and complete cooperation.	Company provides the Commission with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the Commission's investigation and any ensuing litigation	Full cooperation with the Commission throughout the procedure, including the provision of all evidence in its possession
Company must refrain from further participation in the cartel activity.	Upon discovery of the breach, company takes prompt and effective action to terminate its part in the activity	Must end the infringement immediately
Company must not be the one to initiate the cartel or taken steps to coerce another Licensee to take part in the cartel activity.	Company has not compelled or induced any other corporation to take part in the anticompetitive agreement and was not a ringleader or originator of the activity	The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel.

IDA's proposed regime	Australia[40]	EU[41]
If company is not the first to come forward but provides evidence before the IDA makes its decision, then the company can receive a reduction of up to 50% of the applicable financial penalty.	The ACCC's discretion as to the quantum of reduction in financial penalty	Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" (i.e. reinforces Commission's ability to prove the infringement). The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.
Marker will be given on application where all evidence is not immediately available to the company. A marker protects the company's place in the queue for a limited period so that it can perfect the evidence	A corporation may request the placement of a marker. If a marker is placed, it will have the effect of preserving for a limited period the marker recipient's status as the first person to apply for immunity in respect of the cartel.	Discretionary marker is granted which means an immunity application can be accepted on the basis of only limited information. The applicant is then granted time to perfect the information and evidence to qualify for immunity.

4.56 As the table above shows, the high level guidance in relation to the IDA's Leniency Programme closely mirrors the European Commission's regime and includes similar key factors to the Australian approach.

4.57 In summary, SingTel supports the IDA's Leniency Programme as set out in its Telecoms Competition Guidelines. Nonetheless, given the importance and potential impact of such a regime, SingTel is concerned to ensure that the IDA provides industry with the appropriate information in relation to the regime, including a separate leniency guideline and an industry-wide information campaign.

5 CONCLUSION

5.1 We submit our views and recommendations above for the IDA's consideration.