CONSULTATION ON 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

Submission by StarHub Ltd to the
Info-communications Development Authority of Singapore

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1. SUMMARY OF MAJOR POINTS:

1.1 StarHub Ltd ("**StarHub**") thanks the Info-communications Development Authority (the "**Authority**") of Singapore for providing parties with the opportunity to comment on its proposed amendments to:

(1) the Advisory Guidelines Governing Petitions for Reclassification and Requests for Exemption (the "**Reclassification and Exemption Guidelines**"); and

(2) the Advisory Guidelines Governing Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition (the "**Telecom Competition Guidelines**").

1.2 We have carefully reviewed, and are in agreement with most of the revised Guidelines. However, we believe that the Authority should take this opportunity to provide more clarity on the processes that it would adopt for cross-jurisdictional competition cases, involving multiple regulatory agencies. In particular, given the increasing trend of convergence between the infocomm (i.e., IT and telecoms) and media sectors, it is important for the Authority to provide clarity on how it will handle cross-jurisdiction cases involving itself, the Media Development Authority of Singapore ("**MDA**"), and the Competition Commission of Singapore ("**CCS**").

1.3 We also note the recent revisions to the Telecommunications Act (the "**Act**"), which allow the Authority to impose significantly higher financial penalties for any contraventions of its regulatory frameworks. Given the sharp increase in financial penalties applicable (especially for larger licensees), we believe that it is important for the Authority to provide licensees with greater clarity on how it intends to calculate financial penalties going forward.

1.4 Our specific comments on the individual sections of the Guidelines are set out in the following sections of this submission.

2. STATEMENT OF INTEREST:

2.1 StarHub is a Facilities Based Operator ("**FBO**") in Singapore, having been awarded a licence to provide Public Basic Telecommunication Services ("**PBTS**") by the Telecommunications Authority of Singapore ("**TAS**") (the predecessor to the Authority) on 5 May 1998.

2.2 StarHub Mobile Pte Ltd is a wholly-owned subsidiary of StarHub. StarHub Mobile Pte Ltd was issued a licence to provide Public Cellular Mobile Telephone Services ("**PCMTS**") by the TAS on 5 May 1998. Our commercial PBTS and PCMTS services were launched on 1 April 2000.

2.3 StarHub acquired CyberWay Pte Ltd (now StarHub Internet Pte Ltd) for the provision of Public Internet Access Services in Singapore on 21 January 1999.

2.4 In July 2002, Singapore Cable Vision Limited (now StarHub Cable Vision Ltd) merged with StarHub, and become a wholly-owned subsidiary of StarHub. StarHub Cable Vision Ltd holds an FBO licence and offers cable TV and broadband services.

2.5 StarHub Online Pte Ltd is a wholly-owned subsidiary of StarHub. StarHub Online Pte Ltd was issued a licence to provide Public Internet Access Services in Singapore on 22 February 2005.

2.6 Nucleus Connect Pte Ltd, a wholly-owned subsidiary of StarHub Ltd, incorporated on 14 April 2009, is the appointed Operating Company of the Next Generation Nationwide Broadband Network.

2.7 This submission represents the views of the StarHub group of companies, namely StarHub Ltd, StarHub Mobile Pte Ltd, StarHub Internet Pte Ltd, StarHub Online Pte Ltd and StarHub Cable Vision Ltd.

3. COMMENTS ON THE RECLASSIFICATION AND EXEMPTION GUIDELINES

3.1 Section 2.4.1(e): Effect of bundling on market definition

3.1.1 In its proposed revisions to this section of the Reclassification and Exemption Guidelines, the Authority has stated that "[i]*n assessing market definition involving bundling of services and/or product offerings*", the Authority will "*consider whether a hypothetical monopolist supplying a bundled offering will be constrained from introducing a small but significant non-transitory price increase by the threat that Customers will switch to buying the individual components separately and/or alternative bundles offered by its competitors*".

3.1.2 We agree that bundling can have an impact on market definition. However, the Authority should exercise caution when reviewing bundled offerings, to take care not to define a market too broadly.

3.1.3 Taking the case of a hypothetical monopolist of a bundle (A+B), who is unable to profitably increase its price because of substitution to the individual components (i.e., A or B). Such a situation does not always imply that the bundle and *both* the individual components are within the same market.

3.1.4 It is also important to analyse whether the bundle and *each* individual component constitute a market. It is possible that a hypothetical monopolist of a market containing the bundle (A+B) and A alone, would not be constrained from increasing its prices. This would be the case if products A and B are not substitutes, and customers who wish to buy product A have no choice but to buy from the hypothetical monopolist.[1] If the Authority were to then add product B into this market, it would unnecessarily widen the market, and compromise any tests for significant market power ("**SMP**").

3.1.5 Hence, we would urge the Authority to further clarify that, while considering bundles as part of its market definition exercises, it will also conduct the necessary analysis of the bundles and the individual components, to accurately define the product markets.

3.2 Section 2.5: Other Considerations

3.2.1 In deciding whether or not to grant a request for exemption from Dominant Licensee obligations, the Authority has stated that it "*will also consider whether granting the exemption will have any pro-competitive benefits, such*

[1] The Authority may wish to refer to Section 2.3 of http://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf, which sets out a report for the European Commission, DG Competition.

as allowing the Dominant Licensee to introduce new services or respond more quickly to changing market conditions".

3.2.2 While we agree that the Authority should analyse any pro-competitive benefits of an exemption request, we believe that these should be balanced against any potential anti-competitive effects or harm to customers that could be generated. Hence, we urge the Authority to add balance to this section, by stating that, in considering any pro-competitive benefits, it would also assess whether such benefits could outweigh any potential anti-competitive effects or harm that would arise from the grant of an exemption request.

3.3 Section 4.1(a)(ii): Rejection of exemption request

3.3.1 We note the Authority's stance that it will "*summarily reject*" a request for exemption or petition for reclassification if it "*plainly lacks merit*".

3.3.2 As a summary rejection would represent a serious blow to the applying licensee, we would appreciate the Authority's clarification on the circumstances under which it would deem a request/petition "*plainly lacks merit*". We believe that one possible scenario could be where the Dominant Licensee has already submitted a prior exemption request, which had been rejected, and fails to prove that any relevant changes to market conditions have taken place since its previous request.

4. COMMENTS ON THE TELECOM COMPETITION GUIDELINES

4.1 Cross-jurisdictional competition issues

4.1.1 As we have highlighted earlier, there is an increasing trend of convergence between the infocomm and media sectors. As noted by the Minister of Communications and Information: "[c]*onvergence will extend beyond just media platforms as infocomm technologies increasingly become more deeply embedded with media*". Minister also announced the setup of a "*Joint Infocomm & Media Masterplan*" which would, amongst others, allow the Ministry to "*streamline our ICM* [i.e., infocomm and media] *policy frameworks*".[2]

4.1.2 In this regard, we would note that there could be at least three competition agencies involved in competition issues relating to the infocomm and media sectors. Specifically, the Authority is in-charge of the telecoms sector, the MDA is in-charge of the media sector and the CCS is in-charge of other ancillary services which are not defined as either telecoms or media.

4.1.3 It is therefore important for the Authority to provide clarity on how cross-jurisdictional competition cases will be handled by the various competition agencies. In particular, we would appreciate the Authority's clarifications on:

(1) How parties can make complaints about cross-jurisdictional competition cases. I.e., whether such parties can submit their complaints to a single co-ordinating agency, or whether multiple applications should be made to multiple agencies. This clarification would be particularly important for smaller companies, who may lack the resources to customise their applications to the individual requirements of various competition agencies;

(2) Which frameworks will be applicable (as there is currently no standardised timelines/procedures for how the different competition agencies deal with competition issues); and

(3) How information is to be gathered, i.e., whether the companies involved can expect to receive a single request for information from a co-ordinating agency, or multiple requests for similar information from each of the agencies involved. We note that having a single request for information would significantly reduce the burden imposed on companies subject to a competition investigation.

[2] Quoted from the response by the Minister at the Committee of Supply Debate on the Ministry's budget on 8 March 2013.

4.1.4 We believe that more clarity on how cross-jurisdictional cases will be handled will provide greater certainty, and reduce the administrative burden imposed on parties to any competition investigation.

4.2 Thresholds for determining anti-competitive behaviour

4.2.1 We would also seek the Authority's clarification on the differences, if any, between the various thresholds for anti-competitive behaviour adopted by the Authority, MDA and CCS. Today:

(1) The Authority prohibits: (1) a licensee with SMP from using its dominant position in a manner that: "*unreasonably restricts, or is likely to unreasonably restrict, competition*"[3]; and (2) licensees entering into an agreement with another licensee or any non-licensed entity that "*has the effect of unreasonably restricting competition*"[4];

(2) The MDA prohibits any abuse of Dominant Position, or any agreement, that has the "***object*** *or effect of preventing, restricting or distorting competition*"[5]; and

(3) The CCS prohibits: (1) agreements, etc., which have as their "***object*** *or effect the prevention, restriction or distortion of competition*"[6]; and (2) any conduct on the part of one or more undertakings "*which amounts to the abuse of a dominant position*"[7],

(emphasis added).

4.2.2 Based on our understanding of the different thresholds, it appears that both the MDA and the CCS prohibit behaviour which has the "*object*" of preventing, restricting or distorting competition. However, the Authority does not appear to consider the "*object*" of a particular behaviour. Indeed, based on Section 2.5(d) of the Telecom Competition Guidelines, the Authority has stated that it "*generally will focus on the actual or likely competitive effects of a Licensee's actions, rather than the Licensee's subjective intent (i.e., what the Licensee hoped to accomplish)*".

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[3] Reference Section 8.2 of the Telecom Competition Code (the "**Code**").

[4] Reference Section 9.1.2 of the Code.

[5] Reference Sections 6.4.1 and 7.1 of the MDA's Media Market Conduct Code.

[6] Reference Section 34(1) of the Competition Act.

[7] Reference Section 47(1) of the Competition Act.

4.2.3 Hence, we would like to seek the Authority's clarification on this matter, as well as any other potential differences between the competition regimes in the telecoms, media and ancillary markets. We note that it would be incongruous if a particular sort of behaviour would be considered anti-competitive in one market, while being permitted in another (related) market.

4.3 Applicable financial penalties

4.3.1 The Authority's licensees are required to comply with a wide range of regulatory obligations, ranging from operational requirements (e.g., regular reporting of information) to prohibitions against conduct which could have a significant impact on customers (e.g., rules against anti-competitive behaviour and abuse of dominance). The Authority has provided a finer level of detail on the applicable financial penalties for only a subset of its frameworks (e.g., the Authority's Quality of Service ("**QoS**") standards).[8] For other frameworks, it would appear that any contraventions could result in a licensee facing the full amount of penalties specified under Section 8(1) of the Act.

4.3.2 While, in most cases, the Authority does highlight the aggravating and mitigating factors it took into consideration when determining the severity of the contravention, the Authority does not specifically explain how it derives the final financial penalty quantum. This is in contrast to the CCS, which provides detailed explanations on how it derives its financial penalties, as well as calculates its penalties to the individual dollars and cents.[9]

4.3.3 As Section 8(1) of the Act has recently been revised to allow the Authority to impose financial penalties of up to "*10% of the annual turnover*" of a licensee[10], licensees are now potentially subject to a significantly higher penalty. In particular, larger licensees are looking at potential financial penalties in the range of tens or hundreds of millions of dollars.

4.3.4 We therefore believe that it is important for the Authority to provide further clarity on how it intends to calculate financial penalties for the various frameworks that it has in place. Such clarifications would include:

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[8] E.g., under the QoS standards for 3G Public Cellular Mobile Telephone Service, licensees may be subject to a financial penalty of up to $50,000 for each instance of non-compliance.

[9] Reference various Infringement Decisions by CCS, e.g., Chapter 4 of the CCS' Notice of Infringement Decision: Bid Rigging by Motor Vehicles Traders at Public Auctions of Motor Vehicles: http://www.ccs.gov.sg/content/dam/ccs/PDFs/Public_register_and_consultation/Public_register/Anticompetitive_Agreements/Motor%20Vehicle%20Traders_%20ID%20Final_Public%20Non-confi(28%20Mar%2013).pdf.

[10] Reference Secton 8(1)(ii)(A) of the Act.

(1) Under what circumstances and, under which of its regulatory frameworks, would the Authority consider imposing a penalty based on a percentage of a licensee's annual turnover? For example, we submit that financial penalties, based on a percentage of a licensee's annual turnover, should not be imposed for contraventions where there is an insignificant impact on customers (e.g., a failure to provide information within the deadlines imposed by the Authority);

(2) For cases where a financial penalty based on a percentage of a licensee's annual turnover is imposed by the Authority, what would be the benchmark percentages applicable for different contraventions, and how would the Authority adjust the percentages to take into consideration various aggravating and mitigating factors; and

(3) How would the Authority calculate the time period over which the 10% turnover should be calculated? E.g., if the contravention occurs over a period of more than 1-year, will the penalty be based on a licensee's turnover for multiple years? Conversely, if the contravention occurs for a short period only, is the penalty still calculated based on the annual turnover value?

4.3.5 As the Authority is now consulting on the Telecom Competition Guidelines, we would greatly appreciate if it could consider providing more information on how it intends to impose financial penalties for anti-competitive behaviour under Sections 8 and 9 of the Code.

4.4 Linkage between Section 4 and Section 8 of the Code

4.4.1 Section 4 of the Code implements *ex ante* restrictions on Dominant Licensees, while Section 8 allows IDA to take *ex post* enforcement against any abuse of SMP. However, we note that there appears to be strong linkages between the two sections of the Code. E.g.:

(1) Section 4.2.1.1 requires Dominant Licensees to "Provide Service at Just and Reasonable Prices, Terms and Conditions", while Section 8.2.1 prohibits "Pricing Abuses";

(2) Section 4.2.1.2 requires Dominant Licensees to "Provide Service on a Non-discriminatory Basis", while Section 8.2.2.1 prohibits "Discrimination"; and

(3) Section 4.2.2.1 requires Dominant Licensees to "Provide Service on Reasonable Request", while IDA has stated that "Refusal to Supply" could be a Section 8 breach.[11]

4.4.2 In certain cases, it appears that Section 4 relates to a Dominant Licensee's duties to "End Users", while Section 8 relates to how a Licensee with SMP interacts with other licensees. However, this distinction does not appear to apply consistently throughout. We therefore request the Authority's clarifications on the circumstances under which either Section 4 or Section 8 would be applicable. E.g., if a Dominant Licensee discriminates in favour of its affiliate, will it be subject to enforcement for one or both Sections 4 and 8 of the Code?

4.5 Section 3.2.1.1(a) – Predatory Pricing

4.5.1 The Authority has stated that "*a Licensee with Significant Market Power must not sell its services or equipment below its cost for **a sustained period** in order to drive efficient rivals from the market*" (emphasis added).

4.5.2 The use of the term "*a sustained period*" appears to suggest that selling services below costs for "*a limited period*", but long enough to drive efficient rivals from the market, is acceptable. We believe that this should not be the case. We would also note that the term "*a sustained period*" is ambiguous, undefined and not otherwise used in the Code.

4.5.3 Hence, we suggest that the Authority remove the reference to "*a sustained period*", and simply prohibit any below-cost pricing that drives efficient rivals from the market (regardless of the time period over which the below-cost pricing took place).

4.6 Section 3.2.1.2 – Price Squeezes

4.6.1 Under Section 8.2.1.2 of the Code, Licensees with SMP are prohibited from engaging in price squeezing. However, the Authority would note that the wholesale input sold by the upstream licensee may differ significantly from the eventual retail product sold (e.g., the downstream licensee could include ancillary services such as consultancy, maintenance and advisory services). Hence, the ability of a downstream operator to profitably sell services would differ significantly depending on the various ancillary services packaged together with the wholesale input.

4.6.2 We would therefore request that the Authority provide clarifications on how it intends to: (1) define the retail product being sold; and (2) determine the profitability of the product being sold.

[11] See Section 3.2.3(a) of the Telecom Competition Guidelines.

4.7 Section 3.2.2.2(c)(ii) – Predatory Network Alteration

4.7.1 Section 3.2.2.2(c)(ii) of the Telecom Competition Guidelines states that the Authority will find that "*a Licensee with Significant Market Power has no legitimate business, operational or technical reason for altering its network interface when … the adverse impact of its actions on interconnected Licensees was **grossly** disproportionate to the benefit to itself and its End Users*" (emphasis added).

4.7.2 It is unclear why the Authority has used "*grossly disproportionate*" as a threshold in this instance. We also note that the term "*grossly disproportionate*" is undefined. Based on a plain reading of this section of the Telecom Competition Guidelines, it would appear that the Authority would allow a Licensee with SMP to alter its network, adversely impacting and imposing disproportionate costs on interconnecting licensees, so long as the adverse impact and costs imposed were not "*grossly*" disproportionate to any benefit derived by the Licensee with SMP. This does not appear to be in-line with Section 8.2.2.2 of the Code.

4.7.3 We would also highlight that the term "*grossly disproportionate*" is neither used in the Code, nor is it used in other parts of the Telecom Competition Guidelines as a threshold for explaining how the Authority would review possible abuses of a dominant position. We would therefore suggest that the Authority remove the term "*grossly*" from section 3.2.2.2(c)(ii) of the Telecom Competition Guidelines.

4.8 Section 3.4.2(a)(ii) – Specific Prohibited Practices (Sub-section 8.4.2 of the Code)

4.8.1 The Authority has similarly used the term "*grossly disproportionate*" as a threshold to determine whether a licensee's actions constitute an unfair method of competition. Again, we would raise our concerns that the term is undefined, and is not otherwise used in Section 8.4.2 of the Code.

4.8.2 Therefore, we would similarly suggest that the Authority remove the term "*grossly*" from section 3.4.2(a)(ii) of the Telecom Competition Guidelines.

4.9 Section 4.3.1.2 – Bid Rigging

4.9.1 Section 9.3.2.2 of the Code prohibits "*Competing Licensees*" from entering into agreements to co-ordinate separate bids for assets, resources or rights auctioned by IDA.

4.9.2 However, we note that, in the case of the Authority's spectrum auctions, the registered bidders may not be licensees at the point of bid submission. Such bidders would only become licensees after they had been awarded spectrum (and usually as a condition of the spectrum award).

4.9.3 We would therefore seek the Authority's clarifications on whether it can take enforcement action against either: (1) non-licensees colluding to rig bids; or (2) licensee(s) and non-licensee(s) colluding to rig bids. If such behaviour is outside of the Authority's purview, we would then question whether the CCS would be able to investigate such cases as being possibly in contravention of Section 34 of the Competition Act.[12]

[12] Section 34 of the Competition Act prohibits "*agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore*".

5. CONCLUSION:

5.1.1 StarHub appreciates the opportunity to comment on the Authority's Guidelines. We are generally agreeable with the theoretical framework set out in the Guidelines.

5.1.2 However, we urge the Authority to provide further clarity on the procedures it would adopt in relation to cross-jurisdictional competition cases involving the MDA and the CCS.

5.1.3 In addition, given the significant increase in the potential financial penalties that licensees now face, we also urge the Authority to provide greater clarity on how it would seek to impose financial penalties for any breach of its regulatory requirements.

StarHub Ltd
24 April 2013