MEDIA DEVELOPMENT AUTHORITY OF SINGAPORE

CLOSING NOTE TO PUBLIC CONSULTATION ON PROPOSED ADVISORY GUIDELINES ON MARKET DEFINITION & ASSESSMENT OF MARKET POWER

17 July 2013

1 INTRODUCTION

1.1 The Media Development Authority of Singapore ("MDA") first issued the Code of Practice for Market Conduct in the Provision of Media Services ("MMCC") in 2003, with one of the objectives of the MMCC being to enable and maintain fair market conduct and effective competition in Singapore's media industry. Specifically, Parts 4 to 8 of the MMCC set out the provisions in relation to the prohibition of unfair methods of competition, the concept of dominance and the obligations on dominant persons, the prohibition of agreements that restrict or distort competition, and consolidations.

1.2 During the public consultations arising from the last triennial review of the MMCC, MDA received comments from industry players requesting clarification and transparency in how MDA would define and determine a "relevant media market" in a competition analysis undertaken pursuant to the relevant MMCC provisions. To this end, MDA intends to issue a set of advisory guidelines on the definition of "relevant media markets" (the "Advisory Guidelines").

1.3 The Advisory Guidelines will set out the analytical framework used by MDA in defining markets in the media sector for the purpose of assessing competition cases, designating Dominant Person(s), assessing consolidations, and assessing whether to grant exemption requests as provided for in the MMCC. MDA recognises that market definition is often the first step in a competition analysis, and the Advisory Guidelines will primarily focus on MDA's approach in (a) defining the relevant market, and (b) assessing market power of the party under review in the relevant market.

1.4 MDA launched a public consultation on the draft version of the Advisory Guidelines ("Proposed Advisory Guidelines") on 25 January 2013.

1.5 The public consultation on the Proposed Advisory Guidelines closed on 1 March 2013, after the original deadline for comments was extended by two weeks. MDA received three submissions from:

a. Singapore Press Holdings Ltd;

b. SingNet Pte Ltd; and

c. StarHub Cable Vision Ltd.

1.6 MDA would like to thank the respondents for their useful feedback and comments.

2 SUMMARY OF COMMENTS RECEIVED FROM THE PUBLIC CONSULTATION

2.1 Two common themes ran through the responses of the three respondents. These are summarised below:

a. The respondents generally felt that the Proposed Advisory Guidelines should provide greater clarity and more practical guidance on how MDA would approach market definition and the assessment of market power. Related to this issue, some respondents requested for specific examples regarding the test principles that MDA might employ in market definition, or for practical instances of indicative media markets. One respondent suggested that some of the examples given in the Proposed Advisory Guidelines were unclear, incorrect or outdated.

b. All responses requested for further information regarding the impact of the Advisory Guidelines on the designation of dominant licensees under the MMCC. The respondents noted that the *Media Development Authority of Singapore (Regulated Persons) (Dominant and Non-Dominant Positions) Notification 2003* ("Notification") currently classifies licensees as being dominant in a certain "industry", as opposed to a specific market, and wondered if there would be any change in the approach that MDA would take in the future. Further, some of the respondents suggested that MDA should review the current designation of dominant licensees in light of the Advisory Guidelines.

2.2 The respondents also separately raised additional comments as set out below:

a. One respondent commented that paragraph 9.7(ii) of the Proposed Advisory Guidelines unhelpfully conflated issues arising from access to key inputs (as a factor in considering whether there are barriers to entry) with issues surrounding the designation of certain resources as an "Essential Resource" under Part 9 of the MMCC. The respondent put forth certain proposed amendments to paragraph 9.7(ii) of the Proposed Advisory Guidelines.

b. Another respondent suggested that the Proposed Advisory Guidelines incorrectly identified product bundling as a factor in market definition. The respondent suggested that the bundling of products should only be a relevant consideration in competition assessment once it has been determined that the relevant undertaking has Significant Market Power ("SMP") in the relevant market.

c. The same respondent also suggested that there should be greater consistency between the approaches adopted by the Infocomm Development Authority of Singapore ("IDA") and MDA in relation to market definition and the assessment of market power, particularly in view of the increasing level of convergence between telecommunications and media markets.

3 MDA'S RESPONSE TO COMMENTS FROM THE PUBLIC CONSULTATION

Greater clarity in Advisory Guidelines

3.1 The respondents generally felt that there should be more specific details set out in the Advisory Guidelines in order to provide more guidance to industry players. Some specific areas where the respondents requested for greater clarity included paragraph 4.2 of the Proposed Advisory Guidelines, where MDA alluded to situations where other implementations of the hypothetical monopolist test might be more appropriate, as well as the potential need to adapt the SSNIP test as a result of the two-sided nature of media markets.

3.2 One respondent also stated that the Advisory Guidelines should incorporate some specific case studies (similar to the case studies set out in the guidance from the Australian Competition and Consumer Commission ("ACCC") on Media Mergers (2006)), or at least set out MDA's view regarding what some indicative media markets in Singapore might be for the purposes of competition assessment.

3.3 The same respondent also suggested that some of the examples in the Proposed Advisory Guidelines were "unclear, incorrect or outdated". In particular, the following examples were cited:

a. paragraphs 8.1 to 8.3 of the Proposed Advisory Guidelines, which referred to various possible permutations for the definition of the market for a bundled product offering comprising both sports programme and variety shows; and

b. paragraph 5.4 of the Proposed Advisory Guidelines, which described the application of the SSNIP test to determine whether a video-on-demand ("VOD") service where videos were streamed to the customers' PC or other devices over the Internet lay in the same market as DVD rentals.

3.4 Finally, the respondent sought greater clarity in how MDA would ascertain market shares for the purposes of determining whether the entity under review had SMP in the relevant media market. Referring to the Horizontal Merger Guidelines (2010) issued by the U.S. Department of Justice and Federal Trade Commission, the respondent argued that market share should not be measured in terms of subscriber numbers, but instead supported the calculation of market share based on revenues of various industry players in the relevant market.

MDA's response

3.5 As mentioned in the consultation paper issued by MDA, the Proposed Advisory Guidelines merely described the general conceptual framework that MDA would adopt, and were not intended to be overly prescriptive. MDA is of the view that further elucidation of the principles set out in the Proposed Advisory Guidelines may not necessarily lead to better outcomes from a policy perspective. MDA needs to retain sufficient flexibility in applying the Advisory Guidelines in order to achieve a fair outcome based on the specific facts of each case (e.g. the specific characteristics of the focal product in question). In this regard, MDA notes that the approach taken in the drafting of the Proposed Advisory Guidelines does not differ significantly from the approach taken in other similar guidance from the Competition Commission of Singapore ("CCS"), IDA, or relevant regulatory authorities in other countries.

3.6 A higher degree of specificity in the drafting of the Proposed Advisory Guidelines is likely to lead to the guidance set out in the Proposed Advisory Guidelines being outdated very quickly. As a number of the respondents have pointed out in other parts of their responses, the landscape that industry players are operating in is changing at a rapid pace, and developments such as media convergence threaten to upend traditional ways of thinking about media markets. For the same reasons, MDA takes the view that the principles set out in the Proposed Advisory Guidelines should only provide high level guidance.

3.7 Similarly, an overly detailed prescription of the alternative hypothetical test implementations may also lead to MDA being unable to adopt international best practices as they develop. Alternatively, the Advisory Guidelines may have to undergo frequent revisions in order for such international best practices to be incorporated. MDA trusts that respondents would agree that neither would be desirable from a policy perspective. For these reasons, MDA would prefer not to provide further details regarding the alternative implementations of the test alluded to in paragraph 4.2 of the Proposed Advisory Guidelines.

3.8 In relation to the request for case studies or indicative examples of media markets to be included in the Advisory Guidelines, MDA is of the view that, in the context of the Singapore media market, there are insufficient precedents or test cases for substantive guidance to be provided at this stage. Again, any indicative examples of media markets may be overtaken by developments in the market and, even if non-binding, would quickly cease to provide useful guidance. MDA also notes that the case studies in the ACCC guidance consider the application of market definition principles in the context of merger analysis. Notwithstanding the foregoing, MDA will consider incorporating case studies in the Advisory Guidelines once there is a sufficient body of decisions on which helpful guidance can be based.

3.9 In response to the comments on the allegedly "unclear, incorrect or outdated" examples used in the Proposed Advisory Guidelines described in paragraph 3.3 above, MDA notes that:

a. The respondent appears to have misconstrued paragraph 8.3 of the Proposed Advisory Guidelines. Paragraph 8.3 of the Proposed Advisory Guidelines merely considered the substitutability between a bundled product and products offering the individual components of the bundled product on a standalone basis. There was no intention on MDA's part to conflate potential media markets with programming genres. The actual outcome on the application of the analytical framework described would depend on empirical evidence, and MDA did not in any way conclude that sports programming and variety programming might potentially be in the same market. Interestingly, while this respondent noted that the application of this framework would result in the '*patently absurd situation where Free-to-Air (FTA) and subscription television may be found to operate in the same media market*', another respondent cited evidence both locally and internationally to support its argument that there is strong substitutability between FTA and subscription television. This corroborates MDA's view that it would be unwise to be too specific in drafting the examples or implementation of the principles set out in the Proposed Advisory Guidelines.

b. With regard to the example set out in paragraph 5.4 of the Proposed Advisory Guidelines, MDA is of the view that the alternative proposed by the respondent (i.e. comparison of VOD services across different mediums) does not provide greater clarity or guidance than the example chosen. The original example highlighted the fact that substitute products do not necessarily have similar characteristics to the focal product in question. It was also instructive on a point that the respondent had raised, which was that substitute products may potentially be provided by suppliers under a different licensing regime, or may even be provided by suppliers who are not licensed by MDA. The analysis at this stage would be limited to the definition of the relevant media market, and the licensing regime or regulatory framework applicable to each of the products under consideration should not feature in such assessment. It is not MDA's intention to address issues relating to the imposition of similar constraints on licensees holding different types of licences in the Advisory Guidelines. In view of the foregoing, MDA has decided that no change is warranted at this stage.

3.10 While various measures may potentially be used in calculating the market share of the entity under review, MDA would not conclude that revenue share is the preferred or most appropriate measure. As the respondent noted in an earlier paragraph, the ACCC Merger Guidelines (2008) notes that concentration levels may be calculated with reference to sales by value, volume or capacity. While both examples cited by the respondent are in the context of merger analysis, MDA considers that the examples usefully highlight that a number of measures may potentially be appropriate. For the reasons discussed above, MDA would prefer to retain the flexibility to apply the most appropriate measure(s) on a case-by-case basis. Nevertheless, MDA will amend the Proposed Advisory Guidelines to describe possible measures that MDA will use in assessing market share, and therefore market power.

Impact of Advisory Guidelines on designation of dominant licensees

3.11 As mentioned above, the respondents generally sought guidance on how the Advisory Guidelines would impact the current process for the designation of dominant licensees under the MMCC. The respondents noted that the Notification currently classifies licensees as being dominant in a certain "industry" (e.g. newspaper publishing services industry, or subscription television services industry), as opposed to a specific media market.

3.12 One respondent noted that the current classification of dominant licensees appears to have been made in the absence of a market definition and market power assessment. As such, the respondent requested for clarity as to whether MDA intends to apply the Advisory Guidelines in assessing the market power of a dominant licensee in the relevant media market in investigating allegations of abuse of dominance, or whether MDA will truncate its analysis by virtue of the fact that the entity has been classified as dominant in the Notification. The respondent also suggested that MDA should consider reviewing the current designation of dominant licensees under the Notification.

3.13 Another respondent also made a similar call for MDA to conduct a detailed review of the media services market in Singapore, and to assess whether there is a need to reclassify the licensees currently designated as dominant in the Notification. The respondent went on to highlight several factors that MDA should take into account in conducting such a review, including:

a. the complex and intertwined nature of the media markets in Singapore, and in particular the high level of substitutability between FTA and subscription television;

b. the development of alternative broadcasting platforms such as over-the-top services provided over the Internet, which may potentially have a global reach;

c. the impact of content piracy on competition in the media market;

d. the increasing level of convergence in the media industry, and the important role of the Next Gen NBN in reducing barriers to entry; and

e. the relevance of other factors (such as the power of content providers in dictating prices, terms and conditions for desirable or premium content) in assessing market power.

MDA's response

3.14 MDA acknowledges that the approach taken in classifying licensees as dominant to date is such that the dominant licensee will be presumed to have SMP in all media market(s) in the industry that it is licensed to operate in. One of the respondents referred to this as an "entity-based dominance regime", and had expressed support for such an approach.

3.15 Nevertheless, MDA would like to clarify that the MMCC does not prevent MDA from classifying a licensee as being dominant only in certain media markets that it is licensed to operate in, if the facts of the case support such a conclusion. MDA is also cognisant of the fact that developments in the media sector imply that the entity-based approach alone may not be sufficient. However, nothing in the Advisory Guidelines should fetter MDA's discretion in this regard.

3.16 In relation to the current classification of dominant licensees under the Notification, MDA confirms that it will be prepared to reclassify such dominant licensees under the framework described in paragraph 5.5 of the MMCC, where appropriate. Such a review is likely to take place after the next triennial review of the MMCC. In undertaking such a review, MDA will be mindful of the factors listed in paragraph 3.13 above, to the extent that they are relevant. MDA would just note at this stage that:

a. paragraph 9.7(ii) of the Proposed Advisory Guidelines did in fact contemplate the effect of the Next Gen NBN in reducing barriers to entry to media services markets; and

b. the Proposed Advisory Guidelines did recognise that the charging of different prices to different customers does not necessarily amount to price discrimination, as paragraph 6.14 highlighted that the difference in price should not be a result of different cost structures e.g. higher costs involved in serving one group of customers.

3.17 Notwithstanding the foregoing, a dominant licensee would have to comply with its obligations under Part 6 of the MMCC in respect of all media market(s) in which it has been classified as being dominant, as the regime is intended to be *ex ante* in nature. In the event that the dominant licensee is of the view that it does not in fact have SMP in any media market in which it has been classified as being dominant, the dominant licensee can file an exemption request with MDA under paragraph 5.6 of the MMCC. MDA will apply the principles set out in the Advisory Guidelines in determining whether such an exemption should be granted.

Relationship between key inputs and Essential Resources

3.18 Paragraph 9.7 of the Proposed Advisory Guidelines highlighted certain factors that MDA would consider in assessing whether barriers to entry exist in a particular market. One of the factors that MDA would consider is whether access to certain key inputs may deter new entrants from entering the market (paragraph 9.7(ii) of the Proposed Advisory Guidelines). One respondent commented that issues arising from such access to key inputs had been conflated with the concept of Essential Resources as elucidated in Part 9 of the MMCC, which was mentioned in the same paragraph.

MDA's response

3.19 MDA emphasises that it was not MDA's intention to conflate the two - MDA is well aware that key inputs as described in paragraph 9.7(ii) of the Proposed Advisory Guidelines do not necessarily constitute Essential Resources under Part 9 of the MMCC. It does not follow that a key input should be designated as an Essential Resource, even if MDA finds that access to such key input constitutes a barrier to entry.

3.20 MDA had merely intended to highlight the regime for the designation of a resource as an Essential Resource under Part 9 of the MMCC to provide readers of the Proposed Advisory Guidelines with further background information. However, MDA recognises that the inclusion of the reference to Essential Resources in the same paragraph may be confusing and MDA will adopt the amendments proposed by the respondent, including the deletion of the reference to Essential Resources.

Product bundling as a factor in market definition

3.21 As mentioned above, one respondent argued that product bundling should not feature as a factor in market definition. Instead, the bundling of products should only be a relevant consideration in assessing whether there has been an abuse of dominance, after it has been determined that the relevant supplier is in fact dominant in the relevant market.

MDA's response

3.22 As mentioned above, it would appear that the respondent had misapprehended the relevant portion of the Proposed Advisory Guidelines, which merely described the approach MDA would take in defining the market where the focal product is a bundled product. In undertaking such a market definition exercise, it would be natural to take into account the substitutability between the bundled product and standalone products containing components of that bundled product. Paragraph 8.3 of the Proposed Advisory Guidelines merely served to highlight that a standalone product containing one of the components of the bundled product may be considered a reasonable substitute for the bundled product (in which case the market would be widened to include the standalone product), or it may not (in which case the standalone product would not be part of the relevant market).

3.23 For the avoidance of doubt, MDA did not make any "initial conclusion" that there should be a single market for the supply of bundled products, or that programmes that are bundled together exist in the same market. In its analysis, MDA would only consider whether the standalone product is a reasonable substitute for the bundled product, and would not assess whether the bundling is anti-competitive in nature. MDA agrees that a competition assessment will have to be carried out once the market is defined, in order to determine whether such bundling in fact amounts to an abuse of dominance.

3.24 Nevertheless, MDA appreciates that the current drafting of paragraphs 8.1 to 8.3 of the Proposed Advisory Guidelines may be improved by specifying that the focal product in question is the bundled product and that the purpose of the exercise is to assess substitutability of standalone products containing components of that bundled product. MDA has made some consequential amendments to the relevant paragraphs to improve clarity.

Consistency in approaches adopted by IDA and MDA

3.25 One of the respondents commented that there should be consistency in the approaches of IDA and MDA in the definition of relevant markets and assessment of market power, particularly in an environment where telecommunications and media services are rapidly converging. The respondent provided two examples of such inconsistency:

a. the adoption of a market-based approach under which MDA determines whether a relevant undertaking has SMP by defining the relevant market before assessing the undertaking's market power in that relevant market; and

b. the factors set out in paragraph 9.7 of the Proposed Advisory Guidelines, describing certain factors that MDA would consider in determining whether there are significant barriers to entry.

MDA's response

3.26 It should be noted that paragraph 5.3 of the MMCC defines a dominant licensee as an undertaking who has SMP in any relevant media market, and specifically requires MDA to have regard to the proper definition of the relevant media market in assessing whether the undertaking has SMP. MDA notes that the criteria for designation of dominant licensees under paragraph 2.2.1 of the Code of Practice for Competition in the Provision of Telecommunication Services 2012 ("TCC") is drafted in slightly different terms.

3.27 While MDA notes the respondent's feedback on the need for consistency in the approaches taken by MDA and IDA, there may be practical reasons why such consistency may not necessarily be achievable, or even desirable. MDA will consider whether there is a need to further align the MMCC with the TCC during the upcoming triennial review of the MMCC. Nevertheless, such a review is not expected to affect the analytical framework set out in the Advisory Guidelines.

3.28 As discussed in paragraphs 3.14 to 3.15 above, the Proposed Advisory Guidelines should not be seen as inconsistent to what the respondent referred to as an entity-based approach. While there is a possibility that MDA may designate a relevant undertaking as being dominant only in certain media market(s) in the future, MDA will work with IDA to ensure that situations of conflict do not arise in a converged environment. This is explicitly recognised in paragraph 2.1 of the Proposed Advisory Guidelines. However, it should also be recognised that the relevant telecommunications market could be separate, and have different characteristics, from the relevant media market, and a different result may potentially be obtained in each relevant market based on the specific facts of the case.

3.29 In relation to the list of potential competitive constraints from the supply side set out in paragraph 9.7 of the Proposed Advisory Guidelines, MDA notes that these factors were merely non-exhaustive examples of what might potentially constitute barriers to entry. Similarly, the list of factors listed in IDA's Advisory Guidelines Governing Petitions for Reclassification and Requests for Exemption (which the respondent referred to) is also intended to serve merely as illustrative examples.

3.30 The purported inconsistency is therefore not established, as both MDA and IDA may potentially look at factors beyond those listed in their respective guidelines. In any event, MDA notes that there is actually a high degree of overlap between the two lists, for example in terms of the references to sunk costs, access to key inputs or infrastructure, economies of scale and regulatory barriers. MDA further notes that the Proposed Advisory Guidelines is also largely consistent with the CCS Guidelines on Market Definition in this regard.

4 CONCLUSION AND ISSUANCE OF ADVISORY GUIDELINES

4.1 MDA has made certain amendments to the Proposed Advisory Guidelines pursuant to feedback from certain respondents as highlighted above. The final form of the Advisory Guidelines is set out in the Appendix to this Closing Note, and will take effect from 17 July 2013.

4.2 As mentioned in the Advisory Guidelines, MDA will adopt an evidence-based approach in applying the Advisory Guidelines, and will have regard to the relevant factual matrix in each case. In cases where it is apparent that the conduct under assessment is not likely to have an adverse effect on competition, or that the relevant undertaking does not possess SMP under any sensible market definition, it may not be necessary to formally establish a definition of the relevant media market.

4.3 MDA will endeavour to apply the Advisory Guidelines in a coherent and consistent manner. However, the definition of market and assessment of market power is an empirical exercise that needs to be undertaken on a case-by-case basis, based on the prevailing state of the relevant market. As such, previous determinations of MDA on market definition or assessment of market power (under these guidelines or otherwise) will not be binding, and may have limited value as a precedent. MDA will approach each case on the basis of its own facts.

4.4 Finally, in the event of a conflict between the MMCC and the Advisory Guidelines, the provisions in the MMCC will prevail.