



SINGNET PTE LTD

**SUBMISSION TO THE MEDIA DEVELOPMENT AUTHORITY OF
SINGAPORE**

IN RESPONSE TO THE

**PUBLIC CONSULTATION -
ADVISORY GUIDELINES ON MARKET DEFINITION AND ASSESSMENT OF
MARKET POWER**

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SINGNET RESPONSE TO MDA PUBLIC CONSULTATION - ADVISORY GUIDELINES ON MARKET DEFINITION AND ASSESSMENT OF MARKET POWER

1. INTRODUCTION AND STATEMENT OF INTEREST

- 1.1. This submission sets out the response from SingNet Pte Ltd (**SingNet**) to the request for comments from the Media Development Authority of Singapore (**MDA**) consultation on the Advisory Guidelines on Market Definition and Assessment of Market Power (**Advisory Guidelines**).
- 1.2. SingNet is a leading Internet service provider (**ISP**) in Singapore and has been at the forefront of Internet innovation since 1994, being the first ISP to launch broadband services in Singapore. It is licensed to offer IPTV services under a nationwide subscription television licence granted by the MDA.
- 1.3. SingNet's submission in response to the MDA consultation paper on the draft Advisory Guidelines is structured as follows:

Section 1 – Introduction

Section 2 – Executive summary

Section 3 – Detailed Comments

2. EXECUTIVE SUMMARY

- 2.1. SingNet supports the MDA's decision to put out for public consultation the Advisory Guidelines to the Code of Practice for Market Conduct in the Provision of Media Services (**MMCC**).
- 2.2. However, SingNet is concerned that the MDA's approach to the Advisory Guidelines departs from the approach of other Singapore regulators and that, in a number of areas, the Advisory Guidelines fail to provide industry participants with real guidance as to how in practice the MDA intends to approach market definition and the assessment of market power for the purposes of the MMCC.

2.3. In particular:

- SingNet notes that in an increasingly converged media and telecommunications environment it is important that Singapore's regulators, including the MDA, ensure that the regulatory frameworks applicable across sectors are, to the greatest extent possible, consistently applied. In this regard, the Advisory Guidelines fail to ensure that the MDA's approach will be, to the greatest extent possible, consistent with other related regulatory regimes e.g. such as that administered by the Info-communications Development Authority (**IDA**). Given the extent of convergence between media and telecommunications, SingNet urges that the MDA applies an approach consistent with the IDA.
- The MDA should institute an entity-based dominance approach for the purposes of the media sector.
- SingNet is concerned that in a number of areas the Advisory Guidelines fail to provide Regulated Persons and other relevant industry participants with appropriate clarity with regard to the exercise of MDA's market definition function.
- The Advisory Guidelines should therefore contain examples of potential media markets that provide realistic and appropriate guidance for industry participants.
- The MDA incorrectly identifies product bundling as a factor in the determination of market definition, rather than it being properly a factor in determining inappropriate exercise of market power.
- The MDA should take the opportunity provided by the Advisory Guidelines to align its analytical approach in relation to barriers to entry in media markets in Singapore to the approach taken by the IDA under the telecommunications regime.
- The Advisory Guidelines should present how it assesses SMP including guidance with regard to how it computes market share(s).
- The MDA should assess market share using revenues rather than subscriber numbers.

3. DETAILED COMMENTS

Application of Guidelines

- 3.1. The MDA states in section 1.1 that the purpose of the Advisory Guidelines is to set out the analytical framework that the MDA will use in defining markets in the media sector for the purposes of assessing competition cases, designating Dominant Person(s), assessing consolidations and assessing whether to grant exemption requests under the Code of Practice for Market Conduct in the Provision of Media Services (**MMCC**).
- 3.2. SingNet notes that there is currently no analytical framework in place for defining markets and therefore supports the MDA employing an analytical approach to defining media markets.
- 3.3. However, SingNet is concerned that the MDA's general approach towards defining media markets as well as that for assessing dominance in a market departs significantly from the approach taken by other relevant regulators in Singapore such as the IDA, with the effect of fostering an inconsistent regulatory environment for industry participants in Singapore.
- 3.4. SingNet considers that in an increasingly converged media and telecommunications environment it is important that Singapore's regulators, including the MDA, ensure that the regulatory frameworks applicable across sectors are, to the greatest extent possible, consistently applied.
- 3.5. As recently noted by the Singapore Government's Media Convergence Review Panel, with Singapore's "*advanced info-communications infrastructure and tech savvy citizenry*" the effects of media convergence are increasingly pronounced. In particular, the panel considered that Singapore's policy and regulatory frameworks, designed for traditional media platforms and industry structure, were "*no longer able to cope with the characteristics of the converged media environment*".¹
- 3.6. As described further below, SingNet is concerned that the adoption by regulators in Singapore of different regulatory standards will lead to perverse outcomes. In converged sectors such as media and telecommunications, there is an even greater

¹ Media Convergence Review Panel (2012) *Media Convergence Review - Final Report*, Section 1.2, p.2.

need for consistent outcomes. It would be absurd if the application by different regulators in converged markets led to some operators being considered dominant while other operators, who are similarly situated in their respective markets, being considered to be non-dominant.

Approach to dominance – MDA approach should be consistent with IDA approach

- 3.7. In its Advisory Guidelines, the MDA has set out its preferred approach to the assessment of market power in media markets in Singapore in accordance with the terms of the MMCC.²
- 3.8. The MDA intends to adopt a market-based approach to the assessment of dominance in a market. Under this approach, the MDA determines whether a Regulated Person has Significant Market Power (SMP) in a particular market by first defining the relevant market and then assessing market power.
- 3.9. Whilst the use of an SMP approach is common in the assessment of market power, the approach suggested by the MDA in its Advisory Guidelines provides that it could, for example, designate a party as dominant in one media market and not dominant in another media market.
- 3.10. Furthermore, the suggested approach contrasts largely with the approach that has been taken by the MDA for the purpose of dominance in the media market(s) and by the IDA in the telecommunications sector in Singapore.
- 3.11. The current MDA approach for dominance is that the MDA has designated licensees dominant at an entity level for the media market(s) that they are licensed to operate in. Similarly, under the telecommunications framework, a licensee is designated dominant at an entity level in every telecommunications market it operates in, until and unless it can establish to the satisfaction of the IDA that it does not, in fact, possess SMP in a particular market.
- 3.12. SingNet notes that there are rationales in place for the MDA and IDA to adopt such an approach; one being that in an increasingly converged environment, there is clearly merit in having an entity comply with Dominant Licensee obligations for all the services it operates in all the markets and / or sub-markets it operates in

² See, the MMCC, s. 5.3.

- until such a point that the market assessment reveals no SMP on the part of the Regulated Person for particular markets through an exemption request.
- 3.13. Furthermore, we also note that in the media market(s), there is a situation of entrenched monopoly positions of entities such as StarHub Cable Vision Ltd (SCV), MediaCorp Pte Ltd (**MediaCorp**) and Singapore Press Holdings Ltd (SPH)
- 3.14. Therefore, we note that the MDA approach towards its Advisory Guidelines should not, therefore, lead to a situation of divergence between the regulatory approaches of the MDA and the IDA – both of whom are regulators of entities operating in a converged environment.
- 3.15. SingNet submits that while a market based approach to dominance can be workable, given the current competitive dynamics in the media industry, the growing impact of convergence and the aspiration for regulatory consistency, the MDA should institute an entity based dominance regime for the purposes of the media sector.

Market definition

- 3.16. In the alternative, if SingNet's preference for an entity based regulatory regime is not accepted by the MDA, SingNet submits that the MDA's Advisory Guidelines need to clearly set out the manner in which the MDA in practice intends to administer its preferred regime. Similarly, if SingNet's view is accepted by the MDA, then the MDA's Advisory Guidelines could usefully be used as guidance in relation to the MDA will assess market-based exemption requests.
- 3.17. In that regard, SingNet is concerned that in a number of areas the Advisory Guidelines fail to provide Regulated Persons and other relevant industry participants with appropriate clarity with regard to the exercise of MDA's market definition function.
- 3.18. In particular, SingNet submits that the Advisory Guidelines;
- include examples of potential media markets which do not provide industry participants with meaningful guidance and may be outdated given the nature of the technological change in the sector;

- fail to provide industry participants with practical instances of what markets the MDA would consider as being indicative media markets for the purpose of assessing competition dynamics in Singapore, both in the current environment and in the short and long term future;
- incorrectly identifies product bundling as a factor in the determination of the market definition, rather than it being properly a factor in the assessment of market power.

Unclear, incorrect and outdated examples

- 3.19. SingNet is concerned that the MDA's Advisory Guidelines contain examples of potential media markets which do not provide realistic and appropriate guidance for industry participants and, in some cases may be outdated given technological advances in the industry.
- 3.20. For instance, the Advisory Guidelines refer to a number of possible permutations for the market for the supply of sports programming which includes the potential for sports programming and variety programming being considered to be in the same market or, alternatively, in separate markets.³
- 3.21. Comparing sports programs with variety programs in this way seems to suggest that the MDA considers there to be market characteristics (both demand and supply-side substitution) that are sufficiently distinct for these genres to be regarded as separate media markets.
- 3.22. Furthermore, by approaching media market definitions in this way, the MDA seems to have conflated potential media markets with programming genres. If such an approach was applied in practice, it 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.
- 3.23. Such an approach also raises the question as to how the MDA intends to approach market definition as it relates to the licensing framework, given that parties offering FTA television and subscription television service(s) operate under different licences and in different regulatory contexts. For example, if scheduled

³ MDA (2012) [Proposed] *Advisory Guidelines on Market Definition and Assessment of Market Power*, Cl.8.3, p.11.

- or linear programming is considered one media market, would FTA providers and subscription television providers be subject to the same requirements in the MMCC despite the fact they are granted separate and different licences?
- 3.24. The Advisory Guidelines fail to address this issue in any substantive way.
- 3.25. Another example of the use of unsuitable examples relates to the MDA's reference to video-on-demand (**VOD**) markets. The MDA has raised the possibility of a VOD service being in the same market as DVD rentals.⁴
- 3.26. SingNet submits that such a comparison is less relevant, and therefore of less assistance for the purposes of the Advisory Guidelines, than, for instance, a comparison of VOD services across different mediums (e.g. movie titles being available on Amazon) SingNet submits that the inclusion of the unsatisfactory examples identified above simply adds confusion because they do not provide sufficient clarity and guidance for industry members to then assess the relevance and applicability of the MDA's proposed Advisory Guidelines. The expression of these alternative views may, in fact, generate situations where the market definitions result in unnecessarily narrow markets and unrealistic competition assessments.
- 3.27. In summary, SingNet is concerned that the examples set out in the Advisory Guidelines do not further the MDA's stated aim of providing "*further explanation and clarity on the approach and standards that MDA will use*" to define the relevant markets for the purposes of the MMCC.
- 3.28. Consequently, SingNet suggests that the examples identified above be removed from the Advisory Guidelines and replaced with more appropriate representations of potential media markets in Singapore.

Indicative Markets

- 3.29. SingNet considers that to provide greater certainty for Regulated Persons and other industry participants, the MDA should set out a number of specific case studies or, at a minimum, indicate the MDA's view of what may be indicative media markets in Singapore for the purposes of its competition assessments

⁴ MDA (2012) [Proposed] *Advisory Guidelines on Market Definition and Assessment of Market Power*, Cl.5.4.

- 3.30. While SingNet acknowledges that indicative markets would not be static and that the MDA would not be bound or constrained by them for any particular competition assessment, SingNet submits that the inclusion of practical examples would act as a useful and practical guide or starting point to industry participants to enable a better understanding of the MDA's preferred approach to market definition.
- 3.31. The Australian Competition and Consumer Commission (ACCC) includes a number of case studies in its guide to Media Mergers.⁵ While the ACCC notes that the case studies are only examples, the guidelines nevertheless set out instances of how the ACCC would approach its merger analysis in particular markets. The ACCC provides examples of potential merger scenarios and uses them to "*highlight the type of questions that the ACCC will be addressing when considering specific media mergers*".⁶
- 3.32. SingNet submits that to further the MDA's stated aim of providing guidance for industry participants on the MDA's analytical framework, the MDA should include in the Advisory Guidelines its view of indicative media markets in Singapore or, alternatively, to include some case studies of potential merger scenarios in the Singapore media market.

Bundled programs as a single market

- 3.33. In its Advisory Guidelines, the MDA has noted:
- the incidence of bundled and unbundled services in the media sector:
 - the potential for monopoly pricing in relation to the supply of a bundled offering: and
 - consequently, whether there is in fact a single market for the supply of bundled programs.⁷
- 3.34. SingNet submits that this initial conclusion by the MDA is groundless.
- 3.35. SingNet considers that bundling products should only ever be used in a competition assessment once market power in a particular market has been

⁵ ACCC (2006) Media Mergers, p.26.

⁶ ACCC (2006) Media Mergers, p.26.

⁷ Advisory Guidelines at 8.A.

- determined. The fact that two products can be bundled says nothing about the market definition itself. For that matter, the simple fact that products are bundled does not necessarily reflect that they exist in the same market – that is, bundled offers may not be substitutable for any other offers (bundled or otherwise).
- 3.36. SingNet submits that only when market power has been found is it then proper to make an assessment of whether such market power has been inappropriately used to leverage bundled products.
- 3.37. As the Australian Competition and Consumer Commission (ACCC) have noted in its Bundling in Telecommunications Markets information paper, “...*bundling conduct is only likely to raise anti-competitive conduct concerns when the carrier or CSP has market power in the supply of at least one of the bundled products*”.⁸
- 3.38. As is already clear under section 6.4.2.3 of the MMCC, a Dominant Person must not as a condition for purchasing a media service (or advertising capacity) require a customer (or advertiser) to mandatorily purchase an additional service. In other words, the MDA itself recognizes that bundling (in this case, mandatory bundling) is in itself a reflection of market power, which has to be established through a due and proper competition assessment.
- 3.39. As such, SingNet seeks clarification of this point in the MDA’s Advisory Guidelines.

Assessment of market power

- 3.40. SingNet is concerned that the MDA has not provided industry participants with a sufficient degree of certainty in relation to how the MDA intends to approach the assessment of market power for the purposes of establishing SMP.
- 3.41. In particular, SingNet submits that:
- by failing to better align its approach to the assessment of barriers to entry with those of other regulators such as the IDA, the MDA has not ensured that, to the greatest extent possible, the regulatory frameworks that apply across relevant industries are applied in a consistent manner; and

⁸ ACCC (2003), Bundling in Telecommunications Markets – Information Paper, August, p, 11.

- the Advisory Guidelines fail to provide clarity on how the MDA intends, as a practical matter, to assess market shares in relation to media markets.

Consistency of approach to competition regulation

- 3.42. SingNet has identified one particular area of inconsistency in the MDA's Advisory Guidelines which relates to the determination of barriers to entry.
- 3.43. The MDA's guidelines identify the following non-exhaustive factors which the MDA considers may constitute barriers to entry:
- sunk costs;
 - access to key inputs;
 - economies of scale;
 - network effects; and
 - regulation.
- 3.44. In contrast, the IDA's guidelines governing petitions for reclassification and requests for exemption identify five broad, but non-exclusive, categories of barriers to entry:
- technical barriers;
 - access barriers;
 - financial barriers;
 - commercial barriers; and
 - regulatory barriers.
- 3.45. While there are some factors which do overlap across both regulators, for instance the IDA's financial barriers would include the MDA's sunk costs, SingNet submits that the differing approaches create a great deal of uncertainty for Regulated Persons and other industry participants.
- 3.46. SingNet submits that in an increasingly converged environment it is important that Singapore's regulators administer the regulatory regimes which apply to converged market operators in a way that is both consistent and clear for the businesses regulated under those frameworks.

3.47. In that regard, SingNet submits that the MDA should take the opportunity provided by the Advisory Guidelines to align its analytical approach in relation to barriers to entry in media markets in Singapore to the approach taken by the IDA under the telecommunications regime.

Assessment of Market Shares

3.48. SingNet submits that the MDA should provide Regulated Persons greater clarity in relation to how it will ascertain market shares for the purposes of determining SMP in a media market.

3.49. While the MDA has indicated that, in accordance with the MMCC, an entity with a market share of more than 60 per cent will be presumed to possess SMP, there is no guidance given on how those shares will in fact be calculated and determined by the MDA.

3.50. In Australia, the ACCC makes it clear under its Merger Guidelines that it will typically measure concentration levels according to sales, volume and capacity using information from a variety of relevant sources.⁹

3.51. Without regulatory consistency and clear guidance on the issue of market shares, the MDA's assessment of market power in media markets remains not only uncertain for Regulated Persons and industry players but, in a convergent environment, may also result in the absurd situation whereby a single entity may be found by the IDA to have SMP in one market but not considered dominant by the MDA using a different approach.

3.52. In that regard, SingNet considers that the MDA's Advisory Guidelines present an opportunity for the MDA to set out clearly its approach to assessing SMP, including to provide operators with guidance in the manner in which market shares will be calculated and the level of market share (so calculated) which will be presumed to constitute SMP in a media market.

3.53. Furthermore, SingNet submits that subscriber numbers are a poor measure of market share because customers are not homogeneous and subscriber numbers do not properly reflect a corporation's ability to misuse power in relevant markets.

⁹ ACCC (2008) Merger Guidelines, s.7.10, p, 36.



3.54. As noted by the U.S. Department of Justice and the Federal Trade Commission in those agencies' 2010 Horizontal Merger Guidelines:¹⁰

“In most contexts, the Agencies measure each firm’s market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers”.

3.55. SingNet therefore supports the calculation of market share based on revenue. This is the conventional measure which other regulators use and most appropriately corresponds with the power of a corporation in a market. Furthermore, market share by revenues will reflect clearly the level of market concentration which is an important reflection of the true state of competition, and therefore the level of dominance of individual players in the specific market.

4. CONCLUSION

4.1 SingNet submits its comments to the MDA for its consideration.

¹⁰ U.S. Department of Justice and Federal Trade Commission (2010) *Horizontal Merger Guidelines*, August 19, p.17.