

SINGAPORE PRESS HOLDINGS LTD

Submission to the Media Development Authority of Singapore
on the Proposed Advisory Guidelines on Market Definition & Assessment of Market
Power

1 March 2013

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BY HAND & EMAIL

Attention: Mr Daryl Singh Puran
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Dear Sirs

PUBLIC CONSULTATION ON THE PROPOSED ADVISORY GUIDELINES ON MARKET DEFINITION & ASSESSMENT OF MARKET POWER

1. Singapore Press Holdings Ltd ("SPH") welcomes the opportunity to submit its comments on the Proposed Advisory Guidelines on Market Definition & Assessment of Market Power (the "Proposed Advisory Guidelines"). The comments set out herein by SPH are in response to the Media Development Authority of Singapore's ("MDA") invitation to comment, as published on 25 January 2013.
2. SPH considers that the Proposed Advisory Guidelines generally reflect international best practices in the assessment of market definition and market power issues, and are generally consistent with the approach of other competition and regulatory bodies in Singapore. However, SPH respectfully submits that there are a number of further points that MDA should consider in finalising the Proposed Advisory Guidelines. Each of these points is further elaborated below.
3. In making the following submissions SPH has been conscious to focus its comments on those matters that it considers to be of particular importance to the functioning of the industry and the potential application of the Proposed Advisory Guidelines.

Summary of major points

4. First, SPH considers that the Proposed Advisory Guidelines would benefit from further elaboration and specificity with regard to each of the relevant media sectors. Whilst the Proposed Advisory Guidelines do provide some examples in this regard, SPH considers that more specificity in relation to the particular characteristics of the Singapore media industry would be beneficial.
5. Secondly, SPH submits that MDA should provide clarity as to the interaction of the Proposed Advisory Guidelines, the Code of Practice for Market Conduct ("MMCC") and the Media Authority of Singapore (Regulated Persons)(Dominant and Non-Dominant Positions) Notification 2003 ("Notification").
6. At present, undertakings are specified as dominant persons in a particular industry (under the Notification), rather than being identified as dominant in a particular market. Accordingly, SPH submits that it should be clarified as to whether MDA intends to revisit such classifications, or in the alternative how the Proposed Advisory Guidelines may apply to the assessment of conduct undertaken by such specified persons. In particular,

SPH considers that it would be helpful for MDA to set out in further detail how it intends to apply the Proposed Advisory Guidelines in assessing conduct under paragraphs 6.3, 6.4.1 and 6.4.2 of the MMCC, where an undertaking is already specified as a dominant undertaking pursuant to the Notification.

7. Thirdly, SPH submits that paragraph 9.7(ii) of the Proposed Advisory Guidelines should not make reference to the ability for MDA to specify resources as essential under Part 9 of the MMCC. SPH submits that whilst access to key inputs is rightly a relevant consideration in the assessment of barriers to entry (and thus the assessment of market power), the question of specifying resources as essential under Part 9 of the MMCC ought to be approached in a manner that mirrors the approach to “essential facilities” in general competition law. SPH has proposed wording revisions to paragraph 9.7(ii) of the Proposed Advisory Guidelines, as set out in paragraph 22 of this submission.
8. Fourthly, SPH submits that the Proposed Advisory Guidelines should further elaborate on the potential applications of the hypothetical monopolist test, as proposed and contemplated at paragraph 4.2 of the Proposed Advisory Guidelines.

Tailoring of the Proposed Advisory Guidelines to the media and broadcasting industries

9. As a general point, SPH submits that the Proposed Advisory Guidelines would benefit from further elaboration on the approach and potential assessment of issues that are specific to the relevant media sectors i.e., the film, newspaper and broadcasting sectors. Whilst SPH notes that at various stages of the Proposed Advisory Guidelines, media specific examples are used to illustrate certain principles, further specific elaboration would be helpful.
10. In the usual course, general competition authorities may choose to keep advisory guidelines generic, to enable their adaptation to various different products, services and industries. However, the potential scope of application of the Proposed Advisory Guidelines is clearer in so far as it will apply to those products and services over which MDA has regulatory oversight.
11. SPH submits that greater clarity would afford greater certainty to undertakings in the industry attempting to use the Proposed Advisory Guidelines to self-assess their conduct.

Current dominant person notifications and designations

12. At present, the dominant person obligations within the MMCC apply to certain regulated persons, as specified by MDA within the Media Authority of Singapore (Regulated Persons)(Dominant and Non-Dominant Positions) Notification 2003 (“Notification”). Under this Notification, SPH is specified as a dominant person in respect of the newspaper publishing services industry.
13. SPH notes that the dominance classification within the Notification is currently “industry” specific, rather than market specific (and that an “industry” may well comprise a number of different markets as would be defined under the Proposed Advisory Guidelines). Moreover, SPH notes that the previous specification of dominance within the Notification would appear to have been made in the absence of a market definition assessment, and a corresponding market power assessment, and in the absence of a public consultation process.
14. SPH submits that the pre-existing classification under the Notification is of particular relevance to an assessment of conduct in the context of an abuse of dominance allegation, under paragraphs 6.3, 6.4.1 and 6.4.2 of the MMCC. In particular, should MDA

assess conduct under these paragraphs of the MMCC, it is unclear as to whether MDA would apply the Proposed Advisory Guidelines to assess the relevant market and market power of the particular undertaking in question, or simply truncate its analysis if the particular undertaking is already specified as dominant under the Notification.

15. Accordingly, SPH submits that for clarity, MDA may wish to elaborate more on the proposed application of the Proposed Advisory Guidelines in the context of the Notification, and to those parties that are currently specified as dominant within a particular industry. In particular, SPH submits that it would be helpful for MDA to clarify whether the Notification will continue to apply, or whether the dominance classifications therein are likely to be reviewed in accordance with the Proposed Advisory Guidelines.

Essential resource concept

16. At paragraph 9.7(ii) of the Proposed Advisory Guidelines, the issue of access to key inputs is raised as relevant to the consideration of barriers to entry. SPH respectfully considers that the issues of access to key resources, and the concept of “essential resources” (as that term is used in Part 9 of the MMCC), have been conflated in a manner that is unhelpful and confusing.
17. Paragraph 9.7 deals with barriers to entry that might be taken into consideration by MDA in assessing whether a party holds market power, and the degree of any such market power. As indicated, SPH submits that access to key resources may be a relevant consideration in that assessment; however, there are other factors that also require concurrent assessment in order for such an assessment to be made. In particular, whilst access to established networks or infrastructure might indicate some level of incumbency advantage or entry barriers, such entry barriers may ultimately be able to be overcome by an entrant. Similarly, countervailing buyer power and existing competition may be sufficient to offset any potential market power (as acknowledged in paragraphs 9.8 and 9.9 of the Proposed Advisory Guidelines). In other words, ease of access to an input is simply one factor in the assessment of barriers to entry and market power.
18. Against the background above, SPH considers that it is not necessary for the Proposed Advisory Guidelines to make reference to the ability of MDA to deem resources as essential under Part 9 of the MMCC. In doing so the Proposed Advisory Guidelines suggest that such a designation might be made to alleviate simply one of a number of entry barriers. However, SPH submits that the concept of essential resources under the MMCC should mirror that of “essential facilities” in general competition law, and that a high threshold should apply in respect of any such regulatory designation.
19. The essential facilities doctrine is a concept founded in general competition law, which is premised on the fact that a refusal to supply access to an “essential facility”, can distort competition in a downstream market to which that facility is used as an input. SPH notes that the threshold for establishing that a facility (or resource) is indeed essential is, and ought to be, high. In general, it is considered that a facility or resource must be “indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence”¹.
20. SPH notes that the Proposed Advisory Guidelines indicate that:

“...these important resources may be designated as “essential resources” under part 9 of the MMCC to facilitate the entry of competitors into the market”

¹ *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Case C-7/97, 1998 E.C.R. I-7791, [1999] 4 C.M.L.R. 112, at para 41.

21. SPH considers that whether access to an input gives rise to barrier to entry is the critical consideration for the Proposed Advisory Guidelines to reflect at paragraph 9.7(ii). However, the fact that such a barrier to entry exists, or provides an advantage to an incumbent operator should not be sufficient for any such inputs to be considered essential resources, as suggested by established international competition law jurisprudence. Such designations should be reserved for where such resources are truly indispensable for market entry, rather than those that simply represent a barrier to entry (whether or not such barriers confer on the incumbent a dominant position or otherwise).
22. Accordingly, SPH submits that the wording of paragraph 9.7(ii) of the Proposed Advisory Guidelines ought to be amended as follows:

“Access to key inputs: Incumbents who may own resources / inputs that are important for the production of product hold a strategic advantage over potential entrants that may have difficulties in gaining access to these key resources (e.g. access to distribution network). The extent to which access to such resources constitutes a barrier to entry will be assessed by MDA on a case-by-case basis. Generally, if a rival does not have access to these key inputs, it is unlikely to enter the market. As such, these important resources may also be designated as “essential resources” under part 9 of the MCC to facilitate the entry of competitors into the market. At the same time, MDA will also consider the impact of industry-wide developments, such as media convergence and the deployment of open access Next Generation Nationwide Broadband Network, which are likely to reduce access barriers for new entrants.”

‘Other implementations’ of the hypothetical monopolist test

23. SPH notes that paragraph 4.2 of the Proposed Advisory Guidelines provides:

*“...MDA recognises that **other implementations of the hypothetical monopolist test** may be more appropriate in certain instances, for example where the focal product is provided to consumers free of charge in a market where advertising or quality differentiation is the dominant form of competition (e.g. an advertisement-supported online video-streaming service). MDA is also cognisant of the fact that media markets can frequently be characterised as a two-sided market, and that the econometric models employed in the application of the SSNIP test may have to be adapted as a result of the two-sided nature of the market.”*

24. SPH understands that the general impetus behind the paragraph identified above is to ensure that there is flexibility in the approach to the application of the hypothetical monopolist test in situations where a rigid application of the test would be difficult, or would not generate meaningful results.
25. However, SPH submits that it would be useful for there to be further elaboration on the other implementations of the hypothetical monopolist test that are envisaged. In particular, in situations where the focal product is provided to consumers free of charge, or where the market exhibits two-sided characteristics, SPH considers that it would be helpful for the Proposed Advisory Guidelines to specify the price over which the effects of a 5-10% increase would be considered.
26. SPH submits that further clarity in relation to the possible iterations of the hypothetical monopolist test ought to be elaborated upon within the Proposed Advisory Guidelines so as to provide more assistance for entities attempting to self-assess their arrangements and conduct.

Conclusion

27. SPH welcomes the opportunity to participate in the public consultation exercise for the Proposed Advisory Guidelines. SPH hopes that its views and submissions on the Proposed Advisory Guidelines will be carefully considered and addressed by MDA.
28. Please do not hesitate to contact the undersigned (Tel: +65 6319 3058; Email: limmlg@sph.com.sg) if you have any queries or require any clarification.

Yours faithfully



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