SUBMISSION FOR THE SECOND PUBLIC CONSULTATION

ON THE DRAFT CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION AND MEDIA SERVICES

19th March 2021

To:

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Introduction

1. Liberty Wireless ("**Circles**") wishes to take this opportunity to thank the IMDA for welcoming additional input from the industry on the Code of Practice for Competition in the Provision of Telecommunication and Media Services ("**Code**").

2. We see this as a positive sign that IMDA appreciates the importance of arriving at a Code that fairly, yet firmly defends the interests of end-users, the vibrancy of the market, and the policy goals which serve Singapore. As IMDA is well aware, any instrument as foundational as this Code shapes our market for decades to come (much like previous Codes of Practice have done in the past).

3. We also value the opportunity afforded by this Second Public Consultation to affirm — and in some areas, offer a better understanding of the assessments made by IMDA and the views espoused by respondents in the First Public Consultation. The permanency of any Code of Practice, and its function as a workable framework that all market stakeholders can understand and observe, makes it crucial that the concepts underpinning this Code are correctly understood in terms of their impact and how they could restrain and/or embolden damaging market behaviour.

4. As such, we recognise that this Code (like others before it) is subject to continual review from many sides, including those seeking to advance their commercial interests over those of Singapore & the welfare of the market. It is important that IMDA distinguishes between the two as it heads towards its final assessments, and its final decision on how the Code is structured to achieve Singapore's sectoral policy goals.

<u>Statement of Interest</u>

5. Circles' interests, reflected in the positions highlighted below, stem from our perspective over Singapore's consumer marketplace as a driver of innovation.

6. Despite our smaller size relative to the others; Circles is responsible for a notable share of the market, and for leading a wave of product, service, and other innovations that Singaporeans

benefit from today. Our experience as a nimble, yet impactful player contributes to our understanding of the intersection between regulatory and commercial considerations — and where they must meet to create the fair environment that innovative challengers like ourselves need to thrive in.

7. As such, we are deeply invested in a Code that defends innovative players — a Code not just preserves the right for a fair, contestable market; but actively seeks to balance anti-competitive tendencies that subvert fair play.

Our approach to this Consultation

8. Circles agrees that the Code is fully grounded in worthy regulatory principles, as expressed in Paragraph 10 of the Second Public Consultation (the "**Paper**"), but is respectful that such principles be the foundation of how the market must work.

9. However, we remain concerned that the Code, as presented in the Second Public Consultation, may fall short of being an effective bedrock for appropriate market conduct without an equal focus on defining how policy will be implemented and enforced, when market conduct fails to conform to those principles. Below, we re-emphasise the points we made in our original response to the IMDA's First Public Consultation, and urge the IMDA to consider refining its assessments and the proposed Code in this regard.

10. Our comments that follow step through three approaches:
    a. Emphasising points from our read of the assessments and industry views reflected in the Second Public Consultation, issuing from our firm belief that market conditions today and tomorrow must not be allowed to dampen innovation or harm growth.
    b. Explaining why some of those positions are more relevant now than before, based on our first-hand understanding of the realities of the marketplace.
    c. Extending our views on other issues raised across the First and Second Public Consultations.

Positions set in Circles' first response (filed on 15 May 2019)

11. For ease of reference, we summarise (and build on) several points from our response to the First Public Consultation here. At the risk of repetition, we choose to bring them to the IMDA's attention again for clarity; and to highlight the increased attention and urgency they deserve — given, with the nationwide shift towards 5G and the increasing pace of the market's evolution, that each of our expressed positions are now significantly more important than they were two years ago when we brought this to your attention.

12. IMDA should and must act decisively to defend services-based competition, and equivalent access to the scarce resource of 5G spectrum in the nascent 5G market: where network facilities are difficult and in some cases impossible to replicate, and resale is not only permitted but encouraged.

13. In 2019, we called for IMDA to enshrine mandated MVNO access to 5G spectrum on a fair, reasonable, and non-discriminatory basis within the Code, urging the IMDA to make it explicitly clear that any attempt by the market to hoard or abuse this scarce resource would be met by regulatory resistance.

14. Considering that the resulting Wholesale Framework (Decision released 30 Dec 2019) did not mandate this access, and that competitive dynamics continue to change rapidly in the transition to 5G, Circles calls on IMDA to provide a clear and fair indication of which "proactive measures" (as committed in Paragraph 15 of the Second Public Consultation) it would take, to facilitate service-based operators' access to 5G, and ensure that services-based competition thrives fully for the benefit of the market.

Dominance and SMP

15. Circles is keenly aware that Singapore's initial competition framework for our industry — as defined in the Telecom Competition Code (2012) ("**TCC**") — was originally developed with the understanding that predesignating dominance was an effective means to shorten dispute resolution.

16. Under the TCC, dominance did not have to be proven in order to investigate abuse. Instead, the procedural device of classifying Dominant Entities and Abuses of a Dominant Position was structured such that any investigation would start with the facts of alleged abuse and make an according determination. This was crucial in maintaining market vibrancy. In being designed to counteract any instance of abuse with speed, the TCC's goal was to pre-empt the common tactic employed by those who seek to abuse their market power — that of prolonging any investigation; expending the valuable time of the regulator, the public consumer, and the abused market player to debate the existence of dominance; while the persisting abuse remains to dampen market vitality, or worse, destroy market offers and even participants.

17. In Part IV of our response to the First Public Consultation (summarised in Paragraphs 1.9 - 1.10 in that same response), we cautioned that in the context of our current market, the efficacy of this procedural device hinges heavily on where the IMDA recognises the existence of Significant Market Power ("**SMP**"). Our intent was to highlight that, without adding clarity to this framework, we risk giving way to the unintended consequence that enforcement against anti-competitive behaviour leveraging SMP will be slow or, worse, turn ineffective.

<u>Other positions requiring consideration, or a deeper review by IMDA</u>

18. In this section, we respond briefly to other areas of the Paper where we see room for further finetuning.

Regulatory Review Period

19. Circles supports the Principles laid out by IMDA in Paragraph 10 of the Paper. However, we do not believe that the market has "stabilised", and that this is therefore an appropriate time to relax the review period to a five-yearly basis.

20. We recognise IMDA's position, in Paragraph 17, that it retains the flexibility to consult and amend certain provisions of the code as it deems necessary. However, with the continuing evolution of digital platforms, security issues, and wireless technology, amongst other topics; the market has dramatically accelerated. That makes this the precise time at which the IMDA should

be the most iterative, such that the Code closely tracks market developments, avoids obsolescence, and reflects best practices to deliver vibrancy and innovation.

21. We urge the IMDA to stand by the current three-year review, which would institutionalise its commitment to making worthwhile, timely, and proactive adjustments to the Code, rather than relying primarily on sporadic industry feedback in the intervening time of a five-year cycle, to stir regulation to evolve.

Anti-competitive conduct

22. Circles wishes to express serious concern about IMDA's assessment in Paragraph 56 which states that "…some discriminatory conducts have been found to generate substantial efficiencies or benefits… [which] may outweigh any harm to competition", and as such, "the discriminatory conduct per se should not constitute an abuse of dominance."

23. We caution that regulation — and the enforcement or lack thereof resulting from it — is not a zero-sum game. Where the Code is meant to be governed by the Regulatory Principles laid out by the IMDA in Paragraph 10 of the Paper, this calculus instead risks emboldening errant players in the market to abuse the Principles for their benefit.

24. Our concerns are grounded in precedent. An early instance of market abuse in the form of predation, over a century ago, was formative to seminal anti-competitive policy; on the surface, conduct which was predatory purported to benefit customers for the "expansion of demand" — only to see the elimination of competition within a few years, as all competitors other than the predator exited the market, and an eventual, significant increase in rents from the very few competitors remaining. The only beneficiary was the predator.

25. As such, we urge the IMDA to recognise that the regulator serves as a proxy competitor, and must remain diligent at all times against abuse. We also urge the IMDA to take all additional time necessary to anticipate the anti-competitive practices that would be enabled by this assessment, and reconsider this assessment; that it may arrive at a Code that recognises, identifies, and takes corrective action against conduct that damages markets.

Predatory network alteration

26. In response to IMDA's assessment in Paragraph 79 of the paper, Circles' position is that predatory conduct is antithetical to fair competition and market vibrancy, regardless of whether the party performing the predatory act possesses SMP. Hence, we urge the IMDA to remove the prerequisite for a licensee or RP to have SMP for an act of predatory network alteration to be prohibited.

Changes to Decision and Reconsideration Process

27. Circles wishes to add our recommendation that the submission timeline for Reconsideration be extended to 21 days. While we suspect that IMDA has been understanding and flexible in circumstances e.g. where the content of IMDA's decision or direction has required clarification, we believe that circumstances such as the one above should be accommodated, or that the window for industry to seek a Reconsideration should be extended. This would allow the industry more time and flexibility to make a considered request.

<u>Where we agree</u>

28. Circles agrees with the following positions raised in the Paper as generally time tested and sound.

Regulatory principles

29. As stated previously, Circles agrees with the Principles — and we urge the IMDA to keep in mind that, while the Principles are admirable and sound, it remains important to apply them well in executing the responsibilities of the Code, and in applying policy to regulatory determinations; such that conduct in each regulatory decision upholds rather than deviates from those principles, as a result of the regulatory process.

Unauthorised use of EUSI

30. We agree with IMDA's intended approach to the management of EUSI, and add that any attempt for any provider to collect such information should only be used for the provisioning of the service being provided. To that end, unnecessary or extraneous information collected should be

prohibited, that providers in the sector know that they are held to a protective and responsible standard.

Structural separation

31. We accept and agree with IMDA's assessments, but would like to reaffirm that a decision of such great consequence must only be exercised with the express consent of the Minister.

Private rights of action

32. Circles is supportive of the position on Private Rights of Action expressed in Paragraph 315 of the Paper. We strongly suggest IMDA establish a clear process which includes that its decisions will be publicised in a timely and clear manner; and that an injured third party may join or submit a Request for Enforcement, should it believe it has a claim against the Responding Licensee.