CONSULTATION ON PROPOSED 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,

UNDER THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES 2005

6 MAY 2005

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STATEMENT OF INTEREST

We appreciate the opportunity given by the Infocomm Development Authority ("IDA") to comment on the proposed 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, under the code of practice for competition in the provision of telecommunication services 2005 ("Guidelines").

The following carriers involved in preparing this joint submission ("Submission") are (i) BT Singapore Pte Ltd, (ii) Macquarie Telecoms, and (iii) T-Systems Singapore Pte Ltd. The carriers may also be submitting their own individual more detailed comments.

As competitive providers of communications services to the business or residential users of Singapore, we have a significant interest in ensuring that this Consultation results in improvements to the Guidelines and the competitive regime in Singapore. We are desirous of seeing the benefits of competition flow through to users of communication services by way of lower prices, increased choices and better services. In addition, as a key trading country, it is important for Singapore to have a robust regulatory framework that promotes competition in the communications industry.

COMMENTS

We welcome the IDA's decision to issue the Guidelines in response to the industry's call for greater transparency and clarity in IDA's assessment framework for granting reclassifications and exemptions under Sub-Sections 2.3 and 2.5 of the Code of Practice for Competition in the Provision of Telecommunications Services 2005 ("Code").

Our comments on the draft Guidelines are set out in the following sequence:

Part I : Discrepancies between the Code (and Guidelines) and Act should be eliminated

Part II : Guidelines should be more robust

Part III : Market definition is the foundation to an assessment of competition in markets

Part IV : Comments on the specific provision of the "Petitions for Reclassification and Requests for Exemption"

Part V : Comments on the specific provision of the "Abuse of Dominant Position, Unfair Methods of Competition and Agreements involving Licensees that Unreasonably restrict Competition"

Part I: Discrepancies between the Code (and Guidelines) and Act should be eliminated

As mentioned in our previous submissions, there is considerable discrepancy between the Code (and Guidelines) and the new Competition Act ("Act"). Singapore should be aiming to move the telecommunications sector under the Act or at least ensure consistency between the two in the interim. As mentioned previously, we strongly believe that a two tier system of competition regulation will lead to an imbalance within the competition regime, promote regulatory uncertainty and give rise to serious issues of interpretation, application and enforcement.

We are disappointed that there appears to have been no effort to align the provisions of the revised Code (and Guidelines) with the Act, even though there was an opportunity to do so during the Code review process. The concerns we have raised over the undesirability of this two-tier regime in previous submissions to the Ministry of Trade and IDA seem to have gone unnoticed. The telecommunications sector is accordingly disadvantaged in having weaker competition and enforcement provisions as compared with the Act.

An example of this is the IDA's decision of 12 April 2005 to exempt SingTel from certain ex-ante obligations on International Managed Data Services, which has effectively created a "quasi competition law regime" whereby SingTel's conduct will henceforth be policed by ex-post competition rules albeit, under the weaker Code provisions. Consequently, we would request that IDA review its proposed tests on an abuse of dominant position as some of them are so unrealistic and onerous to prove that no undertaking could ever found to be in infringement.

Part II: Guidelines should be more robust

We submit the general criticism that the Guidelines are lacking in detail and are drafted to allow too much discretion and not enough guidance to carriers. We also make a general observation that a large portion of these Guidelines are repetitive of the Code. As such, the value add of these draft Guidelines is not significant. We would urge the IDA to include more detail and tighten these Guidelines to ensure that they are effective. For example, it would be extremely helpful to licensees if the Guidelines included greater detail on the tests the IDA will use to assess pricing abuses such as price squeeze and cross-subsidisation by dominant licensees.

In addition, we note that the Guidelines are advisory only and implementation will be "flexible". As you would be aware, business certainty is crucial to carriers. We would request that IDA give its assurance that it will adhere to the Guidelines as strictly as possible and give full reasons where it seeks to deviate from them.

Part III: Market Definition is the foundation to an assessment of competition in markets

Before a market's competitiveness can be fully assessed, it is well recognised by competition authorities world-wide that market definition must first take place. In the absence of the Competition Act applying to telecommunications, we must stress that it is extremely crucial that markets are accurately defined since it is a means to assess effective competition for the purposes of ex ante regulation. This is because the telecommunications sector does not yet have access to the stronger provisions in the Act and therefore has a weaker "safety net" of ex-post provisions to fall back on.

Specific comments on market definition are provided in relation to S2.1 and S2.4.1.

Part IV: Comments on Specific Sections of "Petitions for Reclassification and Requests for Exemption"

(i) S2.1 - Request for Exemption from Application of Special Dominant Licensee Provisions

Market Definition

We are concerned about the lack of guidance on how markets are defined. Rather, S2.1 (d) gives dominant licensees discretion to define markets. As the assessment of a petition for reclassification essentially involves assessing whether a licensee has significant market power, the definition of the market is of fundamental importance since effective competition can only be assessed by reference to the market defined.

Accordingly, the definition of the market should not be left to the sole discretion of the dominant licensee seeking exemption as any assessment would be self-seeking and guided by an overarching interest to define the market in a way such that it would qualify for the exemption. The dominant licensee's petition (including market definition and assessment of competition) should be rigorously reviewed by IDA and industry input sought. As an example, in its previous requests for exemptions, SingTel conveniently applied for a block exemption across a range of international services and justified it as one market as it deemed fit. In retrospect, the exercise was too simplistic by international standards and lacked the rigor of a market review.

We urge the IDA to improve on the scope of Guidelines to clarify the process by which the Singapore telecommunication markets will be defined and competition assessed. Useful guidance on the market definition is provided by the *EC Guidelines on Market Analysis and Calculation of Significant Market Power ("SMP Guidelines")*[1] and the *Commission Notice on Definition of the Relevant Market for the Purposes of Community Competition Law ("Commission Notice")*[2]. We provide some suggestions below and consequently urge the IDA to include in the Guidelines an examination of how telecommunications markets are to be defined and competition on them assessed.

Substitutability of services

S2.1 (d) lacks guidance on the criteria IDA will use to determine substitutability of services. We submit that substitution analysis should take into account both the demand and supply side characteristics. According to well established European case law, the relevant product/service market comprises all those products or services that are sufficiently substitutable in the terms of their:

- Objective and physical characteristics, i.e. whether they are suitable for satisfying consumers' needs;
- Conditions of competition – different pricing models imply different consumer groups and therefore separate markets, e.g. business and residential customers;
- Market structure – e.g. technology convergence would lead to increasing product substitutability.

We would request that S2.1 (d) be expanded to include the standards to be used in the analyses on demand and supply side analyses.

Demand-side substitution

Demand side substitution determines the substitutability of products or a range of products which consumers could easily switch between as a result of a relative price increase. As demand side substitution focuses on the interchangeable characteristics of products or

[1] http://europa.eu.int/comm/competition/liberalisation/others
[2] OJ [1997] C372/5, 4 CMLR 177

services from the consumer's perspective, consumer churn may be considered a proxy for demand-side substitution.

Switching costs are an important factor to consider when assessing demand side substitution. Switching costs may include prior investments in technology, long term contracts, excessive premature termination costs etc.

Supply-side substitution

Supply side substitution considers the ability for consumers to seek alternative sources of supply of a product / service given a relative increase in price. In addition to considering the number of service providers (and associated cost of switching), supply side substitution should also take into account the existence of existing legal, statutory and regulatory requirements that would raise entry barriers into the relevant market and therefore, discourage supply side substitution.

(ii) S2.2 - Evidence to be considered

We note that S2.2.1 (b) and S2.2.2 are mirror images of S2.6.1 and S2.6.2 of the Code, respectively.

S2.2 (c) requires dominant licensees to provide relevant information with 'reasonable effort' and if not available, to make good faith estimates. Market definition and assessment of competition in that market require an analysis of all available evidence of past market behaviour and an overall understanding of the mechanics of a given sector. We are of the view that the reasonable effort and good faith standards are too weak. Dominant licensees are in a privileged position in the market. They have access to greater levels of market information, trends and statistics than any other operator, or indeed, the regulator. Therefore they should bear the evidentiary burden in making a petition for reclassification and the standards must be sufficiently rigorous.

In the absence of stating specific evidence that a dominant licensee must include when submitting a petition for reclassification, the dominant licensee will provide the bare minimum. This was the case in SingTel's previous exemption requests from dominant licensee obligations in the provision of International Telephone and International Capacity Services, where several respondents to the IDA consultations commented on SingTel's failure to provide verifiable data. SingTel should, therefore, not have qualified for the exemption request to be reviewed until sufficient data to substantiate its claims were made available.

Therefore, we would request that the Guidelines should be made more specific in terms of the information requirements that must be submitted in making a petition for reclassification and the petition rejected in the event these requirements fall short. We would stress that it is **extremely critical** that the gaps created from the exclusion of telecommunications from the scope of Competition Act are narrowed by having rigorous standards of qualification for exemption from ex-ante regulation.

For example, IDA should require the following evidence when analysing demand-side substitution:

- Previous evidence of consumers' behaviour;
- Examination of historical price fluctuations in potentially competing products;
- Records of price movements;
- Relevant tariff information; and
- Evidence of consumer churn in response to price changes.

When analysing supply-side substitution, evidence should be sought on behaviour to delay, deny and refuse service, such as:

- Delays and obstacles in concluding interconnection, access and collocation agreements;
- Delays and denials of service when negotiating other forms of commercial agreements; and
- Obtaining rights of way for network expansion.

(iii) S2.3 - Analytic framework for assessing requests for exemption applicable to facilities

The criteria set out in S2.3 (b) (i), on performance of similar or comparable function is not sufficient to determine whether a Licensee's facility is sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunications market. Even where services are substitutable, there would be performance differences in terms of quality of service and cost.

For example, while wireless broadband technologies such as WiMax (801.16) may be deployed to serve local access purposes, associated performance issues such as latency, jitter, packet loss, interference etc. hardly makes it a comparable substitute to local leased circuits but rather, complementary. Interoperability with existing systems and networks to deliver seamless quality of service is also an important factor.

Factors such as quality of service, cost, interoperability etc. should also be assessed in determining whether the cost or difficulty of replicating a Licensee's facility is a sufficient barrier to new entrants.

(iv) S2.4 Analytic framework for assessing requests for exemption applicable to services

2.4.1 Market Definition – The market definition should be expanded to include the standards to be used in the analyses on demand and supply side analyses as discussed in S2.1 on Market Definition.

S2.4.1 (a) (i) – IDA states that it may apply the "hypothetical monopolist" test. This suggests that there could be situations where IDA will not apply the "hypothetical monopolist" test. If so, we seek clarification in what circumstances IDA would/would not apply the test and where it chooses not to, what other test would be applied. Notwithstanding, we consider that IDA should, as a starting point, apply the "hypothetical monopolist" test in all cases when assessing each exemption request in the interests of uniformity and business certainty.

The "hypothetical monopolist" test is a widely adopted and useful test for assessing the existence of any demand and supply side substitution. The *SMP Guidelines* recommend that as a starting point, national regulatory authorities should apply this test firstly to an electronic communications service or product offered in a given geographical area, the characteristics of which may be such as to justify the imposition of regulatory obligations, and having done so, add additional products or areas depending on whether competition from those products or areas constrain the price of the main product or service in question.

S2.4.1 (b) – In addition to identifying whether a service is provided at the wholesale or retail level, further distinctions may also need to be made between service provision to different customer groups, such as business vs. residential customers.

S2.4.1 (b) and (c) – The starting point for defining and identifying product markets is a characterisation of retail and wholesale markets over a given time horizon taking into account demand side and supply side substitution[3]. Once the relevant product market is identified, the next step would involve undertaking a definition of the geographical dimension of the market. S2.4.1 (b) and (c) does not, however, clearly state that IDA is required to define the market in this sequence. For the avoidance of doubt, we would request that IDA clarify that it would seek to first identify the product market and only then, the geographic dimension of the product market in question.

S2.4.1 (b) does not clarify the basis on which the geographic scope of the product markets would be derived. Traditionally, this was determined by reference to two main criteria:

- the area covered by a network and
- the existence of legal and other regulatory instruments

Based on the criteria, geographic markets may therefore be local, regional, national or covering several territories. We would request that IDA clarify the basis on which it will determine the geographic dimension of the relevant product markets.

S2.4.2 (a) (ii) – Market shares are often used as a proxy for market power. We welcome the IDA's clarification that it would presume a Licensee with market share in excess of 40% to have significant market power ("SMP").

In addition, other factors such as market share trends should also be considered. For example, a licensee with a significant position in the market who is gradually losing market

[3] Section 2 of SMP Guidelines

share may well indicate a more competitive market but does not preclude a significant market power, whereas a licensee with fluctuating market shares over time may indicate a lack of market power.

S2.4.2 (b) – in addition to market concentration and entry barriers, we would request that the list of other factors in assessing a licensee's ability to act anti-competitively (i.e. possess SMP) should be expanded to include:

- Overall size of the undertaking;
- Control of bottleneck infrastructure;
- Technological advantages or superiority;
- Absence of or low countervailing buying power;
- Easy or privileged access to capital and financial markets, i.e. deep pockets
- Diversification of products and services, e.g. bundled products or services;
- Economies or scale and scope;
- Vertical integration;
- A highly developed distribution and sales network; and
- Absence of potential competition.

These are criteria in the *SMP Guidelines* as relevant to the assessment of single dominance and established by case law such as *United Brands v Commission, Hoffmann-La Roche v Commission and Michelin v Commission.*

Part V: Comments on Specific Sections of "Abuse Of Dominant Position, Unfair Methods Of Competition And Agreements Involving Licensees That Unreasonably Restrict Competition"

(i) S2.1 – Relationship of Competition Rules to Ex Ante Regulation

The Guidelines state that "[a]s competition develops, IDA anticipates that it will be able to reduce the level of ex ante regulation, and place greater reliance on ex post enforcement." This means that Sections 8 and 9 of the Code and accompanying Guidelines will become increasingly important for the telecoms industry in Singapore. It is therefore, extremely important that these provisions are aligned to the corresponding provisions in the Competition Act, otherwise Singapore is at risk of nurturing two divergent and inconsistent competition regimes. Further, if inconsistencies are allowed to develop between the two competition regimes it will become increasingly more difficult to incorporate the telecoms industry into the provisions of the Competition Act. The risk is that telecoms will be left with its own hybrid ex post competition law with very weak enforcement provisions, much to the detriment of all the carriers in the market.

(ii) S2.2 – Flexible Implementation

IDA will implement sections 8 and 9 of the Code "flexibly". As previously noted, it is important that IDA maintains business certainty and adheres to the Guidelines as strictly as possible.

(iii) S2.3 - The "Unreasonably restricts competition" Standard

As the IDA states in S2.3(d), it is important that the "test" for assessing whether conduct "unreasonably restricts competition" is forward-looking i.e. not just whether the conduct in question restricts competition but whether it **could** or **is likely to** have that effect. For clarity, therefore, IDA's general test in S2.3(b) should read "...IDA concludes that the conduct actually harms or is likely to harm End Users...".

In addition, further clarification of the *de minimis* rule in S2.3(c) would be helpful because conduct which may fall within the prohibitions in the Code may in fact have an insignificant effect on competition. IDA should give examples of when the Code is unlikely to be contravened and further guidance as to what constitutes an 'unreasonable' restriction. For example, the EC *Notice on Agreements of Minor Importance* sets out the market share thresholds for determining when a restriction of competition is not appreciable. Likewise, the IDA could include a rule that where the parties to an agreement have a combined market share less than x% then the agreement is unlikely to unreasonably restrict competition.

(iv) 3.2 - Abuse of a Dominant Position

The test for abuse of dominance states that a dominant licensee will have abused its dominant position where it has SMP in a telecoms market and has engaged in unilateral conduct that has restricted or is likely to restrict competition in any telecoms market in Singapore. However, the IDA does not give much guidance on what constitutes SMP. Although, S2.4.2 of the Guidelines on Petition for Reclassification presumes a Dominant Licensee to have SMP if it has a market share in excess of 40%, it is not clear whether this would be applicable to an abuse of dominance situation. It is important therefore that IDA clearly states examples of when a dominant licensee has/has not got SMP.

Further, the IDA does not indicate how it will approach market definition in abuse cases. The test for dominance refers to a dominant licensee having SMP 'in a telecommunication market' and engaging in abusive conduct 'in any telecommunication market in Singapore'. The IDA needs to clarify further whether in each part of this test it is referring to the same market. It also needs to demonstrate how it will conduct market definition analysis.

(v) 3.2.1.1 - Predatory Pricing

The Guidelines provide that the test of predatory pricing is based on selling below average incremental cost and a three step test is proposed. We would urge IDA to re-examine this

burdensome test because it will, in practice, be extremely difficult for a licensee alleging abuse to prove that predatory pricing has taken place. Predatory pricing is always notoriously difficult to prove and this test makes it even more so. For example, how will IDA decide which sales below incremental cost are 'likely to' drive rivals out of the market (a subjective test)? How is IDA going to form a view of the future efficiency of rivals? Also, how will the IDA assess recoupment of losses, particularly in view of the fact that the price-cost ratio is not static?

We are also disappointed that IDA has used Average Incremental Cost as the basis for the test for predatory pricing because it allows for forecasting errors. Long Run Average Incremental Cost (LRAIC) is preferred because over the long run, costs which are fixed in the short term - for example, labour - become variable. Failing to recognise asset lives as an important factor in the assessment means that the anti-competitive test is out-of-kilter with the investment decision, and could result in stranded assets, which are obviously not in the company's commercial interest. Also LRIC and LRAIC are well-understood, tried and tested cost measurement concepts in the arena of regulatory finance: this cannot be said of any of the alternatives.

As such, we submit that LRIC and LRAIC are the only intellectually robust, unambiguous, well -understood tests with an international track record. Moreover, LRAIC and LRIC avoid the pitfalls of subjectivity and forecasting errors and provide an acceptable level of regulatory certainty to all industry participants.

Consequently, we would urge IDA to consider adopting a presumptive test, such as that adopted by the European Commission and Office of Fair Trading in the UK. In the presumptive test, where a dominant carrier is found to be pricing below LRIC there is a presumption that it is intending to engage in predatory pricing. It is then up to that dominant carrier to rebut the presumption. Where a dominant carrier's individual prices are above LRIC but revenue overall fails to cover total costs, it will be regarded as predatory pricing if it can be established that the purpose of the conduct is to eliminate a competitor.

(vi) 3.2.1.2 - Price Squeeze

The Guidelines provide that this test is based on the price the dominant licensee charges for a service "is so high that the dominant licensee's downstream business or affiliate could not profitably sell its product". This is not however, the only way in which a price squeeze can occur. A price squeeze can occur where the dominant licensee raises the cost of the key input and/or lowers its prices in the downstream market. IDA should build the latter conduct into its test.

As price squeeze is a very common abusive conduct in telecommunications markets, it would also be helpful if IDA give some indication as to how it intends to conduct price squeeze investigations. For example, how it intends to assess cost allocation to ensure that a dominant licensee does not conceal a price squeeze by altering cost allocation between its upstream and downstream activities. It is also important to understand IDA's approach to

assessment of margin (eg the appropriate rate of return and the appropriate time period over which to measure profitability).

(vii) 3.2.1.3 - Cross subsidies

The Guidelines set out the test for cross-subsidisation and state at S3.2.1.3(c) that IDA may conduct cost allocation studies "to determine whether cross-subsidisation has occurred." In what circumstances would IDA not conduct cost allocation studies and in these circumstances, how would the IDA determine whether cross subsidization has occurred?

Furthermore, the Guidelines elaborate neither on how these cost allocation studies will be conducted, nor on the methodology to be used. We consider that an appropriate cost allocation study would be one that shows whether the cost allocation method is objective and reflects cost causation and that the method has been uniformly applied.

We would submit that the real key is the accounting treatment of common costs which must be uniform to avoid any one product getting a free ride at the expense of another and over or under recovery of cost. To this end, we would request that the allocation methodologies should be published, audited, scrutinized and consistently applied. Beyond this, other fall-back tests could include:

- A test of whether the revenue over the lifetime of a service would exceed the LRIC, including the cost of capital, would allow the IDA to determine whether a dominant licensee's revenues from an activity might be expected to fail to cover the costs associated with that activity over its economic lifetime.
- A combinatorial test could establish whether the prices of services in groups that share common costs cover both the incremental and common costs of supplying those services. If they did not, this would indicate that the group of services was being cross-subsidised.
- In assessing whether revenue from providing a service would exceed LRIC, the IDA might wish to perform a discounted cash flow analysis.
- For mature services, a profitability analysis based on accounting data could be used to determine whether there has been a cross-subsidy.

Much of IDA's reasoning turns on the question of whether common costs have been "appropriately allocated". How is this determined? For example, based on the accounting separation system? We submit that "appropriately allocated" would mean:

- A public consultation on the methods to be used in the allocation of common costs
- Full publication of the detail of methods eventually adopted for the allocation of common costs
- Consistent application of the method adopted
- Confirmation by audit

General language used in S3.2.1.3 could be taken to imply that common costs should be allocated differently according to whether they are in an effectively competitive market or

not. This is wrong because it offends against the principle of cost causality. The fact that a common cost arises in an effectively competitive environment is not a cost driver, merely a market feature. As such, recovery of the cost should reflect the cost causation – the service which caused the cost to be incurred.

S3.2.1.3(b)(i) – the reasoning on using revenue to cross subsidise is unclear. A price is a price and it either covers its costs over the product life cycle or it does not. Does it mean that in the accounts, revenues are deducted from some products and added to others? If so, then this is cross subsidy and should be caught by the auditors.

S3.2.1.3(e) is problematic. How does the IDA propose to demonstrate the dominant licensee's intent to cross subsidise when the dominant licensee could have set a price in accordance with a customer's willingness to pay? For example, by comparing the price elasticities of the two services? Even then, this is problematic as the dominant licensee could claim it was merely Ramsey pricing.

In view of these comments, we would request that the IDA provide more details of the tests it will apply in the assessment of cost allocation and in particular, whether the dominant licensee is able to cover its cost and especially in the case where services share common costs.

(viii) 3.2.2 - Other Pricing Abuses

We acknowledge that IDA's list of pricing abuses is not conclusive but merely indicative of the abuses which may be practised by a dominant licensee. However, there are other pricing abuses which warrant inclusion and consideration because they are particularly prevalent in the telecoms industry. These include:

Discounts

The provision of discounts by a dominant licensee can substantially reduce the effective price of services offered to end-users, giving it a significant competitive advantage. Discounts may be a form of price discrimination where the discounts are offered to certain customers that do not reflect underlying cost differences. For example, the dominant licensee has been known to give better discounts to its retail customers than it provides to other licensees. It is therefore critical that the publication of tariffs by dominant licensees include all discount structures applicable to the tariffed services.

Examples of discounts which may amount to an abuse and require close examination include:

- loyalty rebates where the discount is dependent on the customer not taking, or restricting, supplies from competitors;

- discounts calculated across a range of product markets including those where the licensee is dominant;

- volume rebates calculated on the basis of total telecoms expenditure across a range of competitive and regulated markets; and

- discounts targeted at a narrow group of customers, who are vulnerable to switching.

Excessive Pricing

Likewise, excessive pricing may be an abuse where the price charged has no reasonable relation to the economic value of the product supplied (at retail or wholesale level). A classic case of excessive pricing in the telecommunications industry is where a dominant operator charges excessive prices for the supply of network inputs required by competitors in a downstream market

(ix) Other Non-pricing Abuses

Other important non-pricing abuses prevalent in the telecommunications sector but omitted in the Guidelines include: (i) refusal to supply and (ii) bundling.

Refusal to supply and behaviour short of refusal to supply

Refusal to supply is a classic example of abuse of a dominant position and in the telecommunications sector, it often appears as a refusal to grant access to new or existing services, or as a discriminatory refusal to supply, or as a withdrawal of access from an existing customer. It may also take the form of a refusal to supply information in relation to technical or network information. Moreover, behaviour short of refusal to supply (e.g. unreasonable delay, imposing unreasonable terms and conditions etc) is another important example of an abuse where there is no objective justification.

The Guidelines, in S3.2.2.1(d), contain a discussion of discriminatory refusal to supply. However, there are other forms of refusal to supply which need to be taken into account. For example, the EC Access Notice sets out three types of refusal to supply which are often encountered in the telecoms industry:

- a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market; (i.e. discriminatory refusal);

- a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market: (i.e. refusal to grant access where access is required to supply new services); and
- a withdrawal of access from an existing customer.

As regards refusal to grant access where access is required to supply new services, a refusal in these circumstances is likely to limit the development of new services and impede the development of competition. According to the European Court of Justice in Oscar Brunner v. Mediaprint (1999), a refusal to grant access required to supply new services is prohibited where (i) it is likely to eliminate all competition on the part of the undertaking that is seeking access in the relevant downstream market, and (ii) the refusal is incapable of objective justification. According to the UK Office of Fair Trading's Guidelines applying the Competition Act 1998 to the telecommunications sector, the regulator considers that a refusal by a dominant operator to grant access might be an abuse of dominance where the refusal prevents the supply of a new service that has one or more of the following characteristics:

- the service requires end to end capability across the dominant undertaking's network;
- the service requires interconnection in order to be economically viable;
- the service requires that equipment on customers' premises be capable of interacting with the network.

We would therefore urge IDA to include reference to this important example of abusive conduct in its Guidelines. Furthermore, as regards withdrawal of access from an existing customer, this may also be an abuse where no objective reason is provided to justify the termination of service. The Guidelines should also make reference to such an abuse.

IDA has helpfully included a discussion of predatory network alteration in the Guidelines at S3.2.2.2. Related to this abusive conduct is refusal to supply information. The IDA has included discriminatory access to information in S3.2.2.1, but also needs to cover the case where a dominant licensee simply refuses to supply information generated by its network or other important technical information (e.g. such as a refusal to inform a new operator where it can interconnect with its network).

Finally, behaviour short of refusal to supply is another classic example of a dominant operator abusing its dominant position. For example, a dominant licensee may agree to grant access in principle but then use delay tactics in negotiation of terms and conditions or roll-out of the facility so that the licensee is disadvantaged. The dominant licensee may also seek to impose unreasonable terms and conditions or refuse to allow testing. All such behaviour may constitute an abuse where there is no objective justification.

Bundling

There are two types of bundling which need to be considered: (i) where a dominant licensee ties the sale of products in a market in which it is dominant to the sale of products

that are supplied competitively; or (ii) where a dominant licensee bundles together products that could be supplied separately. In each case, IDA needs to assess whether bundling by a dominant licensee has any exclusionary effects on competition.

(x) Anti-competitive preferences

We urge IDA to put more emphasis on the fact that the conduct must have an unreasonable restriction on competition in a **Singapore** telecoms market. This is stated in S3.3 but left out in the tests for price squeeze, cross-subsidisation and discrimination.

We also query the IDA's powers to enforce such an extra-territorial provision. For example, it is not clear how IDA will assess whether a licensee's foreign affiliate has SMP in its home market. Will it, for example, contact the relevant foreign regulator or will it make its own judgment, and, if so, on what basis? Further, how would IDA enforce the finding? We urge IDA to focus on the Singapore market, as opposed to other geographic markets.

S3.3.2 discusses specific practices and in particular the prohibited discriminatory preferences which a licensee may accept from an Affiliate that has SMP. However, the paragraph then goes on to discuss dominant licensees, which is confusing as they were the subject of discussion in S3.2. We would respectfully request the IDA to clarify this paragraph.

Finally, we would question the IDA's ability to make a determination that a foreign affiliate of a Licensee has engaged in a pricing abuse. IDA would need access to that affiliate's internal accounts and cost allocation methodologies. How is the IDA likely to approach evidence gathering to establish a breach of S3.3.3 and S3.3.4?

(xi) S4 - Agreements that unreasonably restrict competition

S4 is unnecessarily complicated and inconsistent with the Competition Act. We propose that IDA align S4 with the Act. In addition, as the provisions are complicated, IDA needs to implement a process whereby licensees can informally seek guidance from the IDA to ensure they are not inadvertently breaching the Code.

(xii) S4.3.1.2 - Bid-rigging

IDA should take into account that a customer may request competitors to make a joint bid. This is increasingly common for large managed network solutions bids and outsourcing contracts.

CONCLUSION

Whilst we welcome the IDA's draft Advisory Guidelines on competition provisions of the Code we would urge IDA:

- to ensure that it does not maintain and compound the discrepancies between the Competition Act and the Code as the telecommunications sector in Singapore will be disadvantaged as a result
- to work towards including telecoms in the Competition Act because it has more robust competition and enforcement provisions and will ensure uniform application of law
- in the interim to work towards ensuring consistency between the two regimes
- and to strengthen the guidelines with this aim in mind so that telecommunications sector is not prejudiced and also so that licensees have as much certainty and clarity as possible over the IDA's approach to S2.3, S2.5, S8 and 9 of the Code

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Each of the carriers participating in this Submission would be happy to discuss these comments in more detail with the IDA, at the IDA's convenience. Please do let us know when would be a convenient time for this discussion.