Submission to IMDA

Singtel's response to IMDA's Consultation Paper on a Converged Competition Code for the Media and Telecommunications Markets

Singapore Telecommunications Limited

Contents

1. Executive summary

Introduction

- Singtel welcomes IMDA's proposal to introduce a converged competition code for the telecommunication and media markets (**Converged Code**) to replace the *Code of Practice for Competition in the Provision of Telecommunication Services 2012* (**TCC**) and the Media Market Conduct Code (**MMCC**).

- Singtel considers that IMDA should take this "once-in-a-generation" opportunity to ensure that the Converged Code:

  - responds to developments in the telecom and media sectors since the introduction of the TCC and MMCC, including the structural reform of the fixed sector through the Next-Generation Nationwide Broadband Network (**NGNBN**);

  - results in a regulatory framework that allows the telecom and media sectors to reach their full potential, maximises consumer welfare and facilitates the development of Singapore's digital economy; and

  - reflects international regulatory best practice.

- While many of IMDA's proposals represent an improvement over the current regulatory framework and would facilitate the objectives identified above, some of IMDA's proposals do not go far enough and would result in regulation that is now unnecessary, not fit-for-purpose and out of line with international regulatory practice.

Market overview, convergence and regulatory principles (sections 2 and 3)

- Singtel broadly agrees with IMDA's observations regarding recent trends in the telecom and media markets, as well as with the regulatory principles that IMDA proposes to adopt in the Converged Code.

- However, many of IMDA's substantive regulatory proposals are in conflict with IMDA's own observations about the state of competition and development in telecom and media markets, as well as the principles of proportionate regulation and preference for market-based solutions that IMDA proposes to incorporate into the Converged Code.

- This inconsistency is particularly apparent in respect of IMDA's proposals to continue regarding entities as dominant in all existing markets, to continue regulating retail, wholesale and resale tariffs, and to expand the Cross-Carriage Measure. These measures do not recognise the step-change in competition in relevant markets, the restructuring of the sector itself through the NGNBN and technological developments that are increasing competition and market maturity.

- In the areas of fixed-line and business capacity services, the trends observed would suggest that the IMDA's view of Singtel's significant market power (**SMP**) in these segments are not accurate.

- IMDA's proposals to reform regulation do not go far enough and consequently continue to represent a highly disproportionate form of regulatory intervention.

Dominance classification and duties of dominant entities (section 4)

Threshold for initial presumption of SMP (section 4.2)

- The market share threshold for determining SMP should be set at 60% for both telecommunication and media markets and should only be one factor (among others) taken into account by IMDA in assessing the existence of SMP, rather than being indicative or presumptive of SMP.

- This approach would:

  - be more consistent with the approach taken by the Competition and Consumer Commission of Singapore (**CCCS**) in the general economy (which adopts a 60% market share threshold for indicating dominance); and

  - reflect the specific needs of Singapore as a small market economy – as argued by economist Michal Gal, smaller economies reach minimum efficient scale at a higher level of concentration than larger economies, such as the US and EU, thereby justifying higher SMP thresholds.

- Singtel's proposed approach would more closely reflect the economic basis for regulating entities that have SMP. The primary rationale for imposing *ex ante* obligations on entities with SMP is to correct for situations where entities do not face a significant degree of competitive pressure.

- Market share is not in itself a determinative factor for whether an entity can behave independently of its competitors and customers. It is therefore more appropriate to regard market share merely as one factor (among others) in the SMP analysis, rather than treating it as a presumptive or indicative factor.

"Market-by-Market" approach to dominance (section 4.3)

- The Converged Code should not continue to regard entities as dominant in all existing markets they operate in. There is no principled rationale for applying the Market-by-Market approach only to new markets.

- IMDA's proposal would represent an effective continuation of the "Licensed Entity" approach to dominance, as entities would still be presumed dominant in existing markets without a market review. IMDA has never conducted a full Market-by-Market review. The market analyses that IMDA has conducted in the context of exemption applications by Dominant Entities are outdated (in some cases, over 15

years old) and cannot reasonably be used as the basis for imposing access obligations under the Converged Code.

- IMDA's proposal fails to respond to step changes in competition in a range of telecom markets (as acknowledged by IMDA). This approach is excessive, contrary to international regulatory practice and would continue to impose significant administrative barriers on operators.

- IMDA should instead move to a full Market-by-Market approach, where *ex ante* obligations are only imposed after periodic market reviews. Market reviews should be conducted concurrently with this consultation into the Converged Code to allow *ex ante* obligations based on such market reviews to come into effect concurrently with the effective date of the Converged Code.

Tariff filing obligations (section 4.5)

- Retail, wholesale and resale telecommunication services should no longer be subject to any tariff approval or notification obligations.

- Retail tariff regulation (including notification obligations) is a feature of "old-world" regulatory frameworks that is no longer relevant given the increased competition in Singapore's telecom sector and the structural transformations that have taken place due to the introduction of the NGNBN, with 100% nationwide coverage, a Universal Service Obligation, stringent Quality of Service requirements and cost-based pricing determined by IMDA.

- Retail tariff filing or notification requirements have also been removed in most advanced markets which like Singapore have undergone structural change and have a high level of retail competition. Requiring retail tariff notification and approval requirements would place Singapore significantly out of line with other advanced economies.

- Wholesale and resale tariff regulation is also no longer justified, given that the prices of wholesale bottleneck services are already regulated through the NetLink Trust (**NLT**) Interconnection Offer, Nucleus Connect Interconnection Offer and the Singtel Reference Interconnection Offer (**RIO**). Other wholesale and resale services are reasonably competitive and there is no rationale for continued tariff regulation of such services.

- At the very most, any tariff filing obligations should be restricted to basic retail telecommunication services (i.e. fixed-line telephony and payphones), where there may be a social rationale for ensuring continued access at a certain price and the market may not be capable of delivering access at this price.

Other proposals

- With the exception of the above, Singtel does not object to IMDA's proposals in respect of dominance-related duties.

Anti-competitive conduct (section 5)

Criteria for abuse of dominant position (section 5.1)

- A purely effects-based test should be introduced for determining abuse of dominant position.
- The *"unreasonable restriction of competition"* test that IMDA proposes to adopt for both telecom and media sectors is ambiguous, as it is not entirely clear whether this is an effects-based test or what makes a restriction on competition *"unreasonable"*. Singtel recommends more closely aligning with the approach taken by the CCCS in the general economy.

Joint dominance (section 5.2)

- The Converged Code should not contain a prohibition on abuse of joint dominance.
- There is no well-established need for such prohibition. The concept of joint dominance creates a risk of regulatory error and uncertainty and there are already existing tools (e.g. prohibitions on anti-competitive agreements) that can be used to target tacit collusion and anti-competitive coordination between market participants.

Specific types of abuse of dominant position (sections 5.6 and 5.7)

- A specific prohibition on cross-subsidisation and predatory network alteration should be removed from the Converged Code.
- Cross-subsidisation that is harmful to competition is already captured by other categories of abuse (e.g. predatory pricing). Cross-subsidisation that falls short of predatory pricing is not itself recognised as a specific type of abuse in other leading jurisdictions, such as the EU.
- A prohibition on predatory network alteration goes well beyond the legitimate scope of competition law and cannot be found in any other established competition regulatory frameworks around the world. It is not the place of competition law to require operators to maintain specific products (including network interfaces) in the market that they otherwise wish to withdraw.

Anti-competitive agreements (section 5.10)

- The types of agreements considered as anti-competitive "by object" should be limited to price fixing and output restrictions, bid rigging, market divisions or allocations, and group boycotts. All other types of agreements should be subject to an effects-based test.
- There is no basis for a specific effects-based prohibition on "foreclosure of access". Such agreements would already be caught by the general prohibition on anti-competitive agreements.

- The efficiency defence should be made available in the case of all agreements, including "by object" agreements, rather than being part of the effects analysis. The efficiency benefits of an agreement are also relevant in the case of "by object" agreements, which are not subject to an effects analysis.

Other proposals

- With the exception of the above, Singtel does not object to IMDA's proposals in respect of anti-competitive conduct provisions.

Consumer protection provisions (section 6)

- The consumer protection provisions should apply only to residential and small business end-users (i.e. business end-users employing fewer than 20 employees). As an exception, the specific protections applying in the context of pay TV services (currently contained in sections 3.2B, 3.2C, 3.2D(b), 3.2E, 3.5A and 3.5B of the MMCC) should apply only to residential end-users.

- There is no basis for expanding the scope of consumer protections to all businesses. Large business and Government end-users tend to be commercially sophisticated actors with a high degree of bargaining power that procure services through competitive tenders, thereby not requiring consumer protections.

- Singtel does not otherwise object to IMDA's proposals in respect of consumer protection provisions.

Mergers and acquisitions (section 7)

- Singtel does not object to IMDA's proposals in respect of mergers and acquisitions.

Resource sharing (section 8)

- Singtel does not object to IMDA's proposals in respect of resource sharing.

Public interest obligations (section 9)

- The Cross-Carriage Measure should be revoked. The measure is an example of highly disproportionate regulation, given the increased level of competition in respect of pay TV services (including from new over-the-top (**OTT**) video streaming services), low take-up of services relying on the measure and the high costs associated with implementing the measure.

- Widespread piracy, the availability of illicit streaming devices (**ISDs**) and the growth of OTT players are substantially reshaping the pay TV sector and placing pressure on revenues. In this context, there is no regulatory basis for imposing onerous cross-carriage obligations on licensees.

- There is also no persuasive rationale for extending the Cross-Carriage Measure to OTT services. It is not clear what economic or competition issue the IMDA is

seeking to solve through this proposal. Consequently, this proposal is excessive and overbearing, and will place Singapore licensees at a further disadvantage compared to the global OTT players.

Interconnection-related obligations (section 10)

Scope of interconnection-related obligations (section 10.1)

- The services subject to interconnection-related obligations should be determined through periodic market reviews, with IMDA issuing an instrument specifying regulated services following each market review.

- If a schedule of Interconnection-Related Services (**IRS**) and Mandated Wholesale Services (**MWS**) is to be maintained, this should be a dynamic instrument listing all regulated services at a given point in time, rather than a static instrument that locks in access obligations for the life of the Converged Code (without regular market reviews).

- Alongside the "Services with No Take-up" identified by IMDA, physical interconnection should be removed from the IRS Schedule. Given the widespread adoption of virtual interconnection and broader technological developments, physical interconnection is no longer relevant.

- Lead-in ducts and manholes should be re-designated as a form of Critical Support Infrastructure (**CSI**) and obligations to supply access to such facilities should apply symmetrically to all operators. Requiring only dominant operators to supply access to lead-in ducts and manholes results in economic distortions and inefficient utilisation of infrastructure, and is therefore not in the interests of the industry and of Singapore as a whole.

- Submarine cable landing stations should be removed from the IRS Schedule and instead be designated as CSI where they meet the CSI criteria (i.e. where they are necessary for providing downstream telecom services and there are no efficient alternatives). Removal from the IRS Schedule will allow licensees to negotiate fair and symmetrical price terms and conditions.

- Further, as submarine cable systems have now shifted to an open-access architecture that permits Submarine Line Terminating Equipment (**SLTE**) housing at locations other than a cable landing station, a case for regulating access to cable landing stations for new systems no longer exists. Consequently, cable landing station access in respect of new cable systems should now be removed from the regulatory framework, whether as CSI or IRS. These facilities cannot be reasonably characterised as economic bottlenecks in relation to new cable systems and there is no rationale for imposing access obligations.

Voice termination pricing (section 10.3)

- A bill and keep (**BAK**) approach is not appropriate for voice termination on PSTN networks. Voice termination over PSTN imposes a readily quantifiable cost on the terminating operator. Moreover, given that Singtel has a much larger PSTN network than other operators, a BAK approach would result in Singtel bearing much higher costs of termination than other operators, without the ability to recover such costs through reasonable termination charges based on a Forward-Looking Economic Cost (**FLEC**) methodology.

- Given that a substantial volume of voice termination continues to occur on the PSTN network, the current calling-party-pays (**CPP**) approach should be retained for PSTN networks.

- Singtel does not support the use of BAK on new IP networks either. This is a complex area that requires significantly more analysis and it is not necessarily the case that BAK will represent the most economically efficient approach. Singtel submits that simply advocating for BAK is too simplistic and that a more detailed economic review is needed to better understand the options that should be considered by the industry.

Pricing principles for IRS, CSI and Essential Resources (section 10.4)

- Requiring each dominant operator to develop their own Regulated Asset Base (**RAB**) is inefficient, unnecessary and likely to create economic distortions.

- While an RAB approach may be used in the specific circumstances of the NGNBN, it is not suitable for non-NLT services, including the services and facilities subject to Singtel's RIO. Non-NLT services and facilities are subject to a "build-or-buy" decision, making a FLEC methodology more appropriate.

- Moreover, the development of a RAB for each operator would result in significant costs without any commensurate benefit and would result in different regulated prices being calculated for each operator.

Administrative and enforcement procedures (section 11)

- Input from stakeholders at all stages of the process is essential to ensuring good regulatory decision-making. The Converged Code should therefore include a requirement for IMDA to prepare preliminary and final decisions (to allow stakeholders to proactively provide input before the final decision), as well as a right to request reconsideration of the final decision. With a right to reconsideration and the current provisions for appeals, we believe there is no need for a draft to be issued in between the preliminary and final decisions.

- The grounds on which a dispute may be referred to IMDA should be explicitly set out in the Converged Code, to provide certainty to operators and avoid the dispute resolution process being used in unforeseen ways.

Competition in the digital economy (section 12)

- IMDA's consultation on the Converged Code covers a very comprehensive range of issues.
- To avoid distracting from areas of regulation that are fundamental to the telecom and media sectors, themes relating to the digital economy and its interaction with regulation are more appropriately explored through a separate, specialised consultation that IMDA should hold at a future date.

2. Market overview and convergence

> ***Question 2:1****: IMDA invites views and comments on the observed trends and developments in the telecommunications and media industries, as set out in Part II of the consultation document.*

1 Singtel broadly agrees with IMDA's observations regarding trends and developments in the telecommunication and media industries, including the five "macro trends" identified by IMDA and their impacts on key telecom and media markets.

2 Singtel welcomes IMDA's acknowledgement that there is increasing competition in fixed and mobile telephony market segments, as well as media markets, driven by structural reform, the rollout of the NGNBN and the growth of OTT services.

3 Singtel considers that these developments require significant changes to the regulatory framework to make it fit-for-purpose in an increasingly competitive and dynamic telecom and media landscape.

4 However, Singtel is concerned that, in many cases, the specific regulatory settings that IMDA proposes to include within the Converged Code do not go far enough and are often inconsistent with IMDA's own analysis on trends and developments in the telecom and media industries.

5 Despite acknowledging the *"fundamental shift in competitive dynamics in the next few years brought about by the macro trends that are affecting the telecommunication and media industries"*,[1] IMDA proposes to incorporate within the Converged Code several elements of the existing regulatory framework that are no longer relevant in an increasingly competitive and mature market environment.

6 In particular, the following IMDA proposals do not accord with IMDA's observations that competition has evolved considerably in telecom and pay-tv markets:

[1] IMDA, Consultation Paper, [2.32].

- the proposed continuation of *ex ante* obligations on Dominant Entities in existing telecom markets (without conducting new market reviews);
- the proposed retention of significant tariff filing and approval obligations; and
- the proposed continuation of the Cross-Carriage Measure and its expansion to OTT platforms.

7 In the fixed-line broadband access market, Singtel agrees that the Dominant Licensee classifications imposed on Singtel will need to be reviewed. Players have ready access to fibre services at a cost-plus model and are able to effectively compete with Singtel in the market.

8 In the business capacity services market, however, Singtel already observes the increased competition projected by the IMDA and the market should likewise be reviewed. Customers have increasingly provided feedback that high-speed broadband over Gigabit Passive Optical Network (**GPON**) is commercially fit for purpose. The volume of customers migrating out of local leased circuits (**LLC**) services is significant and contrary to the view that GPON is not seen as a direct substitute by the majority of business end-users. The fall in prices observed by the IMDA is a direct result of competitive prices offered in the market. The volume of players in the GPON market is also comparable to exempted International Managed Data Services (**IMDS**) and backhaul markets.

9 In the domestic fixed-line telephony market, the substitutability of Session Initiated protocol (**SIP**) trunking over broadband, as well as cloud-based players in the market providing Voice over Internet Protocol (**VOIP**) services, should not be underestimated. As the IMDA has observed, SIP and VOIP allow customers to utilise their existing network infrastructure. Singtel's view is that the prevalence of IP-based solutions in the market is substantial and the relevant market should be expanded to include these services.

10 Singtel's detailed submissions on these specific proposals are set out in sections 4.3, 4.5 and 9.1, respectively.

11 As further detailed in the sections below, Singtel considers that the provisions of the Converged Code should more closely respond to and align with the trends and developments in competition identified by IMDA in section 2 of its Consultation Paper.

3. Regulatory principles

Question 3:1*: IMDA invites views and comments on the following proposals:*

(a) to merge the common regulatory principles of the TCC and MMCC; and

(b) to retain the regulatory principle on Promotion of Facilities-based Competition for the telecommunication market only.

12 Singtel does not object to IMDA's proposed approach to setting out regulatory principles in the Converged Code.

13 However, Singtel considers that the substantive provisions of the Converged Code should align more closely with the regulatory principles proposed by IMDA. Some of the substantive regulatory settings in the Converged Code are in conflict with the regulatory principles that IMDA proposes to incorporate into the Converged Code.

14 For example, the regulatory principles refer to the need for proportionate regulation and prioritise reliance on market forces, private negotiations and industry self-regulation over regulatory intervention.[2]

15 However, IMDA's proposals to retain retail tariff regulation and to continue imposing *ex ante* obligations in existing markets (without any market reviews), as well as IMDA's proposed maintenance and extension of the Cross-Carriage Measure, do not demonstrate a priority for market forces and are not an example of proportionate regulation, as they go well beyond what is necessary to respond to the state of competition in the relevant markets.

16 Similarly, IMDA's proposal to adopt a BAK approach for the pricing of all fixed voice termination and to move to a RAB model for the pricing of certain network elements does not reflect the principle of proportionate regulation. This is because (as explained in sections 10.3 and 10.4), it would result in a "one-size-fits-all" approach that does not reflect the specific characteristics and nuances of the services and network elements being regulated, while imposing disproportionate costs on regulated entities.

17 Without meaningful changes to IMDA's proposals in these areas, the regulatory principles risk being a mere rhetorical commitment that is not actually reflected in the substantive provisions of the Converged Code.

18 Accordingly, IMDA should ensure that all of the substantive proposals for the Converged Code align carefully with the regulatory principles set out in section 3 of IMDA's Consultation Paper, as further detailed in Singtel's submission.

[2] IMDA, Consultation Paper, [3.3], [3.5].

4. Dominance classification and duties of dominant entities

4.1 Criteria used for Dominance Classification

> ***Question 4:1****: IMDA invites views and comments on the proposed standards for dominance classification under the Converged Code.*

19 IMDA's proposed approach to dominance classification is that an entity could be regarded as dominant either if it operates facilities that are sufficiently costly or difficult to replicate or has SMP in a relevant telecommunication or media market.

20 Singtel does not have in-principle concerns about this approach, which would extend the criteria used for dominance classification in telecommunication markets to media markets.

4.2 Threshold to be Used for Initial Presumption of SMP

> ***Question 4:2****: IMDA invites views and comments on the appropriate level for the SMP Presumption Threshold.*

21 Singtel considers that IMDA's proposed "**SMP Presumption Threshold**" of 50% is too low and would result in an inefficient level of regulation for both telecommunication and media markets.

22 Singtel submits that the market share threshold for determining SMP should be:

- set at **60%** for both telecommunications and media markets; and
- only one factor (among others) taken into account by IMDA in assessing the existence of SMP, rather than being indicative or presumptive of SMP.

(a) A market share threshold of 60% is more consistent with the approach taken by the CCCS in the general economy and principles of economic regulation

23 Singtel considers that a 60% threshold is more appropriate than a 50% threshold, for three reasons.

24 First, a 60% threshold would bring the Converged Code in line with the approach used by the CCCS for assessing dominance in the general economy. The CCCS considers a market share above 60% as "*likely to indicate that an undertaking is dominant in the relevant market*".[3]

[3] CCCS, *Guidelines on the Section 47 Prohibition 2016*, [3.8].

25 It is unclear why, on the one hand, IMDA accepts that the current 40% SMP threshold in the TCC is too low but, on the other hand, wishes to continue imposing a lower threshold than that applied by the CCCS in the general economy. As IMDA acknowledges in its Consultation Paper, competition in the telecommunications sector has evolved considerably in the past decade.[4] Accordingly, Singtel considers that there is no longer any economic basis for imposing a stricter SMP threshold in the telecommunications and media sectors as compared to the general economy.

26 Second, a 50% threshold applied to the media markets under a Converged Code would be stricter than the current 60% threshold applied to the media sector under the MMCC. IMDA has not established a clear economic rationale for why the SMP Presumption Threshold for the media markets should be lowered from 60% to 50%, aside from making a reference to *"the smaller number of players in the relevant media market"* and asserting that *"a market share of 50% or more is likely to be indicative of SMP"*.[5]

27 The lowering of the threshold from 60% to 50% would only be justified if there has been a material decrease in competition in the media sector, which would require a stricter approach to regulating dominance. However, the Consultation Paper itself acknowledges the growth of OTT media services and the diminishing reach of traditional media platforms,[6] both of which are factors that point to an *increase* rather than a decrease in competition in the media markets. Widespread piracy and availability of ISDs in Singapore (facilitated by extensive penetration of high-speed broadband connections) is also placing increasing competitive pressure on media markets, particularly in respect of pay TV services.

28 Accordingly, Singtel does not consider there to be any economic basis for lowering the SMP Presumption Threshold for media markets from 60% to 50%.

29 If IMDA wishes for the SMP threshold to be consistent across the media and telecommunications markets (a principle which Singtel supports), then a 60% threshold should be used, as it would ensure consistency with the approach taken by the CCCS, while ensuring that the threshold used for media markets is not arbitrarily lowered to 50%.

30 Third, Singtel submits that there is no basis for the Converged Code to follow jurisdictions that impose a lower SMP threshold of 40–50%, such as the EU and the United States. It is widely recognised among competition law experts that smaller market economies, such as Singapore, require different regulatory settings to operate at an efficient level of competition.

[4] IMDA, Consultation Paper, [4.9].
[5] IMDA, Consultation Paper, [4.10].
[6] IMDA, Consultation Paper, p. 8.

31 For example, economist Michal Gal argues that smaller economies achieve a *"minimum efficient scale"* at a larger size relative to overall demand (i.e. a higher level of concentration) than larger economies.[7]

32 This means that a market share which in a larger economy might require regulatory intervention (in the form of access obligations) does not raise the same concerns in a smaller economy.

33 Accordingly, Singtel does not consider that the lower thresholds used in the EU and United States provide a useful precedent in the Singapore context, particularly when the CCCS has adopted a 60% threshold for Singapore's general economy.

34 For all these reasons, Singtel submits that a threshold of 60% is more appropriate and useful for indicating SMP than a threshold of 50%.

(b) The market share threshold should only be one factor in determining SMP, rather than being presumptive of SMP

35 Singtel welcomes IMDA's view that the SMP Presumption Threshold should be set out in the guidelines for the Converged Code (rather than the Code itself), and that this *"will not be the only factor considered for assessing market power and dominance"*.[8]

36 However, Singtel considers that market share (including the market share threshold) should be expressed as being only one factor in determining SMP, to be considered equally among all other factors.

37 The SMP threshold should not create a rebuttable *presumption* of dominance. It should <u>not</u> be the case that an entity whose market share reaches the threshold is automatically "presumed" dominant and then needs to rebut that presumption by pointing to countervailing factors.

38 This approach gives excessive and undue weight to market share as a factor in assessing SMP. Instead, the Converged Code (or the guidelines) should make it clear that market share is an equal factor among others in assessing whether an entity has SMP and that SMP cannot simply be "presumed" from an entity's market share.

39 Treating market share as being one factor (amongst others) in the SMP analysis is supported by examining the economic basis for regulating entities that have SMP.

40 An entity has SMP in a market when it can act independently of its competitors and customers and does not face a sufficient degree of competitive pressure.[9]

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[7] Michal Gal, "Size Does Matter: The Effects of Market Size on Optimal Competition Policy" (2001) 74 *Southern California Law Review* 1437, p. 1444.
[8] IMDA, Consultation Paper, p. 20, [4.12].
[9] See, for example: CCCS, *Guidelines on the Section 47 Prohibition 2016*, [3.3], Case 27/76, *United Brands v Commission of the European Communities*, [65].

41 Market share is not a determinative factor to establishing whether an entity is able to behave independently of competitive pressure and in many cases is not even a particularly useful guide to whether SMP exists.

42 Other factors, such as the structure and size of the market, changes in market share over time, barriers to entry, the position and size of competitors and countervailing buyer power, are also highly relevant in determining the extent to which an entity is subject to competitive pressures and should therefore be classified as dominant.

43 For example, it may be possible for an entity that has a very high market share to not behave independently of competition (e.g. if low barriers to entry mean that future competitors can easily enter the market).

44 Accordingly, Singtel does not consider that there is any basis for giving greater weight to market share and treating it differently to the other factors that IMDA considers when assessing whether an entity has SMP. Indeed, presuming dominance based on market share is likely to distort the SMP analysis and draw attention away from factors that may be more relevant in the circumstances of a particular market.

45 Treating market share as only one factor in the determination of SMP would also be in line with the approach taken by the CCCS in the general economy. In its Guidelines on the Section 47 Prohibition, the CCCS notes that *"[t]here are **no market share thresholds** for defining dominance under the section 47 prohibition"* and market share is merely one factor, among others, in determining whether an entity is dominant.[10] This is because *"[m]arket shares, by themselves, may not necessarily be a reliable guide to market power"*.[11]

46 Moreover, treating market share as a factor in SMP analysis (rather than a presumptive factor) is more appropriate for small market economies such as Singapore. In the merger control context, academic and Senior Assistant Director at the CCCS, Lynette Chua Xin Hui, argues that, *"[m]arket shares and concentration levels in small market economies should … be simply indicators of potential competition concerns but not give rise to a presumption that a merger should be prohibited"*.[12] This allows for a more dynamic assessment that is better suited to smaller market economies, where, as mentioned above, minimum efficient scale is achieved at a higher level of concentration and a more flexible approach is required when determining SMP.

47 This also explains why small developed economies, such as New Zealand and Hong Kong (which have a similar economic size to Singapore) have no SMP market share

[10] CCCS, *Guidelines on the Section 47 Prohibition 2016*, [3.5].
[11] CCCS, *Guidelines on the Section 47 Prohibition 2016*, [3.7].
[12] Lynette Chua Xin Hui, "Merger Control in Small Market Economies" (2015) 27 *Singapore Academy of Law Journal* 369, p. 385, https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/423/Citation/JournalsOnlinePDF

thresholds at all, with regulators considering market share (and its interaction with the other indicators of SMP) on a case-by-case basis.[13]

48 Accordingly, Singtel considers that the guidelines to the Converged Code should consider a market share above **60%** as one factor (among others) in the analysis of whether an entity has SMP, rather than a 50% market share being presumptive of SMP.

4.3 "Market-by-Market" versus "Licensed Entity" Approach to Dominance Classification

> ***Question 4:3****: IMDA invites views and comments on the proposed changes to the dominance regime for the telecommunication and media industries, specifically:*
>
> *(i) to adopt the Market-by-Market approach for the dominance classification of a telecommunication licensee in new markets; and*
>
> *(ii) to require Dominant Persons to demonstrate whether the new service(s) they introduce fall within the market(s) in which they are dominant.*

49 Singtel welcomes IMDA's proposed transition to a "**Market-by-Market**" approach to dominance classification for telecommunication markets in the Converged Code. Singtel has been advocating for the adoption of a Market-by-Market approach for over a decade and considers that this approach is necessary to ensure that access regulation is proportionately targeted and does not result in distortions to the competitive process.

50 In particular:

- a Market-by-Market approach would align Singapore with more established approaches used in best practice jurisdictions, which have recognised that the Market-by-Market approach results in more precise and targeted regulation that minimises regulatory overreach; and
- as IMDA recognises, a Market-by-Market approach would allow operators who are dominant in one or more telecommunication markets to enter other markets (where they are not dominant) and compete with other entities on a level playing field, enhancing the level of innovation and competition in those markets.

[13] Commerce Commission New Zealand, *Fact Sheet: Taking Advantage of Market Power*, https://comcom.govt.nz/__data/assets/pdf_file/0041/89897/Taking-advantage-of-market-power-Fact-sheet-July-2018.pdf; Hong Kong Competition Commission and Hong Kong Communications Authority, *Guideline: The Second Conduct Rule*, 27 July 2015, pp. 17–18, https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf.

51 However, Singtel is concerned by IMDA's proposal to continue regarding entities as dominant in all existing markets they operate in and to only apply the Market-by-Market approach to new markets.

52 Singtel considers that IMDA's proposal does not represent a plausible transition to a Market-by-Market approach, as the vast majority of telecommunication services would continue to be subject to dominance classifications without any market reviews by IMDA. This would effectively result in the maintenance of the "Licensed Entity" approach for the majority of markets and services and would represent a Market-by-Market approach in name only.

53 More specifically, IMDA's proposed approach would result in operators:

- continuing to be subject to access regulation in markets where there is no clear economic rationale for the imposition of *ex ante* obligations; and
- being required to undergo a complex administrative process to demonstrate that their new services do not fall within an existing market, which does not represent a substantial improvement over the current exemption process.

(a) There is no economic basis for imposing ex ante *regulatory obligations in respect of existing markets without conducting new market studies*

54 In its Consultation Paper, IMDA states that maintaining existing dominance designations in respect of all existing markets is *"reasonable"* because *"many of the existing telecommunications service markets have been reviewed, arising from requests for Dominant Licensee exemption, over the years"*.[14]

55 Singtel does not consider this to be a persuasive argument.

56 Over the last 18 years, IMDA or its predecessors have never conducted a comprehensive dominance-related review of all telecommunication markets. IMDA has only assessed competition in telecom markets in the context of specific exemption requests from Dominant Licensees. These market assessments do not comprehensively relate to all telecom markets and put the onus on the Dominant Licensee to show that the relevant markets are competitive.

57 Moreover, the reviews of competition that have taken place in the context of exemption requests are significantly out-of-date and therefore completely unsuitable to imposing current *ex ante* obligations.

58 The structure of most markets, as well as the state of competition, have substantially changed since the last exemption requests were made approximately a decade ago.

[14] IMDA, Consultation Paper, [4.19].

59 More specifically, as IMDA itself points out in its Consultation Paper, the most recent review of competition in telecommunication markets took place in 2009, almost 10 years ago.[15] This review, which took place in the context of Singtel's request for exemption from Dominant Entity obligations, resulted in *ex ante* obligations continuing to be imposed in the leased circuit market, business local telephony services and local managed data services markets.[16]

60 Singtel continues to have *ex ante* obligations in respect of these markets, despite competition having evolved considerably in the past decade and Singapore undergoing significant structural changes in its telecommunication markets due to the introduction of the NGNBN. Indeed, IMDA itself has stated that competition has evolved considerably in the industry since that time.[17]

61 The rationale for imposing *ex ante* obligations in several markets has significantly changed due to the rollout of the NGNBN. In particular, Singtel's network has been overbuilt by the NGNBN and NetLink Trust's product suite includes inputs that allow service providers to provide services that effectively compete with those supplied over the Singtel network. This includes the availability of dark fibre to end-user premises throughout Singapore and the ability to buy dark fibres on a segment-by-segment basis, ensuring a high degree of flexibility for service providers to construct competing downstream offerings.

62 The scope of IMDA's regulation has also not kept up with technological developments, which have resulted in a range of services, such as tail LLCs, remaining regulated notwithstanding the fact that they have been superseded by newer technologies and are subject to no demand.

63 In particular:

- IMDA itself acknowledges in its Consultation Paper that there has been *"zero take-up over the past five years"* for tail LLCs provided over the legacy copper network, given that retail operators are instead using wholesale inputs over the NGNBN.[18] For accuracy, since the introduction of tail LLCs in 2007 under Singtel's RIO, no tail LLC has been ordered by any customer, thereby making it clear that tail LLCs are not a wholesale input that is required for the provision of downstream telecom services. However, under IMDA's proposed approach to dominance classification, it appears that IMDA would continue to subject Singtel to Dominant Entity obligations

[15] IMDA, Consultation Paper, p. 20, footnote 24.
[16] IDA, *Final Decision on the Request by Singapore Telecommunications Limited for Exemption from Dominant Licensee Obligations with respect to the Business and Government Customer Segment and Individual Markets*, 2 June 2009, https://www.imda.gov.sg/-/media/imda/files/inner/pcdg/consultations/20071116_stgovcustsegindmkt/bgtsfinaldecem.pdf.
[17] IMDA, Consultation Paper, [4.9].
[18] IMDA, Consultation Paper, [10.8].

in respect of tail LLCs (without any market review), on the basis that these are an "existing service".

- Under IMDA's proposed approach, Singtel would continue to have Dominant Entity obligations in relation to legacy DSL services, even though this network is in the process of being decommissioned and customers can access improved services through the NGNBN from numerous broadband service providers. Dominant Licensee obligations are therefore no longer warranted in respect of DSL services.

64 Continuing to impose *ex ante* obligations on all "existing services", despite significant structural changes in the market and on the basis of market reviews that are over a decade old does not represent proportionate or well-grounded regulation.

(b) IMDA's proposed approach is not in line with international regulatory best practice

65 IMDA's proposed approach to dominance classification is significantly out of line with best-practice jurisdictions around the world, which only impose access obligations on operators following a market review and then regularly conduct renewed market reviews to determine if conditions of competition have changed. For example:

- In the **United Kingdom**, Ofcom imposes *ex ante* obligations on a market-by-market basis, only on operators who are found to have SMP following a market review. Market reviews are conducted every **3 years**,[19] with Ofcom frequently adjusting the scope of *ex-ante* obligations to reflect evolutions in the market following each review.

- In **Australia**, the ACCC imposes *ex ante* obligations on a service-by-service basis, through a "declaration" that must expire within **5 years** unless there are exceptional circumstances.[20] Prior to the expiry of a declaration, the ACCC must conduct a new inquiry into the relevant service, assessing the level of competition once again to determine whether there is a basis for issuing a new (time-limited) declaration.

66 A regular market review process empowers regulators to constantly refine regulatory settings and ensure that they are adapted to current market circumstances.

67 Implementing a full Market-by-Market approach under the Converged Code would ensure that regulation is proportionate and fit-for-purpose at any given point in time. Conversely, maintaining current dominance designations in all existing markets, without conducting any new market reviews, would put Singapore

[19] *Communications Act 2003* (UK), section 84A.
[20] *Competition and Consumer Act 2010* (Cth), section 152ALA.

significantly out of line with leading jurisdictions around the world and would result in an effective continuation of the "Licensed Entity" approach in most telecommunication markets.

(c) IMDA's proposed approach will continue to impose significant administrative barriers on operators seeking to enter new markets

68 In addition to the above, IMDA's proposed approach will continue to impose significantly regulatory barriers on dominant operators seeking to enter new markets.

69 Under the approach proposed by IMDA, operators will be required to prove that the new service they introduce does not fall within an existing market (in which they are deemed to be dominant).

70 This will continue to impose a significant administrative burden on operators seeking to enter new markets. IMDA acknowledges that the proposed assessment process for new services is *"similar"* to the current exemption process,[21] which requires a Dominant Entity to make an exemption application demonstrating why it is not dominant in a market and subjects the operator to dominance regulation until the exemption is granted. In our experience, the exemption process can take 12 months or more.

71 This approach to regulation by IMDA will disadvantage operators trying to enter new markets, thereby hindering innovation and competition in these new markets.

72 For the reasons above, Singtel considers that:

- IMDA should instead move to a full Market-by-Market approach, where *ex ante* obligations are only imposed after periodic market reviews. Market reviews should be conducted concurrently with this consultation into the Converged Code to allow *ex ante* obligations based on such market reviews to come into effect concurrently with the effective date of the Converged Code.

- operators should be free to enter a new market (where they have not been found dominant) without having to lodge an application with IMDA. If IMDA considers that the operator's entry into that market raises competition concerns, IMDA would have the ability to commence a review into that market and designate the operator as dominant or make a determination that the operator's activities fall within an existing market where that operator is dominant.

[21] IMDA, Consultation Paper, [4.17].

4.4 Duties of Dominant Entities

> ***Question 4:4****: IMDA invites views and comments on the application of the ex-ante Dominant Entity duties across both telecommunication and media industries.*

73 Singtel notes IMDA's proposed approach to the duties applicable to Dominant Entities in the telecommunication and media markets. Singtel considers that these duties are broadly aligned with the existing approach under the TCC and MMCC. Given the different types of services provided in telecommunication and media markets, Singtel considers it appropriate that the Converged Code would impose certain duties specific to telecommunication markets and media markets, respectively.

74 However, Singtel has broader concerns about the approach to imposing *ex ante* obligations on Dominant Entities. More specifically:

- as argued in section 4.3 above, Singtel strongly considers that the duties applicable to Dominant Entities should only apply in markets where entities have been found dominant, following a market review; and
- as argued in section 4.5 below, Singtel has significant concerns about IMDA's proposed approach to the tariff filing obligations applicable to Dominant Entities.

4.5 Tariff Filing Obligations

> ***Question 4:5****: IMDA invites views and comments on the proposal to shift to a notification and publication regime for most retail tariffs (other than for withdrawal of such tariffs), while retaining the approval regime for wholesale, resale and certain retail tariffs.*

75 Singtel considers that the tariff filing obligations proposed by IMDA in its Consultation Paper do not represent any meaningful improvement from the current obligations in the TCC, are not fit-for-purpose and are out of step with international regulatory practice.

76 In particular, Singtel is concerned about the proposal to:

- continue requiring full tariff approval for wholesale services, resale services and certain basic ("designated") retail services as well as approval for the withdrawal of existing services; and
- require notification to IMDA for introducing new retail tariffs or modifying existing retail tariffs (for non-basic retail services).

(a) Retail tariffs should not be subject to any regulatory filing obligations

77 Singtel considers that retail telecommunication services should no longer be subject any regulatory filing or notification obligations in Singapore, after 18 years of full liberalisation and the introduction of the NGNBN. This would reflect evolutions in the structure and state of competition in the telecoms sector and would also be in line with international regulatory practice, which has long moved away from tariff filing as an appropriate or proportionate form of regulatory intervention at the retail level.

78 Retail tariff regulation is an "old-world" feature of telecommunications regulatory frameworks that was withdrawn in many jurisdictions as early as the 2000s (as explained further below) as these jurisdictions migrated to more sophisticated wholesale regulatory frameworks based on competition law principles.

79 The initial basis for introducing retail tariff regulation was to ensure access and affordability of telecommunications services. As industry structures and regulatory approaches evolved, the focus of regulation in best-practice jurisdictions has moved from the retail level to the wholesale level, with an emphasis on ensuring that all downstream operators have access to wholesale inputs at a competitive price. This drives competition in retail markets, which is regarded as a more effective in improving outcomes for end-users, as compared to direct price regulation at the retail level.

80 As IMDA acknowledges in its Consultation Paper, *"there appears to be healthy competition at the retail level"*, driven by the rollout of the NGNBN and the changes to market structure this has created.[22] The fact that, as IMDA points out, there are now *"more than 25 licensees offering retail broadband services to End Users"* means that competition is effective in keeping prices low. Singapore now has one of the most competitive retail telecommunication sectors in the world, with the country having one of the world's highest speed-to-price ratios in the world for broadband services.[23]

81 In this context, there is no longer any clear rationale for IMDA continuing to regulate retail prices through the imposition of retail tariff notification and approval obligations. Retail tariff regulation is now an anachronism in the Singapore context, where there is a sophisticated framework for wholesale access and a resulting high level of competition in downstream markets.

82 Moreover, retail tariff filing is no longer a feature of most sophisticated telecommunications regulatory frameworks. Regulators in other advanced markets like Singapore, where there is robust retail competition, have recognised that retail tariff regulation is a disproportionate form of intervention and imposes significant

[22] IMDA, Consultation Paper, [4.36].
[23] Mike Hanlon, "Broadband Bang per Buck", *New Atlas*, 27 November 2017, https://newatlas.com/broadband-speed-versus-cost-country-comparison/52346/

administrative burdens on both regulators and operators, while having limited utility for consumers.

83 More specifically:

- In **Australia**, retail price controls and regulation no longer apply since 2015. Economic analysis commissioned by the Department of Communications found that such price controls were not making any differences to actual pricing in the market and the price control regime was no longer satisfying its objectives. The Minister of Communications revoked price controls in 2015, finding that these controls *"are no longer considered necessary"*.[24]

- In the **European Union**, the European Commission (**EC**) removed all retail communication markets from its recommendation on markets susceptible to *ex ante* regulation in 2014.[25] This means that the EC no longer recommends that member states impose tariff regulation (and other *ex ante* obligations) in respect of retail services.

- In the **United Kingdom**, retail tariff regulation no longer applies since 2006. In allowing retail price controls to lapse, Ofcom found that removal of controls was *"likely to promote competition leading to further innovation and benefits for consumers"*, as operators would be incentivised to engage in tariff innovation.[26]

- In **Canada**, the Canadian Radio-Television and Telecommunications Commission (**CRTC**) abolished most retail regulation in the 2000s. In particular, the CRTC eliminated price floor constraints for bundled services in 2006 and uniform pricing requirements in 2007.[27] In addition, in 2016, the CRTC decided to forebear from regulating prices for retail broadband Internet access services. The CRTC motivated its decision by acknowledging the extent of competition in retail markets and holding that *"it does not want to take regulatory action that would inadvertently hinder the development of further private and public sector initiatives"* to ensuring affordability of services.[28]

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[24] *Telstra Carrier Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005 Instrument of Revocation 2015* (Australia), Explanatory Statement, https://www.legislation.gov.au/Details/F2015L00330/Explanatory%20Statement/Text.

[25] European Commission, *Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*, https://ec.europa.eu/digital-agenda/en/news/commission-recommendation-relevant-product-and-service-markets-within-electronic-communications.

[26] https://www.ofcom.org.uk/__data/assets/pdf_file/0012/42114/rpcstatement.pdf, [5.14].

[27] Paul Beaudry, 'Wireline deregulation: The Canadian experience' (2010) 34 *Telecommunications Policy* 606, http://202.114.89.42/resource/pdf/5463.pdf.

[28] CRTC, *Telecom Regulatory Policy CRTC 2016-496*, 21 December 2016, [203], https://crtc.gc.ca/eng/archive/2016/2016-496.htm

- In **Malaysia**, prices for retail telecommunication services are no longer regulated since 2016 (including prices for PSTN services, payphone services and Internet access services).[29] In its final consultation report supporting deregulation, the Malaysian Communications and Multimedia Commission mentioned that its emphasis would be on applying *ex ante* regulation at the wholesale level (to encourage retail competition and innovation), while *ex post* competition provisions could be used to remedy any egregious conduct at the pricing level.[30]

- Retail price controls are no longer imposed in **Hong Kong, South Korea** and **Japan**.

84 Accordingly, including retail tariff notification requirements (and full approval requirements for withdrawing existing tariffs) in the Converged Code would place Singapore significantly out of line with its peer jurisdictions.

(b) The proposed notification obligations for certain retail tariffs will continue to impose an unjustified administrative burden on IMDA and operators

85 While IMDA proposes to relax existing approval requirements for new tariffs and for modifications to existing tariffs, a notification obligation would continue to impose significant regulatory burdens on operators, without any material countervailing benefit to end-users. This is particularly because tariff filings are typically customised and relate to sophisticated large enterprises, meaning that, even under a notification obligation, operators would continue to face a significant administrative burden by notifying IMDA of each customised tariff they introduce into the market.

86 In addition, in the past 12 months, Singtel has submitted a total of [**CONFIDENTIAL**] tariff filings. All these tariff filings, except one which is currently being reviewed by IMDA, have been approved by IMDA.

87 The fact that IMDA has approved virtually all the tariff filings lodged by Singtel strongly suggests that the tariff filing process serves no useful process and that the proposed shift to a notification regime does not go far enough, simply replicating many of the costs and administrative burdens that exist today under a different name, without serving any well-grounded regulatory purpose.

88 Notification obligations would not meaningfully reduce the administrative burdens on Singtel and would continue to consume resources. IMDA has not established why a notification requirement is necessary, what specific regulatory problem it is intended to solve and why the benefits of a notification requirement outweigh its costs.

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[29] *Communications and Multimedia (Rates) (Revocation) Rules 2016* (Malaysia).
[30] Malaysian Communications and Multimedia Commission, Public Consultation Report – Review of Rates Rules, 9 October 2015, p. 15, https://www.skmm.gov.my/skmmgovmy/media/General/pdf/PCReport-RatesRules-final.pdf.

89 If IMDA is concerned about price transparency in the market and end-users having access to a high level of price information, there is already a requirement to publish tariffs (including new tariffs and modifications to existing tariffs). This achieves the same practical effect as an obligation to notify IMDA, while minimising the administrative burden.

(c) Retail tariff filing obligations should, at most, be restricted to basic telecommunications services

90 To the extent that IMDA considers the need to impose any tariff-related obligations on operators, these should be limited to "basic" telecommunications services, such as fixed-line telephony and payphones. These are services where there may be a social rationale for ensuring that certain consumers (e.g. low-income or older consumers) can access such services.

91 As a general principle, retail tariff notification or approval does not represent a proportionate form of regulation even for basic telecommunication services. In best-practice jurisdictions, social objectives, such as access to basic telecoms services at an affordable price, are achieved through universal service funding and subsidies, rather than through retail price regulation or tariff approval.

92 Nevertheless, if IMDA does not accept Singtel's submission that all retail tariff approval and notification obligations should be replaced by a publication obligation, Singtel submits that tariff approval should, at most, apply only to basic telecommunications services. This category should be defined in a narrow way under the Converged Code, to apply cover those services where:

- there is a clear social rationale for ensuring that all end-users (including lower-income end-users) have access to such services; and
- the competitive process is inadequate in delivering prices that allow the achievement of the social rationale mentioned above (e.g. because such services are only demanded by limited numbers of end-users or have been superseded by other services that can be supplied at a lower cost, as in the case of payphones).

(d) Wholesale and resale tariff approval obligations are not justified and should be removed under the Converged Code

93 Singtel also considers that the Converged Code should not impose any tariff approval obligations for wholesale and resale services.

94 Wholesale price regulation is only justified in the case of "bottleneck" services, where a dominant operator controls an essential input to a downstream service and market forces are unable to ensure the supply of that input at a competitive price (thereby hindering competition in the downstream retail market). In such a situation, it is wholesale regulation (such as that applicable to NLT and Nucleus Connect under their Interconnection Offers (**ICOs**) and Singtel under the RIO),

rather than wholesale tariff filing, that should serve as the sole basis for regulation of the wholesale market.

95 This is already the case in Singapore. The prices of wholesale bottleneck services are already heavily regulated through a range of mechanisms that operate separately to wholesale tariff approval obligations. In particular:

- NetLink Trust has an ICO and a Reference Access Offer and Nucleus Connect has an ICO, which were subject to approval by IMDA and set out the prices of bottleneck wholesale services supplied using the NGNBN; and
- Singtel has an RIO (as required under section 6.3.1 of the TCC), which was approved by IMDA and sets out prices to a range of wholesale services relating to Singtel's network.

96 Accordingly, wholesale and resale tariff approval obligations in the Converged Code are not necessary to deal with bottleneck services or any other wholesale services where there is an economic rationale for price regulation.

97 Rather than targeting bottleneck services that are the proper subject of regulatory intervention, the proposed wholesale and resale tariff approval obligations in the Converged Code would apply to a range of wholesale and resale services that are competitive, such as wholesale services delivered over Singtel's own fibre network to other large-scale carriers that are servicing business and government end-users.

98 Given the evolutions in industry structure brought about by the NGNBN, Singtel is subject to significant competitive pressure in respect of these services. Moreover, these services can no longer be meaningfully regarded as "bottleneck" services to which access is necessary to facilitate competition in downstream markets. Accordingly, there is no economic rationale for imposing wholesale tariff approval obligations under the Converged Code on such services.

99 Examples of Singtel's wholesale customers include global telecoms players, such as [**CONFIDENTIAL**] and leading regional players, such as [**CONFIDENTIAL**]. These large wholesale customers do not require regulatory protection in the form of tariff approval or notification obligations.

100 Moreover, wholesale and resale services are typically subject to customised tariffs. Customised wholesale tariffs are those offered to FBO and SBO licensees whereas other enterprise customers and government agencies are subject to retail tariffs.

101 Singtel filed [**CONFIDENTIAL**] customised wholesale tariffs in 2016, [**CONFIDENTIAL**] in 2017 and [**CONFIDENTIAL**] in 2018.[31] The type and terms of the

[31] Tariffs include revisions to, and contract term extensions in respect of, previously filed customised schemes. For reference, Singtel also filed [**CONFIDENTIAL**] customised retail tariffs for government customers in 2016, [**CONFIDENTIAL**] in 2017 and [**CONFIDENTIAL**] in 2018. Provision of services to government are subject to tender processes and contracts subject to government-specified terms and conditions.

services subscribed by wholesale customers are largely dependent on their end-users' requirements. The bundle of services, bandwidth(s) required for each service, volume of circuits for each service and bandwidth, and the contract terms for the tariff and each circuit that the customer is willing to commit to vary with each wholesale customer, thereby necessitating a customised tariff for each customer.

102 Requiring Singtel to obtain approval for each customised wholesale tariff imposes a significant administrative burden (both on Singtel and IMDA). In addition, it does not result in any material benefit from a consumer protection perspective, in that the entities subject to such customised tariffs are sophisticated customers who have sufficient bargaining power to obtain customised pricing and terms of service.

103 Accordingly, the only practical effect of including wholesale and resale tariff regulation in the Converged Code would be to impose unnecessary and onerous regulatory obligations on wholesale and resale services supplied in competitive markets.

104 Singtel therefore submits that all tariff filing and approval obligations applicable to wholesale and resale services should be removed from the Converged Code.

5. Anti-competitive conduct

5.1 Effects-based test for abuses of dominant position

105 Singtel considers that a purely **effects-based test** should be used in determining whether a use of market power constitutes an abuse. Accordingly, Singtel agrees with IMDA that the *"object or effect"* test currently used under the MMCC should not be incorporated into the Converged Code.[32] The *"object"* limb of the test suggests that some types of conduct may be *per se* prohibited, even if there is no assessment of anti-competitive effects. Moreover, as IMDA points out, this test is typically used for anti-competitive agreements in other jurisdictions (e.g. the EU),[33] rather than abuse of dominance.

106 International best practice is increasingly moving towards an effects-based test for abuse of dominance. For example, the European Commission's guidance on the enforcement of the EU's abuse of dominance provision states that:

> *"The Commission will normally intervene under Article 82 where,* ***on the basis of cogent and convincing evidence****, the allegedly abusive conduct is* ***likely to lead to anti-competitive foreclosure****"* (emphasis added).[34]

[32] IMDA, Consultation Paper, [5.8].
[33] Treaty on the Functioning of the European Union, Article 101.
[34] European Commission's Guidance on Enforcement of Article 82, [20].

107 The landmark 2017 decision of the European Court of Justice in *Intel* also confirmed that evidence of anti-competitive effect is required to establish an abuse of dominance.[35]

108 In Singapore, the CCCS's Guidelines on the Section 47 Prohibition state that:

> *"In conducting an assessment of an alleged abuse of dominance, CCCS will undertake an* ***economic effects-based assessment*** *in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition"* (emphasis added).[36]

109 In a leading abuse of dominance case, the Competition Appeal Board has also clarified that:

> *"… an abuse will be established where a competition authority demonstrates that a practice* ***has, or likely to have, an adverse effect on the process of competition****"* (emphasis added).[37]

110 Moreover, an effects-based approach is well supported by regulatory theory. The basis for prohibiting abuses of dominance is to target conduct that actually reduces or hinders competition in a market, which ultimately results in a decrease in consumer welfare. Conversely, conduct that does not have a demonstrable anti-competitive effect does not result in any harm for consumers or for the economy more broadly and therefore ought not to be prohibited.

111 In this context, a purely effects-based test is preferable over the *"object or effect"* test currently used in the MMCC.

112 However, the *"unreasonable restriction of competition"* test which IMDA plans to adopt under the Converged Code remains ambiguous in scope. In particular:

- it is not entirely clear whether *"unreasonable restriction of competition"* is purely an effects-based test, or whether conduct can be deemed to *"unreasonably restrict"* competition simply due to its form. The current TCC Guidelines imply that this is an effects analysis (by specifically referring to whether the conduct restricts output, reduces choice, restricts efficient companies from entering the market, etc).[38] However, the effects-based nature of the analysis is not specifically mentioned even in the TCC Guidelines;

- it is unclear what makes a restriction of competition *"unreasonable"*; and

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[35] Case C-413/14 P, *Intel Corporation v European Commission*, Judgment of the European Court of Justice, 6 September 2017.
[36] CCCS, *Guidelines on the Section 47 Prohibition 2016*, [4.4].
[37] *Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] 1 SGCAB 1, [291].
[38] IDA, *Advisory Guidelines Governing Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition*, 25 April 2014, section 3.2(i).

- the *"unreasonable restriction of competition"* test is not used in any other prohibitions on abuse of dominance in Singapore or other leading jurisdictions, meaning that its scope cannot be clarified or interpreted by reference to jurisprudence from the CCCS or overseas jurisdictions.

113 Accordingly, Singtel submits that the Converged Code should adopt an explicitly effects-based test for abuse of dominance, rather than the *"unreasonable restriction of competition"* test.

114 A useful example is the test used in Australia for misuse of market power, which prohibits a use of market power that *"has[,] or is likely to have[,] the effect of substantially lessening competition"* in a given market.[39] This test also has the benefit of more clearly defining the degree to which competition must be lessened ("*substantially*"), as compared to the indeterminate concept of an "*unreasonable*" restriction on competition.

115 Alternatively, if IMDA insists on using the *"unreasonable restriction of competition"* test, IMDA should make it clear (whether in explanatory material or guidelines issued under the Converged Code) that an *"unreasonable restriction of competition"* can only be established when conduct has, or is likely to have, an anti-competitive effect in a relevant market, and that this effect needs to be established based on clear evidence.

5.2 Joint dominance

116 In its Consultation Paper, IMDA proposes to allow for the concept of joint dominance, by prohibiting abuse of dominance by *"one or more"* entities in the Converged Code. This is not currently a feature of the abuse of dominance prohibition in either the TCC or MMCC.

117 Singtel does not consider that the Converged Code should contain a prohibition on abuse of joint dominance, for four reasons.

118 **First**, there is no well-established need for prohibiting abuses of joint dominance in the Singaporean media and telecoms markets at present. As IMDA has acknowledged at several points in its Consultation Paper, telecoms and media markets are increasingly competitive. The critical markets in the telecoms and media sectors can no longer be reasonably characterised as oligopolistic markets, which is what the prohibition on abuse of joint dominance is intended to apply to.

[39] *Competition and Consumer Act 2010* (Australia), section 46. This provision also prohibits misuse of market power that has the "*purpose*" of substantially lessening competition in a market. Singtel does not consider that this limb of the Australian test is relevant in the Singaporean context or is in line with international best practice. It is the ***effect*** of an operator's conduct that should be relevant to determining whether an abuse of dominance has occurred, not the operator's purpose. Aside from the evidentiary difficulties in determining anti-competitive purpose, there is no strong regulatory basis for prohibiting an anti-competitive purpose that has no actual anti-competitive effect, as such conduct does not actually restrict competition in the market and therefore does not create any harm to consumers.

Accordingly, it is not clear what specific regulatory problem an abuse of joint dominance is trying to solve in the Singaporean telecoms and media context.

119 **Second**, the Converged Code will already have a prohibition on anti-competitive agreements, which can be used to target collusive conduct between operators that has anti-competitive effects in a relevant market. This prohibition on anti-competitive agreements under the TCC already specifically covers "*tacit*" coordination *"in the absence of an actual agreement"*,[40] and IMDA has not proposed to remove this aspect of the prohibition in the Converged Code. IMDA therefore already has, and will continue to have, a sufficient tool for addressing tacit collusion and coordination in oligopolistic markets.

120 **Third**, a prohibition on abuse of joint dominance is difficult to apply and creates a risk of regulatory uncertainty and overreach. Abuse of dominance prohibitions target conduct that would be legal and even pro-competitive when engaged in by entities that do not have SMP (e.g. below-cost pricing, bundling, rebates, etc). Accordingly, great care needs to be taken to ensure that:

- entities which do not have a significant degree of market power are not inadvertently subject to dominance-related prohibitions on their conduct, as this actually risks diminishing competition and negatively affecting consumer welfare; and
- the thresholds for determining dominance are clear enough so that entities can readily self-assess whether they are dominant and not engage in conduct that would otherwise be permissible and commercially rational.

121 In jurisdictions that prohibit abuses of joint dominance, the concept has been significantly more difficult to apply and less clear than single-firm abuses of dominance. In the EU, joint or "*collective*" dominance is established when two or more entities are able to act in a coordinated manner in the market as a result of an oligopolistic market structure (even if there is no explicit collusion between them).[41] However, parallel conduct is common even in competitive, non-oligopolistic markets (e.g. one entity reducing its prices to match those of a competitor in a commercially rational manner to maintain its market share).

122 It is very difficult for both regulators and market participants to determine when parallel conduct is sufficiently close to "tacit coordination" so as to result in a finding of joint dominance. As argued by a principal case officer at the UK's competition authority, the concept of collective dominance as interpreted by the EU courts:

> *"… appears to ignore the evidentiary difficulties in proving the competitive price in a given market and, consequently, the* ***danger of actually finding***

[40] TCC, section 9.2.
[41] See Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-2585 and Case T-342/99 *Airtours* [2002] 5 CMLR 317.

***firms as being in tacit coordination when they are in fact competing hard**, as it is possible that firms are aligned at prices close to the competitive price"* (emphasis added).[42]

123 These complexities create a risk of regulatory overreach and a high degree of regulatory uncertainty, as market participants are unable to easily determine if they have a position of joint dominance in a market and therefore adjust their conduct accordingly. The lack of clarity associated with the concept of joint dominance also risks disincentivising firms from dynamically responding to the market conduct of others (in a pro-competitive way), lest they be found to be tacitly coordinating, and therefore jointly dominant.

124 **Fourth**, while a prohibition on abuse of joint dominance is a feature of some competition law regimes (primarily the EU) and Singapore's general competition law, it is by no means widespread globally. For example, Australia,[43] Hong Kong[44] and New Zealand[45] all apply abuse of dominance to single entities only (requiring one entity to be dominant or hold SMP).

125 Even in the EU, which pioneered the concept of collective dominance, the doctrine has been very rarely used in abuse cases, despite being in place for decades. This is primarily due to its complexity and the unintended effects it may have on competition.

126 Indeed, the European Commission has not even incorporated the concept of collective dominance in its guidelines on enforcement priorities regarding abuse of dominance.[46]

127 For all of these reasons, Singtel considers that the Converged Code should not include a prohibition on abuse of joint dominance. If IMDA insists on implementing this prohibition in the Converged Code (by defining dominance by reference to *"one or more"* entities), then:

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[42] Sophia Stephanou, "Collective Dominance Through Tacit Coordination", *GCP: The Antitrust Chronicle*, October 2009, https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/StefanouOCT-09_1_.pdf.

[43] *Competition and Consumer Act 2010* (Australia), section 46: *"**A corporation** that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition [in a relevant market]"*.

[44] *Competition Ordinance* (Cap 619), section 21(1): *"**An undertaking** that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong"*.

[45] *Commerce Act 1986* (New Zealand), section 36: *"**A person** that has a substantial degree of power in a market must not take advantage of that power for [a prescribed purpose]."*

[46] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 24 February 2009, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2009.045.01.0007.01.ENG.

- an extensive consultation should be held before any guidelines are issued on the subject of joint dominance; and
- such guidelines should define the concept of joint dominance with a high level of clarity, to provide market participants with a sufficient degree of certainty.

5.3 Discrimination

> ***Question 5:1****: IMDA invites views and comments on the proposal to adopt the effects-based test of the TCC for the ex post provision on discrimination of service under the Converged Code.*

128 Singtel agrees that the prohibition on discrimination in the Converged Code should adopt an effects-based test, as already used under the TCC. This is in line with Singtel's broader preference for an effects-based approach to abuse of dominance, as explained in in section 5.1 above.

5.4 Price squeezes

> ***Question 5:2****: IMDA invites views and comments in relation to the EEO test benchmark to be adopted for price squeezes and the proposal not to include a "pass-on" criterion.*

129 Singtel agrees with the adoption of an "equal efficient operator" (**EEO**) benchmark to determining the existence of a price squeeze.

130 As IMDA points out in its Consultation Period, the alternative "*reasonably efficient operator*" test promotes a higher degree of uncertainty, as operators are unable to determine precisely what costs a "*reasonably efficient*" operator would incur to transform the relevant input into a downstream service and therefore whether a price squeeze is likely to occur.

131 Singtel also agrees with the removal of the "pass-on" criterion in section 8.2.1.2 of the TCC, for the reasons set out in IMDA's Consultation Paper.[47] Singtel does not consider pass-on to be a relevant factor when determining the existence of a price squeeze and this is also not a requirement in other established competition law regimes.

5.5 Predatory pricing

> ***Question 5:3****: IMDA invites views and comments on the proposed cost standard/ standards for the telecommunication and media markets and the application of the predatory pricing provision to Dominant Entities.*

[47] IMDA, Consultation Paper, [5.19].

132 Singtel agrees that the prohibition on predatory pricing should only apply to dominant entities (not to all Regulated Persons, as currently under the MMCC).

133 Below-cost pricing is not, in and of itself, harmful to competition. Indeed, when engaged in by a non-dominant operator, such conduct tends to be pro-competitive, as it encourages other market participants to lower their prices and is not "predatory", as the non-dominant operator will not have the market power necessary to later raise prices and foreclose the market as a result of its pricing behaviour.

134 Singtel does not object to the adoption of average incremental cost (**AIC**) as a default benchmark for determining whether pricing is predatory. However, the cost benchmarks relevant to predatory pricing differ depending on the circumstances of each case and the nature of the product being supplied. Accordingly, as IMDA signals in its Consultation Paper,[48] IMDA should maintain the flexibility to consider other cost benchmarks, such as long-run average incremental cost (**LRAIC**), where the circumstances of the case justify it.

5.6 Cross-subsidisation

> ***Question 5:4****: IMDA invites views and comments on the extension of the cross-subsidisation provision to the media industry.*

135 Singtel considers that the specific prohibition on cross-subsidisation should be removed from the Converged Code.

136 Cross-subsidisation is not recognised as a specific type of abuse in best practice jurisdiction such as the EU. This is primarily because cross-subsidisation largely overlaps with established categories of abuse of dominance, primarily predatory pricing.

137 Where a firm uses profits obtained in one market to engage in below-cost pricing in another market, with the effect of foreclosing competition, this would already be prohibited as a form of predatory pricing. Conversely, if a firm makes profits in one market (even "monopoly" profits) but does not engage in predatory pricing in another market, it is unclear why such conduct raises any competition concerns, as the pricing is not below cost and therefore cannot effective foreclose competition in the long term.

138 Indeed, a prohibition on cross-subsidisation risks discouraging firms who are dominant in one market from competing strongly in non-dominant markets, as there is a risk that they would be deemed to be engaging in abusive cross-subsidisation, even if their conduct is actually pro-competitive.

[48] IMDA, Consultation Paper, [5.24].

139 This was recognised by the EU courts in *UPS v Commission*, which held that:

> *"dominant companies may compete with other undertakings on price or improve their cash flow* ***unless the prices are predatory*** *or conflict with the relevant national or Community rules"* (emphasis added).[49]

140 On this basis, the Court in *UPS v Commission* explicitly found that it was not necessary to define a specific prohibition on cross-subsidisation.[50] According to a leading EU competition law textbook, *"there are no decisions of the Commission or judgments of the EU Courts finding that cross-subsidy is, in itself, an abuse of a dominant position".*[51]

141 In addition, the Converged Code will already contain a general prohibition on abuse of dominance, which can always be used by IMDA to address particularly egregious forms of cross-subsidisation that have demonstrable anti-competitive effects.

142 Accordingly, to avoid discouraging pro-competitive behaviour in non-dominant markets and unnecessary duplication with other provisions in the Converged Code, Singtel considers that the Converged Code should not contain a separate prohibition on cross-subsidisation.

5.7 Predatory network alteration

> ***Question 5:5****: IMDA invites views and comments on the extension of the predatory network alteration provision to the media industry.*

143 Singtel considers that the provision on predatory network alteration should be completely removed under the Converged Code, rather than being extended to the media industry.

144 Requiring licensees and regulated persons to not make changes to the physical or logical interfaces they use for interconnection is a significant curtailment of commercial freedom which goes well beyond the scope of *ex post* competition law.

145 In addition, to Singtel's knowledge, such a provision cannot be found in any other competition regulatory framework around the world and is not recognised as one of the categories of abuse of dominance in leading jurisdictions such as the European Union.

146 It is not the legitimate scope of competition law (or even *ex ante* access regulation) to require or prevent operators from making changes to their networks. For example, competition law cannot be used to compel an operator to build a new facility or offer a service that it is not currently supplying (even to itself). For the

[49] Case T-175/99, *UPS Europe SA v Commission*, 20 March 2002, [62].
[50] Case T-175/99, *UPS Europe SA v Commission*, 20 March 2002, [61].
[51] Richard Whish and David Bailey, *Competition Law*, 8th edition, 2015, p. 789.

same reason, competition law cannot be used to require operators to maintain specific interfaces in the market that they wish to decommission or withdraw.

147 The withdrawal of a type of interface is only a concern from a competition law perspective if it is *discriminatory* (i.e. if the operator continues to allow its downstream arm to access the interface, while preventing all or some of its competitors from using it). For this reason, the prohibition on refusal to supply, recognised as a form of abuse of dominance in other jurisdictions, only applies to goods or services that are actually being supplied (whether internally to a downstream unit or to at least one other person).[52]

148 Discriminatory refusals to supply are already caught under both the TCC and MMCC by the specific prohibition on "*discrimination*", which IMDA proposes to include in the Converged Code and which prohibits discrimination in access to infrastructure, systems and equipment (therefore including interfaces).[53]

149 The general prohibition on abuse of dominance would also apply to discriminatory refusals to supply (based on international jurisprudence, which widely recognises refusal to supply as a type of abuse of dominance).

150 Indeed, the concept of "*predatory network alteration*" is not used in any other major jurisdiction, indicating that it not a concept that is regarded as raising distinct concerns from a competition perspective or that requires specific regulatory attention in the form of an *ex post* prohibition.

5.8 Bundling

> ***Question 5:6****: IMDA invites views and comments on the inclusion of unreasonable bundling as an example of an abuse of a dominant position in the Converged Code.*

151 Singtel does not have any concerns with including anti-competitive bundling as an example of abuse of dominance in the Converged Code.

152 The test for "*unreasonable bundling"* set out by IMDA in the Consultation Paper is broadly in line with international regulatory practice and accords with the approach used in the European Union. This would allow IMDA to draw on a rich international jurisprudence regarding the application of this concept to the Singaporean telecom and media markets.

[52] For example, in Canada, one of the elements in establishing a refusal to deal is that the *"product is in ample supply"*, meaning that it cannot constitute a refusal to deal when a person refuses to make available a product that it is not supplying at all, including to itself: *Competition Act 1985* (Canada), section 75(1).
[53] TCC, section 8.2.2.1; MMCC, section 6.4.2.1.

5.9 Anti-competitive leveraging and anti-competitive preferences

> ***Question 5:7****: IMDA invites views and comments on the proposed standalone subsection for the provision for anti-competitive leveraging, including the specific practices on anti-competitive leveraging.*

153 Singtel does not have any in-principle objections to IMDA's proposals to merge the provisions on anti-competitive leveraging and anti-competitive preferences.

154 However, Singtel reserves the right to make further comments in respect of these provisions once IMDA develops a clearer proposal about the specific legal tests and scope of the integrated prohibition on anti-competitive leveraging and preferences in the Converged Code.

155 Moreover, to ensure regulatory consistency between the prohibitions on abuse of dominance and anti-competitive leveraging, the test for price squeeze currently used in the anti-competitive preferences provision (section 8.3(b)(i)) should be aligned with the EEO-based test for price squeeze that IMDA proposes to use for abuses of dominance in the Converged Code. This test is discussed in further detail in section 5.4 above.

156 For reference, the current price squeeze prohibition in the anti-competitive preferences provision simply refers to *"efficient competing non-affiliated Licensees"* rather than *"**equally** efficient competing non-affiliated Licensees"*. For the reasons identified in section 5.4 (and by IMDA in its Consultation Paper[54]), an equally-efficient operator test is a preferable benchmark for assessing price squeezes than a *"reasonably efficient operator"* or *"efficient operator"* test, which risks creating regulatory uncertainty.

5.10 Anti-competitive agreements

> ***Question 5:8****: IMDA invites views and comments on the proposal to adopt the "object or effect" approach for the general prohibition of anti-competitive agreements.*
>
> ***Question 5:9****: IMDA invites views and comments on the proposed revisions to the anticompetitive agreements, namely:*
>
> *(a) rename the list of prohibited anti-competitive agreements as "by object" agreements; and*
>
> *(b) respective amendments to the specific anti-competitive agreements.*

[54] IMDA, Consultation Paper, [5.17]–[5.18].

(a) Adoption of "object or effect" approach

157 Singtel agrees with the adoption of an *"object or effect"* test for anti-competitive agreements under the Converged Code. This test is commonly used in other jurisdictions (e.g. the European Union[55]), allowing IMDA to draw upon rich international jurisprudence when applying the test. In addition, the *"object or effect"* test more accurately matches with the scope of the prohibition, which covers agreements that are *per se* prohibited (i.e. "by object" agreements), as well other agreements that are only prohibited where they have an anti-competitive effect.

(b) Renaming and scope of "by object" agreements

158 Singtel agrees with describing the list of anti-competitive agreements prohibited *per se* (without an effects analysis) as "by object" agreements. However, to provide regulatory certainty to market participants, the types of "by object" agreements should be specifically prescribed in the Converged Code.

159 The list of "by object" agreements should be limited to the four categories of agreements currently set out in 9.3.2 of the TCC: (1) price fixing and output restrictions, (2) bid rigging, (3) market divisions or allocations, and (4) group boycotts. These are also the four types of agreements specifically recognised in EU competition law as constituting restrictions on competition "by object".[56]

160 Singtel considers that all other types of agreements cannot properly be characterised as restrictions on competition "by object", and should instead be subject to an effects analysis.

161 Related to this, Singtel does not agree with IMDA's proposal to specifically extend the prohibition on "foreclosure of access" agreements to telecom markets. Such agreements are currently only prohibited in the MMCC *"where this would prevent, restrict or distort competition in any media market"*, suggesting the application of an effects analysis.[57] The TCC does not list any categories or examples of "by effect" agreements and IMDA has not proposed to insert into the Converged Code any list of agreements that are subject to an effects analysis.

162 Accordingly, to avoid duplication, Singtel does not consider that there should be a specific effects-based prohibition on agreements that foreclose access. The general prohibition on anti-competitive agreements already covers all agreements that have anti-competitive effects, including agreements that foreclose access to a particular input. A separate provision dealing with foreclosure of access would only create confusion about what legal test to apply to such agreements and is not necessary.

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[55] Treaty on the Functioning of the European Union, Article 101.
[56] Treaty on the Functioning of the European Union, Article 101(1).
[57] MMCC, section 7.5.6.

163 Singtel otherwise does not object to IMDA's proposals in the section of its Consultation Paper titled *"Other administrative amendments"*,[58] namely:

- IMDA's clarifications regarding the scope of group boycott agreements;
- the proposal to extent the prohibition on vertical market allocation to the media industry; and
- the proposal to characterise exclusive dealing as a form of abuse of dominance rather than a type of anti-competitive agreement.

(c) Application of the efficiency defence

164 IMDA's proposals regarding the application of the efficiency defence are unclear:

- On the one hand, IMDA suggests that it will consider whether agreements result in efficiencies *"[a]s part of the [effects] assessment"*, when assessing *"the likely effect on competition for other agreements"*.[59] This suggests that the efficiency defence will only be available for agreements that restrict competition *"by effect"*, and will not be available for *"by object"* agreements.
- On the other hand, IMDA states that it *"will retain the existing considerations of efficiencies set out in the TCC and MCC"*,[60] which allows the efficiency defence to be applied to all types of agreements and does not incorporate this defence within the effects analysis.[61]

165 Singtel considers that IMDA should maintain the approach currently used in the TCC and make the efficiency defence available for all agreements, including *"by object"* agreements.

166 The efficiency defence should not be a component of the effects analysis but should rather be applied as a separate step in determining whether an agreement violates the relevant prohibition. This is because the effects analysis and efficiency defence involve different considerations: while the effects analysis looks narrowly at the agreement's *effect on competition*, the efficiency defence looks more broadly at whether the agreement would have any beneficial impacts, such as improved efficiencies that are passed on to consumers, notwithstanding its negative effect on competition.

167 For this reason, the efficiency defence is also relevant in the case of *"per se"* or *"by object"* agreements. Such agreements are (because of their very nature) presumed to have an anti-competitive effect, meaning that no effects analysis is required. However, such agreements may still potentially bring about efficiencies that are

[58] IMDA, Consultation Paper, [5.43]–[5.44].
[59] IMDA, Consultation Paper, [5.40]–[5.41].
[60] IMDA, Consultation Paper, [5.41].
[61] TCC, section 9.3.4.

passed on to consumers, in which case such agreements may still improve overall economic welfare despite their anti-competitive effect.

168 This mirrors the approach used in the European Union, where the efficiency defence is contained in a separate section of the relevant legislation and can be invoked in respect of all agreements.[62] As specified by the European Commission's Guidelines, *"agreements which are caught by Article 81(1) [including "by object" agreements] but which satisfy the conditions of Article 81(3) [the efficiency defence] are not prohibited"*.[63]

169 Accordingly, Singtel submits that the Converged Code should make it clear that the efficiency defence applies to all agreements (including "by object" agreements) and that the efficiency defence is not a component of the effects analysis.

5.11 Unfair methods of competition

> ***Question 5:10**: IMDA invites views and comments on the proposed changes to the rules governing unfair methods of competition.*

170 Singtel does not have any objections to IMDA's proposed changes to the rules governing unfair methods of competition.

6. Consumer protection

6.1 Scope of Consumer Protection Provisions

> ***Question 6:1**: IMDA seeks views and comments on the:*
>
> *(a) proposed exclusion of Resellers from being protected by the Consumer Protection Provisions in the Converged Code;*
>
> *(b) proposed application of all the Consumer Protection Provisions in the Converged Code to both residential and business End Users, except for the Pay TV market-specific provisions (i.e., Sub-sections 3.2B, 3.2C 3.2E, 3.5A and 3.5B), and the CIS requirement, which will only be applied to residential End Users; and*
>
> *(c) proposal to continue to not apply the Consumer Protection Provisions in the Converged Code to OTT TV or content services.*

171 Singtel agrees with IMDA's proposal to exclude resellers from the scope of the "**Consumer Protection Provisions**" in the Converged Code. Since they themselves

[62] Treaty on the Functioning of the European Union, Article 101(3). The European Commission's Guidelines on the [10] – [11].
[63] European Commission, *Guidelines on the application of Article 81(3) of the Treaty*, 27 April 2004, [10], https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427(07)&from=EN.

engage in the supply of services to end-users, resellers tend to have a sophisticated understanding of the terms of service, are not in a vulnerable position vis-à-vis licensees and therefore do not require specific regulatory protection in the form of Consumer Protection Provisions. Moreover, resellers are already not covered by the consumer protection provisions in the TCC.

172 However, Singtel does not agree with the application of the Consumer Protection Provisions to all business end-users, as proposed by IMDA, for several reasons.

173 **First**, the Converged Code would result in an unjustified expansion in the scope of consumer protections for business end-users, without any regulatory basis. In 2016, the then-MDA exempted Regulated Persons from the consumer protection obligations in sections 3.2A to 3.2F, 3.5A and 3.5B of the MMCC as they apply to business end-users. It is now unclear why IMDA seeks to re-impose some of these obligations (i.e. the obligations in section 3.2A, 3.2D(a) and 3.2F) in respect of business end-users.

174 While IMDA mentions that *"some small and medium sized businesses … will benefit from such user safeguards"*,[64] it is not clear why such businesses require more protection now than they did when the MDA made its decision in 2016. Moreover, to the extent that small businesses specifically require protection, this can be dealt with by specifically protecting small businesses (as discussed below) rather than unnecessarily extending the provisions to <u>all</u> business end-users, regardless of size or level of commercial sophistication.

175 **Second**, business end-users, as a general class, do not require regulatory protection in the form of Consumer Protection Provisions. Consumer Protection Provisions are only justified when there is a significant commercial asymmetry between a supplier and a purchaser (e.g. where the customer lacks any bargaining power, information or experience with similar transactions). Large business and enterprise end-users are typically sophisticated customers who have the necessary information and experience to protect themselves in commercial transactions with licensees. Accordingly, Singtel does not consider that there is any basis for imposing Consumer Protection Obligations in respect of large business end-users, whether in the telecoms or media sectors.

176 Singtel recognises that some small businesses who purchase standard, non-negotiated services may require regulatory protection, as they may be in a similar position to consumers in terms of their bargaining power, information and experience. Accordingly, Singtel proposes that:

- as a general principle, the Consumer Protection Provisions should apply to residential and small business end-users only; and
- as an exception to this, the Consumer Protection obligations applying specifically to Regulated Persons in the context of Pay TV services (currently

[64] IMDA, Consultation Paper, [6.6].

contained in sections 3.2B, 3.2C, 3.2D(b), 3.2E, 3.5A and 3.5B of the MMCC) should apply only to residential end-users (as agreed by IMDA in its Consultation Paper and also by the MDA in its 2016 information circular).

177 **Third**, restricting the application of the Consumer Protection Provisions to residential and small business end-users would be in line with international regulatory practice. For example, in Australia, prohibitions against *"unfair contract terms"* (e.g. excessive early termination fees) apply only to contracts with individual consumers or small businesses (defined as businesses that employ fewer than 20 employees).[65] Similarly, the "Customer Service Guarantee" protections in Australia apply only to end-users who purchase 5 or fewer eligible telephone services.[66]

178 Singtel proposes that "small business end-users" be defined in the Converged Code as business end-users that employ fewer than 20 employees, in line with the Australian approach to unfair contract prohibitions. This definition would cover small businesses who truly have less bargaining power and experience relative to licensees and require specific protection in the form of Consumer Protection Provisions, while ensuring that such regulation does not unnecessarily extend to larger business end-users where there is no regulatory basis for imposing consumer protection obligations.

179 Our proposed approach to the scope of the Consumer Protection Provisions is summarised in the table below.

Obligation	Scope of application		
	Current approach under TCC and MMCC	IMDA's proposal	Singtel's proposed approach
Consumer protection obligations in telecom markets (Section 3 of the TCC)	**Residential** and **business** end-users	**Residential** and **business** end-users	**Residential** and **small business** end-users
Consumer protection obligations in sections 3.2A, 3.2D(a) and 3.2F of the MMCC	**Residential** end-users only	**Residential** and **business** end-users	**Residential** and **small business** end-users
Consumer protection obligations in sections 3.2B, 3.2C, 3.2D(b), 3.2E, 3.5A and 3.5B of the MMCC	**Residential** end-users only	**Residential** end-users only	**Residential** end-users only
Other consumer protection obligations in section 3 of the MMCC (i.e. obligations not subject to exemptions under the 2016 MDA information circular)	**Residential** and **business** end-users	**Residential** and **business** end-users	**Residential** and **small business** end-users

[65] *Competition and Consumer Act 2010* (Cth), Schedule 2, Part 2-3, section 23(4).
[66] *Telecommunications (Customer Service Guarantee) Standard 2011* (Australia), section 18.

180 Finally, Singtel agrees with IMDA's proposal to not apply the Consumer Protection Provisions in the Converged Code to OTT TV or content services.

6.2 Common Provisions to be Merged

Question 6:2*: IMDA seeks views and comments on the proposal to:*

(a) merge the requirement on QoS standard; and

(b) extend the flexibility for Licensees to agree to a lower QoS with End Users to the media markets.

Question 6:3*: IMDA seeks views and comments on the proposal to merge the requirements and adopt the procedures under the TCC for service terminations or suspensions for both markets.*

Question 6:4*: IMDA seeks views and comments on the proposal to:*

(a) merge and adopt the TCC's approach for data protection provisions for both telecommunication and media markets; and

(b) extend the MMCC requirement to the telecommunication markets to require Licensees to develop and inform End Users of easy-to-use procedures by which they can subsequently grant or withdraw consent to the use of their EUSI.

Question 6:5*: IMDA seeks views and comments on the proposal to:*

(a) merge the disclosure requirements and extend the CIS requirement to all Licensees; and

(b) reduce the timeframe from 14 days to 5 working days for Regulated Persons to provide End Users with the CIS and contracts, and extend this requirement to the telecommunication markets.

181 Singtel agrees with IMDA's proposals in this section that do not present unnecessary additional burdens for licensees

- the duty to comply with QoS Standards should be merged across telecoms and media markets and the flexibility that licensees currently have to agree a lower QoS with end-users under the TCC should be extended to the media markets;
- the duty to prevent unauthorised use of end-user service information (**EUSI**) should be merged across the telecoms and media markets (adopting the approach currently used in the TCC as the base);
- the duty to provide a Critical Information Summary should be extended beyond Key Telecommunications Licensees to all licensees, to facilitate a

level playing field and ensure that all relevant end-users are protected, regardless of their operator.

6.3 Provisions to be Extended from One Market to the Other

Question 6:6*: IMDA seeks views and comments on the proposal to extend the requirement for mandatory contract provisions to the media markets.*

Question 6:7*: IMDA seeks views and comments on the proposal to introduce the list of minimum billing information to be included in End Users' bills for both markets.*

Question 6:8*: IMDA seeks views and comments on the proposal to extend the requirement for mandatory contract provisions on procedures to contest charges and dispute resolution to the media markets, including the circumstances in which End User may withhold payment, timeframe for contesting the disputed charges, and setting of the interest rates or methodology for establishing the interest rates.*

Question 6:9*: IMDA seeks views and comments on the proposal to:*

(a) retain the prohibition of detrimental mid-contract changes for the telecommunication markets and the requirement to provide at least one-month advance notice for detrimental changes in the media markets; and

(b) introduce an advance notice requirement for any advantageous change that may have a long-term impact on the End User's service for both markets.

Question 6:10*: IMDA seeks views and comments on the proposal to:*

(a) extend the requirement to provide advance notice to End Users for termination of operations or services, to the telecommunication markets; and

(b) provide a three-months' advance notice in writing for cessation of operations or provision of any telecommunication and media services, while allowing IMDA to right to require this period to be extended to better protect End Users' interest under certain circumstances.

182 Singtel does not have significant concerns about IMDA's proposals to extend certain Consumer Protection Provisions from the telecoms sector to the media sector (and vice versa) as part of the Converged Code.

183 These protections predominantly relate to mandatory provisions that must be included in a contract, as well as advance notification requirements for service changes and cessation of service. IMDA's proposals mostly involve extending to the media markets current obligations that apply to telecom markets only (although some obligations, such as the MMCC obligation to provide advance notice for

termination of operations or services, will be extended from the media markets to the telecom markets).

184 Singtel adopts this position on the basis that the overall scope of the Consumer Protection Provisions is limited to residential and small business end-users. As further explained in section 6.1, there is no rationale for imposing mandatory contract requirements in contracts with large business and Government end-users, who are typically sophisticated enough to be negotiate their contracts for telecoms and media services, and who do not require regulatory protection in the form of Consumer Protection Provisions.

6.4 Provisions to be Retailed or Included for a Specific Market

> ***Question 6:11****: IMDA seeks views and comments for the proposal to retain the prohibition on "slamming" for the telecommunication markets in the Converged Code.*
>
> ***Question 6:12****: IMDA seeks views and comments on the proposal to include the existing prohibition of mid-contract detrimental changes in the Converged Code and extend its application to all Licensees beyond the Key Telecommunication Licensees.*
>
> ***Question 6:13****: IMDA seeks views and comments on the proposal to retain the requirement for Pay TV service providers to allow End Users to exit their fixed term contracts without ETC for the specific instances, and the enabling provisions (Subsections 3.2E, 3.5B and 3.8 of the MMCC) for this requirement.*
>
> ***Question 6:14****: IMDA seeks views and comments on the proposal to retain the requirement to offer short term agreements for the Pay TV market only.*
>
> ***Question 6:15****: IMDA seeks views and comments on the proposal to retain the prohibition against the leveraging of a Pay TV service to impose changes on the non-Pay TV service in a bundle by service providers.*

185 Singtel does not object to IMDA's proposals in respect of questions 6:11, 6:13, 6:14 and 6:15 above. These proposals involve maintaining the current telecom or media-specific consumer protection obligations in place, without extending them to other markets.

186 In addition, Singtel agrees with the proposal (referred to in question 6:12) to extend the prohibition of mid-contract detrimental changes from Key Telecommunication Licensees to all licensees. This facilitates a level playing field and ensures that all relevant end-users are protected, regardless of their operator.

6.5 Provisions to be Removed

Question 6:16*: IMDA seeks views and comments on the proposal to remove the current TCC service quality information disclosure requirements.*

Question 6:17*: IMDA seeks views and comments on the proposal to remove the anti-avoidance provision for the media markets.*

187 Singtel agrees with IMDA's proposal to remove the current TCC service quality information disclosure requirements, as well as the anti-avoidance provision for the media markets. Singtel considers that these provisions are no longer relevant and do not respond to any specific regulatory problem, and therefore should not be included in the Converged Code.

7. Mergers and acquisitions

Question 7:1*: IMDA invites views and comments on the following proposals:*

(a) subjecting transactions in which a non-RP or non-AMSP acquires ownership interest in an RP to the requirements of the M&A Provisions; and

(b) extending the pro forma change notification requirement to all RPs.

188 Singtel does not object to the proposed changes to the merger and acquisition approval provisions (**M&A Provisions**) applicable to media markets. Subjecting non-RPs or non-AMSPs who acquire ownership interests in an RP to the M&A Provisions, as well as extending the pro forma change notification requirement to all RPs, would effectively apply the approach currently adopted to M&A Provisions under the TCC to media markets.

Question 7:2*: IMDA invites views and comments on the proposed criteria for the Short Form and Long Form application.*

189 Singtel welcomes IMDA's proposal to simplify and standardise the criteria for Short Form and Long Form applications under the Converged Code.

190 Singtel considers that a 30% market share for the post-consolidation entity is an appropriate threshold for determining whether a Short Form or Long Form application should be required.

Question 7:3*: IMDA invites views and comments on the proposed consolidation review timeline.*

191 Singtel agrees with IMDA's proposal to adopt the consolidation review timeframes in the TCC in the Converged Code.

192 As IMDA points out, the TCC generally involves shorter review periods (e.g. IMDA must ordinarily complete consolidation reviews within 30 calendar days under TCC, but only in 30 working days under the MMCC). Singtel agrees that shorter review periods for media consolidations will promote greater regulatory certainty and will minimise procedural barriers to M&A activity in this sector.

8. Resource sharing

8.1 Scope of Resource Sharing Provisions

> ***Question 8:1****: IMDA invites views and comments on the proposal to limit Media Resource to only infrastructure (akin to Section 7 of the TCC) for the purposes of sharing amongst media licensees.*

193 Singtel does not object to limiting the concept of "Essential Resource" or "Media Resource" to infrastructure only. IMDA's proposed approach would align the scope of resource sharing obligations in the media sector to the approach currently used for the telecom sector, which defines the concept of "Critical Support Infrastructure" (**CSI**) to "infrastructure" only.[67]

8.2 Application of CSI Resource Sharing Provisions to SBOs

> ***Question 8:2****: IMDA invites views and comments on the proposed licensees for which the Resource Sharing Provisions apply.*

194 Singtel agrees that, in the telecommunication context, the Resource Sharing Provisions should apply to all persons who own or control any CSI, regardless of whether they are an FBO or SBO.

195 The rationale for imposing resourcing sharing obligations in respect of CSI is that the sharing of CSI enhances efficiency and is in the public interest, *due to the specific economic characteristics of the facility* (e.g. the fact that it is inefficient to replicate and is a necessary input to supplying a telecom service). This same rationale applies regardless of who owns the CSI and, in particular, regardless of the licensing status of the owner or controller of the CSI as an FBO or SBO.

196 Accordingly, Singtel considers that all CSI, regardless of who owns or controls such infrastructure, should be equally subject to the Resource Sharing Provisions.

[67] TCC, section 7.3.1.

8.3 Proposed criteria for determining Essential Resources and CSI

> ***Question 8:3****: IMDA invites views and comments on the proposed criteria in the determination of both Essential Resource and Critical Support Infrastructure.*

197 Singtel does not object to the four converged criteria proposed by IMDA for the determination of Essential Resources and CSI.

9. Public interest obligations

9.1 The Cross-Carriage Measure

> ***Question 9:1****: IMDA invites views and comments on continuing to apply the CCM to content of all genres.*

198 Singtel is opposes the continuation of the Cross-Carriage Measure.

199 Singtel also objects to IMDA's proposed framework for analysis in the Consultation Paper which has proceeded on the basis that the Cross-Carriage Measure should continue to apply, without any broader examination of whether the Cross-Carriage Measure remains relevant from a competition or public interest perspective.

200 Singtel submits that the Cross-Carriage Measure should be revoked and that a broader analysis from IMDA is needed to test the ongoing relevance of the Cross-Carriage Measure. It has proven to be a failure and represents an example of highly disproportionate regulation.

201 This is evidenced by:

- the high costs associated with the implementation of the Cross-Carriage Measure, creating a significant deadweight loss for the sector – [**CONFIDENTIAL**];
- the very limited take-up of services that rely on the Cross-Carriage Measure, which Singtel currently estimates to be [**CONFIDENTIAL**] in Singapore. This contrasts to approximately 381,000 residential customers as at 31 December 2018 for Singtel TV[68] and approximately 409,000 pay TV customers for StarHub as at FY 2018; [69] and
- the fact that the Cross-Carriage Measure has not reduced content acquisition costs for the industry (as per one of the original objectives of

[68] https://www.singtel.com/content/dam/singtel/investorRelations/financialResults/2019/Q3FY19-MDA.pdf

[69] StarHub, "StarHub Reports 2018 Fourth-Quarter and Full Year Results", 14 February 2019, http://www.starhub.com/about-us/newsroom/2019/february/starhub-reports-2018-fourth-quarter-and-full-year-results.html.

the policy) or addressed IMDA's perceived concerns in relation to content fragmentation.

202 More importantly, IMDA's proposed approach does not have sufficient regard to the changing market dynamics impacting the provision of pay TV services, including:

- the significant take-up of OTT video streaming services, such as Netflix, which operates globally, have rapidly built-up market share locally and have vertically integrated across the supply chain into content production and ownership to support their streaming video businesses with exclusive and other original content; and
- high levels of piracy and the use of ISDs, including in respect of premium sports content, which negatively impact the ability of pay TV operators to monetise subscriptions and jeopardises incentives of operators to pay a premium content.

203 These changes have caused significant disruption to the competitive landscape. By way of example, StarHub recently reported an 11.9% decline in pay TV revenue over the 12 months to 31 December 2018 (relative to FY 2017), with revenue down to $311.3 million. StarHub's reports also indicate that, in 2018, an average of 4,000 pay TV customers per month *"exit[ed] long-term Pay TV contracts for alternative sources of content and entertainment"*.[70] The number of households connected to StarHub pay TV services fell by 10.8% during the course of 2018.[71] Singtel TV has also recently reported a 5.1% reduction in the number of residential TV customers.[72]

204 Considering these structural factors, it is unclear why IMDA considers it is in the public interest for pay TV operators to be required to cross-carry any content at all, or why there should be a further expansion of the Cross-Carriage Measure to extend to all genres. This is likely to be counter-productive and fails to take account of the seismic shift in the competitive landscape brought about from OTT video on demand services, as well as the rise in piracy and ISDs.

205 Singtel submits that competition and investment in the pay TV segment will be best served if pay TV operators are permitted to acquire compelling content that creates a point of competitive differentiation with other platforms or service providers.

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[70] StarHub, "StarHub Reports 2018 Fourth-Quarter and Full Year Results", 14 February 2019, http://www.starhub.com/about-us/newsroom/2019/february/starhub-reports-2018-fourth-quarter-and-full-year-results.html.

[71] StarHub, "StarHub Reports 2018 Fourth-Quarter and Full Year Results", 14 February 2019, http://www.starhub.com/about-us/newsroom/2019/february/starhub-reports-2018-fourth-quarter-and-full-year-results.html.

[72] https://www.singtel.com/content/dam/singtel/investorRelations/financialResults/2019/Q3FY19-MDA.pdf

206 This will reduce industry costs, enhance competition and also create a competitive differentiator for platforms such as Singtel TV and StarHub against new entrants, such as Netflix, Apple TV, Google TV, Fox and HBO, which possess many natural advantages, including global scale, lower content acquisition costs, vertical integration into content production and marketing advantages.

9.2 Offering OTT Services that Contain Qualified Content on a Standalone Basis

> ***Question 9:2****: IMDA invites views and comments on the proposal to require the SQL to offer the cross-carried subscribers access to the QC on its OTT platform, if part of the QC is on the Relevant Platform, on non-discriminatory basis i.e., on the same price and terms offered to the SQL's customers.*

207 As noted above, Singtel does not consider that an expansion to the scope of the Cross-Carriage Measure is appropriate.

208 In particular, Singtel does not support IMDA's proposal to further expand the Cross-Carriage Measure to require Supplying Qualified Licensees (**SQLs**) to provide access to Qualified Content (**QC**) that is offered only via the OTT platforms of an SQL.

209 As consumer habits and TV watching behaviour continue to evolve, pay TV licensees will evolve and innovate in respect of their service offerings. This mean that more content is likely to be delivered through OTT platforms. IMDA acknowledges this in its Consultation:

> *"Consumers now have the ability to choose their service provider(s) based on a broader set of considerations, including content and services provided by players that lie outside of the traditional media and telecommunication space (e.g., **OTT services**, […])".*[73]

> *"In recent years, **significant growth of OTT media services has been observed globally**. Singapore's OTT media services market (in terms of revenue) is projected to grow at a compounded annual growth rate ("**CAGR**") of 15.9% to hit US$128m in 2022 […]"* (emphasis added).[74]

210 OTT services are an offshoot of a competitive and developed content market. A rudimentary count of OTT offers in Singapore shows that there are at least 20 OTT providers actively selling and marketing to the Singapore market. This excludes OTT providers who are not located in Singapore but whose services are also available in Singapore, as well as nascent or emerging OTT players like Facebook and YouTube.

211 It is not reasonable to subject a highly competitive market to cross-carriage obligations.

[73] IMDA, Consultation Paper, [2.8].
[74] IMDA, Consultation Paper, [2.9].

212 If IMDA were to extend the Cross-Carriage Measure, then it would only be reasonable to assume that exclusive content available on an OTT platform would need to be transmitted on a "**Relevant Platform**" like a fibre or coaxial pay TV platform of a nationwide subscription television provider, on grounds that the pay TV provider has acquired rights for that content on OTT platforms, which do not qualify as Relevant Platforms. For example, if a piece of content offered by OTT provider A is currently exclusively available only to specific customers or the OTT provider A's customers on an OTT basis, the same content must be made available to an RQL'S customer. Alternatively, IMDA's proposal would effectively mean that a pay TV provider who is also an OTT provider has no flexibility in how it wishes to price or package its OTT content simply because it may have exclusive rights for content on an OTT basis.

213 The Cross-Carriage Measure, if implemented in the way mentioned above, would effectively place licensed Singaporean pay TV providers at a competitive disadvantage compared to global OTT operators who are able to reach the Singapore market but do not work within the local regulatory framework. Clearly, the measure will change the cost structure for OTT and subscription TV service offers in Singapore as compared to those served out of overseas jurisdictions or even illegitimate and copyright–infringing offers.

214 Content that is offered on an OTT basis is typically meant to serve a specific audience with specific needs. For example, OTT content is typically customised to be watched "on-the-go", on a mobile device or tablet, and is targeted to customers without a fixed network connection. For this reason, content delivered over OTT platforms cannot suitably or in all circumstances be delivered over non-OTT "Relevant Platforms", such fibre or coaxial pay TV platforms. As such, Singtel does not understand how the Cross-Carriage Measure is meant to be technically deployed in the case of OTT-exclusive content that is not suitable for delivery over a Relevant Platform.

215 Moreover, it is not clear what regulatory problem IMDA's proposal is responding to. Singtel itself already offers some of its OTT content (specifically, sports content) to any end-user regardless whether they are an existing pay-TV subscriber. These customers can sign up for its sports content via Singtel's OTT application and pay for the content using credit card. In due course, OTT content will be generally available to all customers and is generally seen as a way to innovate content offerings and packaging. By imposing regulatory obligations on the OTT services, IMDA is in fact dampening incentives to innovate in respect of OTT services and risks diminishing the commercial incentives on operators such as Singtel to grow their OTT services.

216 For the above reasons, Singtel does not believe that there is any persuasive basis for seeking to extend the scope of the Cross-Carriage Measure to include "on-the-go" or OTT services.

217 This is highly premature and IMDA has not provided any clear evidence as to why this is needed from a competition or public interest perspective. As noted above, Singtel considers that the better outcome is for IMDA to completely revoke the Cross-Carriage Measure.

218 Considering the above, Singtel is not supportive of IMDA's proposal to extend the Cross-Carriage Measure to OTT/on-the go services.

9.3 Anti-Siphoning Scheme

> ***Question 9:3****: IMDA invites views and comments on the proposal to introduce coverage obligations to complement the existing anti-hoarding provisions.*

219 Singtel does not object to IMDA's proposal to introduce coverage obligations in relation to the existing anti-hoarding provisions in section 2.6.2 of the MMCC.

9.4 Designated Video and Newspaper Archive Operators

> ***Question 9:4****: IMDA invites views and comments on the removal of Sub-sections 2.5 and 10.4(b) of the MMCC in the Converged Code.*

220 Singtel agrees with the removal of the obligations relating to designated video and newspaper archive operators. These obligations are no longer relevant, particularly given IMDA's decision in 2016 to cancel MediaCorp's designation as a Designated Video Archive Operator.

10. Telecommunications interconnection

10.1 Scope of interconnection-related obligations

> ***Question 10:1****: IMDA invites views and comments on the proposal to remove the Services With No Take-up from the Schedule of IRS and MWS.*
>
> ***Question 10:2****: IMDA invites views and comments on whether IMDA should continue to require Dominant Licensee to offer the Regulated Services.*

(a) The services subject to interconnection-related obligations should be determined through periodic market reviews, not through a static Schedule of IRS and MWS

221 Singtel considers that the inclusion of a schedule setting out Interconnection-Related Services (**IRS**) and Mandated Wholesale Services (**MWS**) in the Converged Code is incompatible with a true market-by-market approach to dominance classification.

222 The current approach of directly specifying IRS and MWS in a schedule to the TCC is a consequence of the "Licensed Entity" approach to regulation adopted in the TCC,

where licensees are presumed dominant in respect of all of their services. Directly listing IRS and MWS in a Code is not well suited to a market-by-market approach, where dominance is assessed through a periodic review of each relevant market and the services subject to access regulation flow from these market reviews.

223 As further detailed in section 4.3 above, Singtel considers that IMDA should adopt a full market-by-market approach to dominance classification. This would involve IMDA conducting periodic market reviews and determining dominant operators on a market-by-market basis. These market reviews should then be used as the basis for imposing specific *ex-ante* obligations on dominant operators in each market, including obligations to supply a particular service in that market and produce a reference offer setting out the terms of supply.

224 This is currently the approach used by Ofcom in the United Kingdom, where obligations to supply certain services or provide access to facilities may only be imposed on dominant operators following a market review. The basis for imposing such obligations must also be reviewed with each subsequent market review.[75]

225 A similar approach is set out in European Union law, with the European Union's Framework Directive clarifying that access obligations can only be imposed following a market review and a designation of SMP.[76]

226 Such approach would ensure that interconnection and access obligations are proportionate and fit-for-purpose. Imposing access obligations through a periodic market review would allow IMDA to more flexibly remove access obligations in respect of services where such obligations are no longer justified, while introducing (or re-introducing) access obligations in respect of new services where justified.

227 Accordingly, Singtel's preference would be for IMDA to impose interconnection-related obligations through a separate instrument that is issued following each periodic market review.

228 If IMDA wishes to nevertheless include a schedule of IRS and MWS in the Converged Code, this schedule should be a dynamic instrument that lists all regulated services at a given point in time and that is periodically updated following regular market reviews.

229 The Schedule of IRS and MWS should not be a static instrument that "locks in" access obligations for the life of the Converged Code or that can only be amended through a review of the Code. This latter approach would be contrary to a true

[75] *Communications Act 2003* (UK), sections 79(1), 84.

[76] Article 15(4) of *Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services*, 7 March 2002: *"Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist."*

market-by-market approach to access regulation, would be overly rigid and would not allow regulation to dynamically respond to evolutions in competition in telecoms markets.

(b) IMDA should remove the "Services with No Take-Up" and physical interconnection from the IRS Schedule

230 If, notwithstanding the arguments above, IMDA wishes to continue directly specifying IRS and MWS in the Converged Code, Singtel makes the following submissions in relation to IMDA's proposals regarding specific services currently set out in the IRS and MWS Schedules to the TCC.

231 Singtel agrees with IMDA's decision to remove the "**Services with No Take-Up**" from the Schedule of IRS and MWS. As IMDA points out, these copper-based interconnection services are no longer being used by licensees due to the transition to fibre-based networks, with zero take-up over the past five years.[77] Accordingly, there is no longer any basis to continue regulating supply of such services through inclusion on the IRS Schedule.

232 In addition, Singtel also considers that **physical interconnection** should be removed from the IRS Schedule. In a similar manner to the "Services with No Take-Up" that IMDA supports removing from the IRS Schedule, physical interconnection is no longer relevant due to the transition to fibre-based networks, as well as broader technological developments.

233 Since 2002, no licensee has implemented physical interconnection, with virtual interconnection now the overwhelmingly dominant form of interconnection in Singapore. Accordingly, physical interconnection is no longer a critical input that licensees rely on to compete in downstream markets or to achieve any-to-any connectivity. For this reason, Singtel considers that there is no longer any regulatory basis to include physical interconnection in the IRS Schedule.

(c) Essential Support Facilities should be removed from the IRS Schedule and, where relevant, re-designated as Critical Support Infrastructure

234 Finally, Singtel considers that **Essential Support Facilities**, such as co-location at exchange buildings and submarine cable landing stations, and access to lead-in ducts and manholes, should be removed from the IRS Schedule and designated as a type of Critical Support Infrastructure (**CSI**) under the Resource Sharing provisions of the Converged Code.

235 Unlike IRS obligations, which only apply to Dominant Licensees, CSI obligations apply symmetrically to all Licensees who own or control such infrastructure. Many of the Essential Support Facilities designated in the IRS Schedule satisfy the criteria proposed for CSI under the Converged Code, in that they are required to provide

[77] IMDA, Consultation Paper, [10.8].

telecommunication services, cannot efficiently be replicated, are not fully (or efficiently) utilised and there is no legitimate justification to refuse sharing.

236 These characteristics apply to Essential Support Facilities regardless of whether they are operated by a Dominant Licensee or not. The identity or market power of a facility owner is not relevant to whether the facility should be a CSI and, more broadly, to whether there is a regulatory basis for mandating access to such facility.

237 The current approach, where only Dominant Licensees have an obligation to provide access to Essential Support Facilities, creates economic distortions, hinders competition and is ultimately not in the national interest, as Essential Support Facilities owned by non-dominant entities are not subject to any access obligations.

238 For example, StarHub owns a significant number of lead-in ducts throughout Singapore. [**CONFIDENTIAL**] However, StarHub has been exempted from section 6 of the TCC and is not subject to the interconnection-related obligations.[78] This situation:

- results in an inefficient utilisation of StarHub's passive infrastructure;
- requires other operators to inefficiently replicate such infrastructure at significant cost; and
- is ultimately detrimental to the development of Singapore's telecommunication sector in a cost-effective manner and negatively affects both competition and consumer welfare.

239 Treating access to lead-in ducts and manholes as CSI (rather than an interconnection-related obligation) would allow this situation to be remedied and would maximise the efficiency and value of passive telecom assets in Singapore.

240 Moreover, subjecting lead-in ducts and manholes to symmetrical regulation would be in line with developments in other best practice regulatory frameworks. For example, in Australia, obligations to provide access to passive infrastructure such as lead-in ducts and manholes apply symmetrically to all infrastructure owners under the land access regime in the Telecommunications Act, rather than being a dominance-related obligation.[79]

241 Singtel considers that access to existing submarine cable landing stations should also be removed from the IRS Schedule and re-designated as CSI. In the same manner as lead-in ducts and manholes, to the extent that there is a regulatory basis for mandating access to a submarine cable landing station, this applies regardless of whether the owner of the facility is a Dominant Licensee. The basis for imposing

[78] IDA, *Notice – Classification of Dominant Licensees under Code of Practice for Competition in the Provision of Telecommunication Services 2010, 21 January 2011*, clause 3(a), https://www.imda.gov.sg/-/media/imda/files/regulation-licensing-and-consultations/frameworks-and-policies/competition-management/telecom-competition-code/10-cdln2011.pdf?la=en.
[79] *Telecommunications Act 1997* (Australia), Schedule 3.

access obligations in respect of submarine cable landing stations turns on whether the facility itself is an economic "bottleneck", and not on whether it is owned by a Dominant Licensees or another entity. Accordingly, the symmetrical approach to regulation that applies to CSI is more appropriate in the case of submarine cable landing stations. Removal from the IRS Schedule will allow licensees to negotiate fair and symmetrical price terms and conditions.

242 In addition, Singtel considers that submarine cable landing station access should only regulated where an actual economic bottleneck exists. Specifically, Singtel does not consider that an economic bottleneck exists in the context of new cable systems which are now being built on an open-access basis and do not require consortium members and access seekers to co-locate within the landing stations.

243 The open access nature of new undersea cables has resulted in a decoupling of the physical cable from the active elements of the system, allowing investors to install their own SLTE outside of the cable landing station (i.e. in city data centres and POP facilities).

244 Consequently, the industry has now substantially moved towards connectivity outside the cable landing station in respect of submarine cable links, and operators are increasingly preferring to interconnect downstream of the submarine cable landing station (rather than at the station itself).

245 Submarine cable landing stations are no longer a "bottleneck" facility for new cable systems. There is therefore no longer a strong regulatory basis to subject submarine cable landing station access in respect of new systems to regulatory obligations as either an IRS or CSI.

246 For cable landing station access to older systems, Singtel submits that this should be regulated symmetrically as a CSI, rather than an IRS. As compared to listing on the IRS Schedule, the CSI regime would allow each submarine cable landing station (for older systems only) to be assessed against the CSI criteria which IMDA proposes for the Converged Code (e.g. whether access to the facility is required to provide telecom services and whether an efficient new entrant can replicate the facility or obtain access from a third party at a reasonable cost).

247 Singtel considers that each submarine cable landing station in Singapore should only be subject to access obligations if it meets the CSI criteria proposed by IMDA, but only in circumstances where access to that facility is needed to access the relevant cable system.[80]

[80] IMDA, Consultation Paper, [8.12].

10.2 Validity Period of Reference Interconnection Offer

> ***Question 10:3***: IMDA invites views and comments on the proposed extension of the validity period of the reference interconnection offer to five years, instead of the current three years.

248 Singtel does not object to IMDA's proposal to extend the validity period for the RIO from three to five years, for the reasons IMDA identifies in its Consultation Paper.[81]

10.3 Voice Termination Regime

> ***Question 10:4****: IMDA invites views and comments on the proposal to harmonise the voice termination regime and change the interconnection charging regime for fixed voice termination from "Calling-Party-Pays" to "Bill-and-Keep". IMDA would also invite views and comments on how IP-based interconnection should be implemented, following the transition from traditional copper-based networks to IP-based networks.*

Singtel does not consider that a bill and keep (**BAK**) approach is appropriate for all fixed voice termination in Singapore, regardless of network technology.

249 Singtel acknowledges that significant technological changes have occurred in the past decade, including a transition to IP-based networks. This transition is expected to continue during the lifetime of the Converged Code, as traditional copper-based networks decline in significance.

250 However, this transition is not yet complete, and a significant volume of voice termination continues to occur over the PSTN network.

251 In this context, Singtel considers that IMDA should adopt a more nuanced approach to regulating voice termination, and that the pricing principles for fixed voice termination need to be adapted to the specific characteristics of the network over which termination is occurring.

252 A BAK approach (i.e. zero termination rate) is <u>not</u> appropriate in circumstances where the terminating operator incurs costs to terminate voice calls and such costs can be readily calculated. Accordingly, a BAK approach is inappropriate in respect of voice termination over the PSTN network.

253 As IMDA itself points out, *"the copper line is a dedicated resource"*.[82] Singtel therefore incurs costs when providing termination over the PSTN network, and such costs can be readily attributable to the termination of calls that originate from other operators.

[81] IMDA, Consultation Paper, [10.37].
[82] IMDA, Consultation Paper, [10.40].

254 Moreover, termination costs over the PSTN network are not relatively equal across operators, due to Singtel having a larger network than other operators. A BAK approach would unfairly penalise larger operators such as Singtel, as the volume of calls from other operators terminating on Singtel's network would be much larger than the volume of Singtel-originated calls terminating on other networks. This would create unfair economic distortions, with Singtel being forced to bear higher costs than other operators without being able to recover such costs through reasonable termination charges.

255 Accordingly, a calling-party-pays (**CPP**) approach (with termination charges calculated according to a FLEC-LRAIC methodology) is more appropriate for voice termination over copper-based networks.

256 Imposing a BAK approach for all voice termination, without regard to network technology, would effectively result in the application of "new-world" rules to an "old-world" network. This would result in regulation that is not adapted and fit-for-purpose.

257 Singtel also does not support the use of BAK in relation to newer IP based networks. IMDA's application of the BAK to newer network is overly simplistic and effectively implies that utilisation of the underlying IP network is cost free. This is not the case and would present a number of economic inefficiencies and distortions. As this is a highly complex matter, Singtel recommends that further analysis needs to be undertaken which involves the industry looking more broadly at IP interconnection charging models and the costs and benefits associated with each approach.

10.4 Pricing principles for IRS, CSI and Essential Resources

> ***Question 10:5****: IMDA invites views and comments on the proposed broad principles for governing the application of the appropriate pricing methodology for the purpose of price determination in the Converged Code.*

258 Singtel considers that requiring each dominant operator to develop their own Regulated Asset Base (**RAB**) to determine regulated pricing for certain network elements is inefficient, unnecessary and likely to create distortions.

259 Due to the shift from copper-based networks to the NGNBN, the primary operator of telecoms infrastructure in Singapore is now NetLink Trust (**NLT**), rather than Singtel. The regulated prices of all NLT products are already determined on the basis of a RAB model.[83] The adoption of a RAB model to regulate NLT's pricing arose in a specific context.

[83] See NetLink Trust, "NetLink Trust Accepts Price Revisions Following IMDA's Review", 8 May 2017, http://www.netlinktrust.com/medias/investor-media/media/press-releases/163-netlink-trust-accepts-price-revisions-follwoing-imda-s-review.html.

260 While the RAB model may be appropriate in the case of NLT, requiring all other operators, such as Singtel, to develop their own RAB would represent a disproportionate form of regulatory intervention.

261 Singtel strongly considers that the pricing methodology adopted by IMDA should be:

- adapted to the specific type of network element being regulated; and
- proportionate (in the sense that the costs of regulation do not outweigh the benefits).

262 Applying a RAB pricing methodology to non-NLT services, including the pricing of services and facilities that Singtel supplies pursuant to its RIO, is problematic for three key reasons:

- First, the services and facilities that Singtel supplies pursuant to its RIO involve access seekers making a "build or buy" decision, making a Forward-Looking Economic Cost (**FLEC**) methodology more appropriate for calculating the regulated pricing of such services and facilities. This differs from NLT services, as the NGNBN was designed for the purpose of providing ubiquitous services to all access seekers and acting as the "default" operator of high-speed broadband infrastructure in Singapore.
- Second, the development of a RAB is a complex exercise that results in significant cost without any commensurate benefit. This is because non-NLT infrastructure owners now play only a marginal role in the deployment of CSI and Essential Resources in the Singapore telecoms market, thereby resulting in very limited benefits from applying a RAB to these operators. Requiring each operator to have their own RAB would therefore be a highly inefficient way of determining pricing for IRS, CSI and Essential Resources.
- Third, a separate RAB for each operator would result in different regulated prices for each operator, which would ultimately result in pricing disparities in respect of the same regulated network elements. This would have the effect of distorting competition, shifting the market towards those operators who have lower regulated prices and ultimately leading to the inefficient utilisation of network elements owned or controlled by other suppliers.

263 Accordingly, Singtel considers that a FLEC methodology should continue to apply to non-NLT services and facilities.

11. Administrative and enforcement procedures

11.1 Introduction of a reconsideration process for certain IMDA decisions

> ***Question 11:1****: IMDA invites views and comments on the introduction of the reconsideration process to media licensees on IMDA's decisions on matters pertaining to competition and consumer protection.*

264 Singtel supports the proposal for a preliminary decision before a final decision. These requirements should be extended to telecommunication-related decisions under the Converged Code.

265 It is a general principle of good regulation that regulatory decisions be made with as much consultation as possible and proactively involving all stakeholders who may be affected by the decision. *Proactive* consultation is more efficient and produces better regulatory decisions than *reactive* stakeholder inputs in the form of an appeals or reconsideration process.

266 Stakeholders add a significant amount of value to the decision-making process by providing their input at various stages of this process. The requirements for preliminary and final decisions gives effect to this principle, by allowing stakeholders to provide their input on aspects of IMDA's decisions, which IMDA can then consider when issuing the final decision.

267 This reduces the risks of:

- erroneous decision-making, by ensuring that IMDA has access to all relevant data, perspectives and interpretations of the regulatory framework before issuing its final decision; and
- decisions being challenged by stakeholders (including through appeals to the Minister), as stakeholders have the ability to make their views known early in the process and IMDA has the opportunity to revise its final decision in line with these views.

268 Reconsideration and appeal rights also play an important role, as they provide a check or backstop against erroneous or unreasonable decision-making. The best regulatory decision-making processes are therefore those that contain a mixture of proactive and reactive opportunities for stakeholder input.

269 Accordingly, Singtel's preference would be that the Converged Code include both a requirement for IMDA to prepare preliminary and final decisions, *as well as* a right to request reconsideration of IMDA's final decision before making an appeal to the Minister. With a right to reconsideration and the current provisions for appeals, we

believe there is no need for a draft to be issued in between the preliminary and final decisions.

11.2 Dispute resolution process

> ***Question 11:2****: IMDA invites views and comments on the broad changes to the dispute resolution process under the Converged Code and to set out the detailed dispute resolution procedures in a separate set of guidelines.*

270 Singtel agrees with IMDA's proposed dispute resolution process under the Converged Code, as set out in Table 11.1 of the Consultation Paper. This approach largely involves extending the current approach used under the TCC to disputes relating to media markets (while also incorporating some features of the current MMCC dispute resolution regime, such as settlement conferences).

271 In addition, Singtel does not object to IMDA's proposal to set out detailed dispute resolution procedures in a separate set of guidelines issued under the Converged Code.

272 However, in the Consultation Paper, IMDA mentions that *"the dispute resolution process proposed for the Converged Code will be applicable, but not limited to the scenarios listed in paragraphs 11.5 and 11.6 above"* (which set out the trigger events or grounds on which a dispute may arise).[84]

273 While the *procedural details* concerning dispute resolution are more appropriately dealt with in guidelines, Singtel considers that the grounds on which a dispute may be referred to IMDA need to be explicitly set out in the Converged Code itself. This is required in order to provide certainty to operators about the scope of the dispute resolution provisions and to prevent this process being used in unforeseen circumstances.

274 Accordingly, Singtel considers that the Converged Code should incorporate the dispute resolution grounds set out in section 11.3 of the TCC and section 10.4 of the MMCC, respectively.

275 While some of these grounds can be rationalised to avoid duplication in a converged context, the overall scope of the dispute resolution provisions should be not extended by allowing the dispute resolution procedure to be used in circumstances other than those in which it is presently used. IMDA has not established a regulatory case for why the scope of application of the dispute resolution procedure should be expanded. Accordingly, Singtel does not consider that there is any basis for expanding the circumstances or grounds on which IMDA may resolve a dispute under the Converged Code.

[84] IMDA, Consultation Paper, [11.7].

11.3 Extension of Informal Guidance provisions to telecommunication markets

***Question 11:3**: IMDA invites views and comments on extending the Informal Guidance provisions to the telecommunication markets.*

276 Singtel supports the extension of the informal guidance provisions to the telecommunication markets.

277 These provisions will assist in providing greater clarity to operators about their regulatory obligations and will also promote greater efficiency, by ensuring that ambiguities regarding the scope of obligations under the Converged Code can be dealt with through the informal guidance process rather than more costly and complex dispute resolution or enforcement proceedings.

11.4 Amendments to structural separation powers

***Question 11:4**: IMDA invites views and comments on the proposal to align the structural separation powers in the telecommunication and media industries and give Minister the authority to issue structural separation order for both industries.*

278 Singtel agrees with IMDA's proposal to remove IMDA's power to impose structural separation on regulated persons in the media sector.

279 Given the significant impact of a structural separation remedy on regulated persons and the fact that it involves national and public interest concerns, Singtel considers that this power is more appropriately vested in the Minister.

280 Accordingly, a structural separation power relating to IMDA should not be inserted into the Converged Code. Amendments to the IMDA Act or any other relevant legislation should instead be made to give the Minister the power to make structural separation orders (mirroring the current powers under section 69C of the Telecommunications Act).

12. Competition in a digital economy

***Question 12:1**: Do the above observations about business models and market changes resonate with your experiences in the digital economy? Do you think that these business models are here to stay or are these developments likely to only remain in the short to medium term?*

***Question 12:2**: What competition policy and philosophy should sectoral regulators adopt in the digital economy?*

***Question 12:3**: What are some of the key, traditional competition concepts that need to be reviewed and relooked in a digital economy? For example:*

a) Taking account of non-price dimensions in competition assessments;

b) Data as an input and qualifying as an essential resource or facility; and

c) New bottlenecks that might be pivotal to affording a platform market power.

***Question 12.4**: Should competition assessments be overlaid with broader policy considerations in a digital economy? Which policy considerations would be relevant to consider?*

***Question 12:5**: Should there be early policy or regulatory intervention in data and AI centric business models that lend to significant scale advantages?*

***Question 12:6**: What new capabilities and toolkits would be necessary to assess competition dynamics in markets where data and AI are central?*

281 Singtel considers that evolutions in the digital economy give rise to a wide range of implications for telecoms and media regulation.

282 Given the complexity of these trends and implications, themes relating to the digital economy are more appropriately explored through a separate, specialised consultation, rather than as part of this consultation on the Converged Code.