M1'S RESPONSE TO IMDA'S CONSULTATION ON THE PROPOSED CONVERGED COMPETITION CODE FOR THE TELECOMMUNICATIONS AND MEDIA MARKETS 2019

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PART I: INTRODUCTION

1. M1 is Singapore's most vibrant and dynamic communications company, providing mobile and fixed services to over 2 million customers. With a continual focus on network quality, customer service, value and innovation, M1 links anyone and anything; anytime, anywhere.

2. M1 welcomes the opportunity to submit our comments to IMDA on the proposed policy positions for the Converged Code, pursuant to a review of the Telecommunications Competition Code and Media Market Code. We have structured our comments as follows:

a. Part II: Market Trends and Developments – sets out our broad views on the identified market trends and market developments in relation to the digital economy, and their impact on regulation;

b. Part III: Dominance Classification – sets out our views on the threshold to be used for the initial presumption of Significant Market Power ("**SMP**");

c. Part IV: Anti-competitive Conduct – highlights our comments on the proposed inclusion of unreasonable bundling as an example of abuse of dominant position;

d. Part V: Consumer Protection – addresses provisions on End User Service Information and duty to notify of certain events; and

e. Part VI: Telecommunication Interconnection – includes our views on the harmonisation of the interconnection charging regime for fixed call termination and the industry's move towards IP-based interconnection.

PART II : MARKET TRENDS AND DEVELOPMENTS

M1's View on the Market Trends and Regulatory Environment

3. The convergence of the telecommunications, broadcasting and IT sectors is profoundly reshaping the communications market. The challenges in terms of rapidly emerging new technologies and new forms of competition and business models driven by such technology convergence have consequential implications for the regulatory frameworks and competition policies governing the market environments. A review of the respective regulatory frameworks is timely and provides an opportunity to refine existing regulations, so as to reflect the technological and commercial realities that have taken place in the markets and to address changing consumer demand, behaviour and expectations. We support the proposed approach to create a harmonised regulatory framework, with the objective to promote fair market conduct while delivering effective competition across the entire value chain.

4. M1 generally agrees with IMDA's observed trends and developments in the telecommunication and media industries. In particular, M1 shares IMDA's observation regarding the increased prevalence of service bundling, as well as the finding that over-the-top ("**OTT**") messaging and voice services have rendered the mobile services market more competitive and are significant competitive restraints on traditional voice and messaging services. Competition in the mobile services market has also intensified with the entry of new mobile operators, such as the mobile virtual network operators ("**MVNOs**").

5. In light of the shifting competitive dynamics, M1 is committed to continuing to innovate on its service offerings to offer greater value to customers. To do so, M1 submits that there needs to be level playing field. This needs to be accompanied by more realistic and effective market definitions, amongst other matters, so as to address the competition issues. On this, M1 highlights that the clear trend towards service bundling calls for a different approach towards assessment of markets and market power, as it can used by market players to foreclose competition – these are elaborated in our submission below.

M1's View on Competition in the Digital Economy

6. While IMDA has proposed the Converged Code in view of the increased convergence of the telecommunication and media markets, M1 would like to highlight that this increased convergence is not confined to these two markets, but also between the telecommunication and the fast evolving digital markets. Large technology firms, with the likes of Google, Amazon and Apple, are already competing with telecommunication and media players within the same markets. Further technology shifts, such as the introduction of 5G networks and IoT applications will continue to drive convergence between these markets.

7. Importantly, these developments have disrupted the way in which the telecommunication players compete. Telecommunication players are facing challenges in competing in the converged markets, while at the same time operating their current businesses. As the industry continues to undergo rapid changes and new business models are evolving, M1 urges IMDA to avoid taking an overly prescriptive approach in regulation. A flexible but principled approach will be more appropriate, while also at the same time ensure that regulations keep up and adapt to these rapid

advances in technology and business models in the digital economy. To this end, the regulatory framework should be forward-looking and technology-agnostic, such that it remains effective regardless of the underlying technology and type of market players involved. It is also critical for IMDA to undertake regular market reviews to monitor the state of competition in markets before any competition impediments or market failures become too entrenched.

8. Moving forward, big data will be regarded as a strategic asset for digital players, not just for the purpose of monetising data in the IoT market but also across the entire business value chain. In this regard, M1 agrees with IMDA's observation that data is likely to become a key factor of production, especially as the use of artificial intelligence becomes more pervasive. This results in "data network effects", thereby entrenching the first mover advantage enjoyed by the incumbent and its consequent ability to lock-in customers through the possession of valuable customer data. As such, M1 urges IMDA to bear this new competition dynamic in mind and to recognise data as a source of market power, both in its assessment of dominance and analysis regarding competitive effects, now rather than waiting for a future review. This is imperative as even if a right to data portability is introduced, it does not go far enough to resolve the problems of the locking-in of customers and the consolidation of market power by the incumbent. To better support its policy objective of promoting effective and sustainable competition, IMDA would need to consider how best to allow for room to impose ex-ante obligations where market power is discerned in new markets as the evolution moves forward, and not simply leave this with ex-post.

PART III: DOMINANCE CLASSIFICATION
Threshold to be Used for the Initial Presumption of SMP

9. M1 notes that IMDA intends to adopt a common 50% SMP Presumption Threshold for both the telecommunication and media industries and that IMDA views a 40% SMP Presumption Threshold as being too low for the telecommunication industry.

10. Whilst M1 acknowledges that there is no standard practice in the SMP Presumption Threshold, and the 50% threshold is in line with the position in the European Union (i.e. a market share of over 50% leads to a presumption of dominance),[1] it bears mentioning that the United Kingdom's ("**UK**") communications regulator, Oftel (now Ofcom), observed that based on the European Commission's decision-making practice, dominance concerns do arise in situations where an undertaking has at least 40% market share. In fact, dominance concerns may even arise where an undertaking has less than 40% market share, depending on the size of the particular undertaking's market share relative to its competitors.[2] Till today, this market share threshold for a presumption of dominance remains applicable in the UK market, notwithstanding the UK market liberalised since the 1980s.

11. While IMDA has highlighted that an entity with market share below the SMP Presumption Threshold may also be found to be dominant if there is sufficient evidence to support such a finding, M1 proposes that IMDA adopts a more prudent position by adopting a lower threshold, while we are moving towards a digital economy and competition authorities are still trying to gain better insights on the implications and impact to market and competition.

12. Whilst M1 disagrees with the proposed SMP Presumption Threshold, M1 agrees with IMDA's view that whether an undertaking has SMP cannot, and should not, be defined solely based on market shares. To this end, M1 notes that guidance may be gleaned from the UK Ofcom's and European Commission's guidelines, such as the following factors:

a. absolute and relative size of the undertaking;

b. technological advantages or superiority;

c. easy or privileged access to capital markets / financial resources;

d. product / services diversification (e.g. bundled products or services);

e. economies of scale and scope;

f. presence of a highly developed distribution and sales network;

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[1] See paragraph 55 of the European Commission's Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services.

[2] *Oftel's market review guidelines: criteria for the assessment of significant market power*, issued by the Director General of Telecommunications on 5 August 2002.

g. countervailing buying power;

h. absence of potential competition;

i. barriers to entry and expansion; and

j. direct and indirect network effects.

13. Apart from the abovementioned factors, M1 would like to stress that in the digital economy, access to certain resources, such as big data, can be a source of market power, as submitted at paragraph 8 above. This is especially so for market players that offer bundled services, who will have access to a vast amount of customer data that cuts across different industries. Su1qch an advantage enables the leveraging on customer information by processing and analysing such data (e.g. consumer profiles, service usage and billing data) so as to improve their operations, provide enhanced consumer experiences and develop new products and services. We, therefore, request IMDA to also give due consideration to access to big data when carrying out its assessment on market power. In this regard, market power should not be assessed purely in terms of revenues or number of subscribers, but should take into account the market player's ability to leverage its customer data to raise prices or reduce quality.

"Market-by-Market" Approach to Dominance Classification

14. M1 notes that IMDA is proposing to adopt a "Market-by-Market" approach for telecommunication licensees in respect of new markets, whereby designated Dominant Entities will not be presumed to be dominant for new services offered in new markets.

15. M1 cautions against this approach which overlooks the fact that Dominant Entities may be able to leverage their dominance in an existing market (either via their operation of facilities that are sufficiently costly or difficult to replicate, their ability to exercise SMP in the existing market or even through market power arising from data they have collected or continue to collect over the years) to affect competition in the new market. This is particularly the case in today's converged environment where services and platforms are interlinked, and technological advances facilitate the creation of new markets and new services that ride on existing facilities and services. In such case, even where a designated Dominant Entity is able to demonstrate that the new service itself does not fall within an existing market that it is participating in, its dominance in an existing market may create competition impediments for the new market. In that scenario where ex-ante regulation will not apply to the Dominant Entity in respect of the new market based on the proposed "Market-by-Market" approach, competition harm would have been created in the new market that would require significant time and effort to remedy. Relying on ex-post measures may be insufficient and too late. Therefore, it is important that IMDA continues to be pro-active and forward-looking in its market assessment in new markets where Dominant Entities participate in.

16. Under a "Market-by-Market" approach, M1 would also highlight that market definition cannot take place along the traditional lines of service category. For example, with the increased prevalence of service bundling as identified by IMDA, not just within the telecommunication

market, but also *across* both telecommunication and media markets (i.e. the "triple-play" combination of broadband Internet access with TV content and mobile services), M1 submits that IMDA should consider whether bundled services ought to constitute a separate relevant product market, distinct from standalone services. This has been considered by regulatory authorities in other jurisdictions, such as in the European Union.[3] Given the convergence of the telecommunication and media markets, and the high take-up of bundled offers, M1 is of the view that a separate relevant product market for bundled services should be defined so as to reflect market realities.

[3] The European Commission had several opportunities to consider whether a separate market should be defined for multi-pay services (which may consist of double-, triple- or quadruple-play offers), although it has ultimately left the question open. See COMP/M.7231 *Vodafone/ONO* (2014), COMP/M.6990 *Vodafone/Kabel Deutscheland* (2013). Note that in *Vodafone/ONO* (2014), the market investigation suggests that a separate market should be defined, as triple- and quadruple-play services were becoming the norm and was offered by the majority of competitors.

PART IV: ANTI-COMPETITIVE CONDUCT
Service Bundling / Anti-Competitive Leveraging

17. M1 supports IMDA's proposal to include unreasonable bundling as an example of an abuse of a dominant position in the Converged Code. IMDA considers "unreasonable bundling" as the tying or bundling of two or more products and services for sale which results in, or is likely to result in, the anti-competitive foreclosure of market(s) to competitors and which cannot be objectively justified.

18. As competition intensifies, it has become a common practice for service providers to leverage the cross-selling of services to attract/retain customers, take for instance bundled services such as triple-play and quadruple-play packages that are being offered.

19. While bundling can bring about various consumer benefits, it can be detrimental to consumers and other competitors if it is used to leverage on an entity's SMP to foreclose competitors from the market, such as an entity with SMP in market for non-telecommunication services (e.g. OTT services or payment services) leveraging that SMP into a telecommunication market (e.g. the provision of fixed broadband access). This leads to consumers finding themselves locked-in to sub-optimal bundles and unable to switch to a standalone service that is superior, especially since consumers may not wish to incur the inconvenience of unpicking the bundles. Depending on the specifics of the bundle, end users may be squeezed into a captive, "all-or-nothing" situation.

20. Back in 2003, M1 had, in its response to then IDA's Consultation Paper on the First Triennial Review of the Code of Practice for Competition in the Provision of Telecommunication Services ("**TCC**"), highlighted the need to safeguard against subtle and prolonged means of leveraging market power from one market to erode the competitiveness of another market. M1 had also highlighted its concerns on the use of bundling to foreclose or reduce the ability of other competitors in a particular market to efficiently compete, and cited international practices adopted by other legislations in handling competition issues. These concerns remain relevant in today's competitive environment, and if anything, have intensified given the present technology trends and customer consumption habits.

21. M1 takes the view that the present provision in the TCC (section 4.2.1.3) on bundling is too narrow. Indeed, there have been cases where market players comply with the requirement by offering services on a standalone basis, but the structuring and pricing of the bundle is such that consumers are effectively "forced" to take up the bundled offering. The present provision therefore fails to capture types of bundled offers that may have the effect of locking-in customers with a single service provider, even without explicitly requiring customers to do so.

22. M1 is therefore in support of the seemingly broader definition of unreasonable bundling under the Converged Code, which appears more consistent with the "rule of reason" approach adopted by competition authorities globally where the pro-competitive and anti-competitive effects

of bundling strategies are assessed on a case-by-case basis.[4] M1 believes that such an approach is a sensible one, as it enables a more holistic review of bundling strategies.

23. However, to ensure that the provision is implemented effectively to achieve its desired outcomes, M1 submits that any assessment of whether a bundling strategy constitutes an unreasonable one must take into account not just the price but also the non-price effects of the conduct. The factors to consider when assessing the non-price effects include:

a. the complexity involved when customers choose to terminate their contracts for one or more services within the bundle, in particular the length of the contract, whether there are any non-price terms that restrict customers from breaking the bundle, hefty early termination charges, the termination processes or technical limitations preventing a product in which a player has market dominance (e.g. Pay TV) to be carried on another product or service in a competitive market (e.g. fibre broadband services);

b. whether customers value the benefit of a "one-stop shop" (i.e. the convenience of acquiring all services from one service provider);

c. whether the bundled goods and services are complementary products; and

d. whether other competitors are able to supply certain services in the bundle.

24. In this regard, M1 submits that the key focus is whether the non-price effects generate greater "stickiness" to one service provider, which reduces the incentive and likelihood of consumers switching to an alternative service provider, even though there is no contractual restriction or impediment that prohibits the customer from taking up one or more of the bundled services from another service provider. In the face of such effects, customers do not effectively have a choice amongst the numerous mobile operators, Internet providers and media content providers available in the market, and could be limited to the two or three bundled services providers in Singapore as competition is basically on the basis of bundles.

25. To this end, there should be greater regulatory oversight over bundling packages involving dominant operators, as the terms and conditions could be designed to create switching or exit barriers for customers.

26. M1 also seeks clarity from IMDA as to whether the provision of unreasonable bundling is intended to apply only to bundling within and across the telecommunication and media markets, or whether it would also include the bundling with services outside of these markets.

27. In this regard, M1 observes that there has recently been an increasing number of tie-ups or partnership between telecommunication licensees and other businesses to offer telecommunication and non-telecommunication services. These tie-ups may adversely affect competition in the

[4] *Bundling Behavior in Telecoms: What Firms Do and How European Competition Authorities Have Included Bundling in their Reasoning* by Competition Policy International, Nov 2016

telecommunication and media markets, and so an assessment of unreasonable bundling should not be limited to bundling within and across the telecommunication and media markets only. In this regard, the proposed provision on anti-competitive leveraging / anti-competitive preferences seems to take a wider perspective that prevents leveraging involving non-telecommunication and non-media markets, which is welcome. M1 further submits that there needs to be further clarity upfront on the assessment of cases that involve anti-competitive leveraging between a telecommunication or media market, and a market that is not licensed by IMDA. With the likely increased prevalence of service bundling across industries, competition regulators may also need to review whether the current sectoral carve-out for ex-post competition regulation would remain effective.

PART V: CONSUMER PROTECTION

Application of Consumer Protection Provisions

28. M1 notes that IMDA has proposed to retain the present position of not applying the Consumer Protection Provisions to OTT TV or content services provided by all OTT TV or content service providers.

29. Should this position be maintained under the Converged Code, M1 submits that IMDA ought to apply this equally to all applicable telecommunication and/or media players offering OTT services. Whether this position applies should be based on the nature of the service provided, as opposed to the identity of the service provider. For example, an OTT service provided by a licensed telecommunication player (which is being licensed by IMDA for the provision of other telecommunication services) should be exempted from the Consumer Protection Provisions in respect of the OTT service it provides. M1 emphasises that it is critical that IMDA apply the regulatory framework equally to ensure a level playing field across all OTT service providers.

Duty to Prevent Unauthorised Use of End User Service Information

30. IMDA has proposed to extend the requirement for 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 End User Service Information ("**EUSI**").

31. M1 is of the view that the imposition of the above requirement in the Converged Code is unwarranted. As IMDA has pointed out, Licensees and Regulated Persons already offer End Users several methods to manage their consent today (e.g. through online portal, mobile applications or hotline). In addition, the Personal Data Protection Act ("**PDPA**") specifies the requirements and guidelines governing the use of personal data, including the notification and withdrawal of personal data. As the PDPA has been the primary legislation governing the use of personal data, we are of the view that all personal data protection requirements should be harmonised or streamlined to allow businesses to operate under the purview of the PDPA. This will provide clarity and certainty to End Users and businesses on their rights and obligations.

Duty to Notify of Certain Events – Advance Notice for Service Changes

32. IMDA has proposed to introduce an advance notice requirement (in writing) for any advantageous change to their telecommunication and media services, especially if it relates to a change in key service features and the prices, terms and conditions on which the service would be provided. M1 notes that this proposal appears to be driven by some instances where Licensees unilaterally made changes that they perceived to be advantageous to End Users without informing them in advance, leading to dissatisfaction of some End Users.

33. While there may be some merits to notify End Users of the advantageous changes, we are of the view that this should not be a blanket requirement for all advantageous changes. In a highly competitive market, customer engagement and positive customer experience is key. Licensees would have the incentive to notify End Users of an advantageous change but should be given the flexibility to decide depending on materiality of the change and extent to which it could contribute towards customer goodwill, versus causing confusion to customers or displeasing others when they receive too many notifications from Licensees.

34. Where there are advantageous changes that are perceived to be "subjective", we would suggest that IMDA provide further clarifications or set out examples whereby Licensees must notify the End Users. This will provide better clarity and minimise any unhappiness from End Users.

Duty to Notify of Certain Events – Advance Notice for Cessation of Service or Operations

35. IMDA has proposed to (i) extend the requirement to provide advance notice to End Users for termination of operations or services, to the telecommunication markets; and (ii) provide a three-month advance notice in writing for cessation of operations or provision of any telecommunication and media services, while allowing IMDA the right to require this period to be extended to better protect End Users' interest under certain circumstances.

36. M1 fully concurs that advance notice should be provided to End Users for termination of any operations or services. However, we are of the view that the period need not be prescribed but based on a reasonableness approach and assessed on a case-by-case basis. For instance, it may be a case where the customer base is very small and there are already many alternatives which customers could easily switch to. Conversely, where the proposed cessation of service is likely to impact a large segment of customers and/or switching to other alternatives would require more effort, a longer advance notice may be warranted. In any case, any request for cessation of service or operations will still be subject to IMDA's approval, which provides the necessary protection for consumer interests in such situations.

PART VI: TELECOMMUNICATION INTERCONNECTION
Change of Interconnection Charging Regime for Fixed Call Termination

37. IMDA has proposed to harmonise the voice termination regime and change the interconnection charging regime for fixed voice termination from "Calling-Party-Pays" to "Bill-and-Keep" ("**BAK**"). IMDA has cited several important developments in the Singapore telecommunication industry in recent years to support the proposed move to the BAK regime:

a. Development of access-based competition over the NBN, whereby consumers are offered bundles of services including voice services;

b. Transition from Time Division Multiplex ("**TDM**")-based voice services to IP-based voice services;

c. Competition from new OTT-based messaging applications that use IP networks;

d. Shift of consumer communication over to mobile networks; and

e. Declining importance of voice relative to data (in terms of both revenues and volumes).

38. We believe that there are merits to move to the BAK model, which can incentivise the deployment of IP-based networks, adoption of efficient technologies, promote efficient interconnection and encourage a level playing field between fixed and mobile operators. As highlighted in IMDA's Consultation, a BAK regime is typically used between operators when there is a balance of traffic between parties, as it avoids transaction costs between both in such cases of symmetric traffic flow. Notwithstanding that there may be variations in network systems and flow of bi-directional traffic across operators, and hence the implicit costs of moving towards a BAK model, we are of the view that a harmonised BAK regime would be beneficial for the industry as a whole in the long term. If implemented, the BAK model should be effected for the whole industry.

39. M1 would, however, caution that a move to BAK should only be considered for interconnection within Singapore. It should not have any bearing on the retail rates to customers, and the international settlement regime between Singapore and overseas carriers, where parties can still commercially negotiate on the international settlement rates as per the current practice.

IP-based Interconnection as Default

40. IMDA stated that given the growing volume of IP-based and VoLTE calls, it is timely to consider interconnection at the IP-level to be the new default, replacing the existing SS7 signalling. Therefore, IMDA is seeking views and comments on how IP-based interconnection should be implemented, following the transition from traditional circuit-switched networks to IP-based networks.

41. M1 understands that the technical specifications for IP-based interconnection are already established. As traffic exchanges are expected to converge towards a multi-service IP-network, IP-

interconnection should be the way forward for the industry. It will also be more cost effective and efficient as compared to existing interconnection arrangements.

42. There is a case for a more proactive and decisive role by the regulator to facilitate IP-interconnection, so as to ensure equal opportunities for all market players. Such a migration towards IP-interconnection will be a major exercise, as significant amounts of effort and resources, as well as implementation lead-time, would be required to replace existing switches and/or interconnect configurations. M1 foresees that it will be crucial for IMDA to work with the industry on the IP-interconnection requirements (e.g. inter-working standards to be adopted, quality of service standards, numbering and translation of E.164 to IP, costs responsibilities, etc) and migration roadmap. There are also other implications that need to be studied, such as the impact to the existing Fixed Number Portability arrangements, and network security requirements.

43. A transition to IP-interconnection would require a major alignment and co-ordinated efforts amongst all parties. Therefore, we propose the establishment of a joint working of IMDA and the operators to help facilitate a smooth transition to IP-interconnection.

CONCLUSION

21. M1 is of the view that today's digital ecosystem calls for a more harmonised, technology-agnostic and flexible regulatory approach to reflect market and technology realties. We would also highlight the importance to align all stakeholders so that there are incentives to engage and work towards the desired regulatory outcome of creating a supportive environment that continues to encourage innovation and promote sustainable competition.