

Competition & Antitrust and Trade, Technology, Media and Telecommunications

Second Public Consultation on Converged Competition Code for the Media and Telecommunication Markets

Introduction

The digital revolution is transforming businesses and industries, and changing the way the services and content are provided to, and consumed by the public. In the media and telecommunication markets, there have been rapid advances in technology and changes in business models. Once distinct sectors, the lines between them continue to blur.

As growth in both markets accelerate and evolve, there is a need for regulations and the competition frameworks to remain applicable and fit for purpose in the current environment.

This was the impetus for the Public Consultation on a Converged Competition Code for the Media and Telecommunication Markets begun by the Infocomm Media Authority ("**IMDA**") in February 2019 (the "**First Consultation**"). The First Consultation sought to obtain the public's views on key trends identified by IMDA in the media and telecommunication markets which have been separately governed by two codes, the Media Market Conduct Code ("**MMCC**") and the Telecom Competition Code ("**TCC**") respectively.

Another key impetus was IMDA's broad policy proposal to develop a harmonised competition code ("**Converged Code**"). IMDA took the view that a single harmonised code would streamline the rules and regulations for industry players, ensure the application of a consistent regulatory framework and allow for better safeguarding of effective competition and consumer interests across both the telecommunication and media markets. Seventeen parties (hereinafter, "**Respondents**") provided comments in the First Consultation.

The Respondents' views have been deliberated and a second consultation paper ("**Second Consultation**") published on 5 January 2021. In this Update, we provide a summary of IMDA's position on the views taken by the Respondents and briefly discuss noteworthy areas of the draft Converged Code, which can be found [here](#).

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Market Overview and Convergence

In its First Consultation, IMDA identified five key macro trends in the telecommunication and media industries. These five macro trends are thought to have a material impact on competition in the two markets due to the following market behaviour:

- (a) transition to Internet protocol ("**IP**")-based services on the Nationwide Broadband Network ("**NBN**");
- (b) increasing competitive edge of service bundling;
- (c) increasing competition from non-traditional digital services and platforms;
- (d) growth of Over-the-Top ("**OTT**") media services; and
- (e) diminishing reach of traditional media platforms.

There was broad consensus amongst the Respondents, who agreed with IMDA's observations, especially regarding OTT services. However, two of the Respondents submitted that a stronger regulatory response is warranted to help market players better cope with the current trends and changes.

Regulation of Dominant Entities

Dominant telecommunication licensees ("**Dominant Licensees**") and dominant media licensees ("**Dominant Persons**") (collectively, "**Dominant Entities**") are currently subject to different *ex ante* regulatory obligations under the TCC and MMCC respectively. The Converged Code seeks to harmonise the standards used to establish dominance and harmonise the duties and obligations of Dominant Entities.

Presumption of Significant Market Power

Under the TCC, a telecommunication licensee is presumed to be dominant if it has a market share of at least 40% while a media licensee is presumed to be dominant under the MMCC if it has a market share of at least 60%. A common market share threshold for Significant Market Power of 50% ("**the SMP Presumption Threshold**") was proposed for the Converged Code in the First Consultation.

Views were mixed. Respondents opposed the lowering of the market share threshold in media markets from 60% to 50% as entities who are currently not considered dominant under the MMCC could potentially be found dominant under the Converged Code. Other Respondents questioned the basis for raising the current threshold from 40% to 50% in telecommunication markets. Some Respondents also questioned the significance of using market share figures in Significant Market Power ("**SMP**") evaluations at all.

IMDA has maintained its position on adopting a 50% SMP Presumption Threshold due to changes in market structure for both the telecommunications and media sectors. In response to the Respondents'

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views, IMDA explained that the 60% market share threshold under the MMCC was adopted in 2007 where there were few key players in the mass media services markets. Given the number of new entrants in the media market, IMDA believes that a new market share threshold is warranted. A market share threshold of 50% would also bring it closer to the standard in other jurisdictions. For the telecommunications markets, the 40% threshold was adopted in 2000 when the markets were first liberalised. With increased competitiveness within the sector, IMDA maintained that a higher market threshold would avoid unnecessarily triggering a presumption of SMP when the market is in fact competitive. In both media and telecommunication markets, market share figures in SMP evaluations remain relevant insofar as this approach is in line with that adopted by other international competition authorities, such as the Federal Trade Commission, the European Commission ("**EC**") and the Competition and Markets Authority. IMDA stressed that the SMP Presumption Threshold is a rebuttable presumption and that IMDA will consider other factors, such as barriers to entry and the existence of countervailing buyer power, in assessing whether there has been a restriction of competition in the relevant markets.

"Market-by-Market" vs "Licensed Entity" approach

The TCC and MMCC adopt different approaches to the classification of Dominant Entities. The TCC uses a "Licensed Entity" approach, which presumes that a Dominant Licensee is dominant in all the markets that it is present in unless proven otherwise. On the other hand, the MMCC uses the "Market-by-Market" approach, which classifies a media licensee dominant in specific markets where it has been found to have SMP. IMDA had proposed adopting a "Market-by-Market" approach for the Converged Code in the First Consultation.

Respondents were generally supportive of the adoption of the "Market-by-Market" approach, and IMDA has decided to extend this approach for the telecommunication markets. Under this approach, Dominant Licensees would no longer be presumed to be dominant for new services offered in new markets. However, there remains an onus on Dominant Entities in both the media and telecommunication markets to demonstrate to IMDA that the new services do not fall within any existing markets in which they are dominant. Dominant Entities that consider themselves no longer dominant in a particular market can apply for an exemption from IMDA. The change in approach means that Dominant Licensees will no longer be automatically subjected to additional ex ante obligations for any new services offered in new markets.

Anti-Competitive Conduct

In the First Consultation, IMDA proposed to merge the ex-post competition provision across the TCC and MMCC, and either remove or extend sector-specific provisions. IMDA also proposed to introduce other concepts regarding anti-competitive conduct in the Converged Code, such as the concept of joint dominance and unreasonable bundling.

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Discrimination

IMDA considers that a discrimination of access happens when an entity with SMP provides access to infrastructure, systems, services, equipment or information to its downstream affiliate on discriminatory prices, terms and conditions without any objective justification. The TCC currently adopts an effects-based test to assess discrimination which requires evidence that the discriminatory conduct by a licensee with SMP has an effect of restricting or impeding other licensees' ability to compete, whereas the MMCC adopts an object-based test which only requires evidence of discriminatory prices, terms and conditions to provide the presence of discrimination.

Only one Respondent took the view that IMDA should adopt the object-based test under the MMCC. IMDA has decided to maintain its proposal to adopt an effects-based test under the Converged Code as some discriminatory conduct can generate substantial efficiencies or benefits, so discriminatory conduct per se should not constitute an abuse of dominance unless it is assessed to have the effect of net harm in the market. In response to a Respondent's request that IMDA should impose explicit requirements to govern the contractual terms signed between upstream and downstream providers, IMDA clarified its position that these go beyond the general anti-competitive agreement prohibitions and should be commercially negotiated by the parties instead.

Cross-subsidisation

Cross-subsidisation generally refers to a situation where a company uses the revenues generated from a market in which it has SMP, to subsidise the services, facilities or equipment that it provides in markets that are subject to a greater degree of competition. Cross-subsidisation is prohibited under the TCC but not the MMCC. It was proposed that the prohibition be extended to media markets under the Converged Code. Entities with SMP will be taken to have abused their dominant position if they use the profits generated in the market(s) in which they are dominant to cross-subsidise the price of a product in another market in which they are not dominant ("**Inter-market Cross-subsidisation**") where this would unreasonably restrict competition in any telecommunication or media market in Singapore.

IMDA has decided to proceed with this proposal. Acknowledging the observation from two Respondents that cross-subsidising is common in the media business, IMDA clarified that the proposed prohibition will only apply to inter-market subsidising by definition (i.e. using revenues from the provision of service in one market that is not subject to effective competition to cross-subsidise the price of service in another market that is subject to effective competition) and therefore will not apply to intra-market cross-subsidisation (e.g. subsidising within TV content packages).

Bundling

The TCC and MMCC do not currently contain any express prohibition on bundling. However, the Converged Code seeks to include a specific provision that expressly prohibits unreasonable bundling.

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Unreasonable bundling refers to a situation where an entity with SMP bundles its products and creates an effect that forecloses its competitors from certain markets, and which cannot be justified.

IMDA has decided to include such a prohibition under the Converged Code as bundling becomes an increasingly common practice in Singapore, so as to prevent providers from leveraging their dominance in one market to distort competition in other relatively competitive markets.

Remediation of anti-competitive agreements

IMDA has decided to adopt its earlier proposal that for agreements that are assessed to contravene the MMCC and TCC, IMDA would only require the specific anti-competitive provisions to be voided (which is the current position under the TCC), instead of voiding the agreements in their entirety (which is the current position under the MMCC). IMDA regarded that this is a more reasonable and practical approach which is consistent with general competition law.

Consumer Protection

Duty to prevent unauthorised use of End User Service Information ("EUSI")

The duty to prevent unauthorised use of EUSI is contained in sub-sections 3.2.6 of the TCC and 3.6 of the MMCC. IMDA has proposed to merge the provisions, which would have the following effects under the Converged Code:

- (a) Extending to telecommunication markets the MMCC requirement for telecommunication licensees to develop and inform end users ("**End Users**") of the procedures through which they could grant or withdraw consent to the use of their EUSI; and
- (b) A streamlining of the MMCC provisions which share any areas of overlap with the Personal Data Protection Act ("**PDPA**").

IMDA has decided to proceed with such an approach. In response to some Respondents' suggestions to rely on the PDPA to reduce confusion, IMDA clarified that the PDPA only governs the personal data of individuals and not the EUSI of business End Users and sole reliance on the PDPA would therefore not meet IMDA's policy intent to protect EUSI of all End Users.

Disclosure requirements including Critical Information Summary ("CIS")

IMDA proposed to do the following under the Converged Code:

- (a) Merge the disclosure requirements under the TCC and MMCC;
- (b) Extend the CIS requirement to all telecommunication licensees;

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- (c) Reduce the timeframe from 14 days to five days for licensees to provide End Users with the CIS and service agreements; and
- (d) Extend the reduction of timeframe to the telecommunication markets to enhance consumer awareness of the terms and conditions in their service agreements.

IMDA will proceed with this approach as all Respondents were in support of the proposal. Market players should note that the CIS requirement will only apply to fixed term contracts that are longer than one month.

Prohibition on charging for services supplier on free trial or complimentary basis

IMDA has decided to merge certain sections of the TCC and MMCC that share the same intent to prohibit licensees from charging End Users for services provided on a free trial or complimentary basis after the end of the free trial or complimentary period, unless the licensee had obtained the End Users' express consent to continue with the service on the agreed terms and conditions. Complimentary services include free value-added services or waivers on certain services offered during the contract term of a fixed term contract (e.g. free Caller ID service). To further protect consumers, IMDA will introduce a new requirement to require telecommunication and media licensees to send a reminder notice to End Users within three to 14 days before the end of the free trial or complimentary service, to notify the End User of the end date.

Mergers and Acquisitions

In its First Consultation, IMDA sought mainly to harmonise the set of rules that applied to mergers and acquisitions across the two markets. The purpose was to subject entities to a consistent process for merger review.

Transactions subject to IMDA's scrutiny

While the mergers and acquisitions provisions ("**M&A Provisions**") under the TCC apply to any person acquiring an interest in a Designated Licensee, the MMCC provisions only catch transactions where the acquirer is either a Regulated Person ("**RP**") or an Ancillary Media Service Provider ("**AMSP**"). It was proposed that the Converged Code follow the approach under the TCC, which will extend the purview of the M&A Provisions to catch *any person* acquiring ownership interest in an RP in the media market.

IMDA has maintained its position from its First Consultation, citing the reason that there is a need to monitor closely all transactions involving the acquisition of ownership interest. Any person wishing to acquire an ownership interest in a RP should therefore be aware of this as they may have to notify IMDA or seek prior approval.

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Thresholds for Short Form and Long Form Consolidation Application

Generally, a Long Form consolidation application form should be used unless the applicants are eligible to use the Short Form consolidation form which is a streamlined application process for transactions which IMDA believes are less likely to raise competition concerns. While the procedure for both applications are similar under the TCC and MMCC, the thresholds for eligibility for the Short Form are different.

IMDA has decided to adopt its proposed common threshold for the Short Form application such that it may be used where none of the applicants individually hold, and/or the post-consolidation entity will not hold, a share of:

- (a) 30% or more of any telecommunication or media market in Singapore or elsewhere; or
- (b) Between 20 to 30% when the combined market share of the largest 3 Regulated Persons and/or AMSPs is 70% or more of any telecommunication or media market in Singapore.

IMDA explained that the adoption of a 30% market share would be a more prudent approach that strikes a good balance between the telecommunication and media markets.

Consolidation review period

The consolidation review periods for IMDA's response to a consolidation review under the TCC and MMCC are also different. Under the Converged Code, IMDA is to adopt the TCC review periods to:

- (a) Ordinarily complete the consolidation review within 30 days after the start of the consolidation review period; and
- (b) Extend the review period by up to 90 days to a maximum of 120 days if a consolidation application is deemed to raise novel or complex issues.

This proposal was welcomed by Respondents, given that the review periods are shorter than under the MMCC, and will be implemented by IMDA. Market players who wish to push for a shorter review period should consider making a submission to IMDA with a proposed duration.

Public Interest Obligations

Cross-Carriage Measure ("CCM")

In 2010, the CCM was introduced to discourage Subscription Television Licensees from pursuing an exclusive content-centric strategy. Under the CCM, a Pay-TV operator who acquires a piece of content on an exclusive basis must make it available for broadcast by all other qualifying Pay-TV operators. Under the existing framework, the CCM is applicable to all exclusive content transmitted on the linear Pay TV platform, regardless of content genre such as drama, movies and sports.

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IMDA has since decided to limit the application of CCM to only live programmes that are acquired on an exclusive basis. This is in view that consumers now have more options to access content and that most TV content apart from live sports, such as dramas and movies, are increasingly made available to consumers on the Internet.

Administrative and Enforcement Procedures

Harmonisation of decision and appeal processes

In the First Consultation, IMDA proposed to introduce the reconsideration process to IMDA's decisions on competition and consumer protection matters in the media markets whereby aggrieved persons may request IMDA to reconsider its decision. This is to replace the current process under the MMCC where IMDA will first issue a preliminary decision, followed by a draft decision, for licensees' comment before issuing its final decision. IMDA has decided to proceed with this proposal to ensure that the processes are harmonised and consistent for both the telecommunication and media markets. In response to one Respondent's suggestion, IMDA clarified that the considerations on whether to stay a decision or direction pending review will continue to apply under the Converged Code, and IMDA will generally consider factors such as the merits of the reconsideration request or appeal and whether the potential harm to any person outweighs the benefits of allowing the decision or direction to go into effect, as well as public interest.

Extension of informal guidance to telecommunication markets

IMDA has decided to extend the informal guidance procedure under the MMCC to telecommunication markets. Under the Converged Code, any person under the purview of IMDA can submit a request for informal guidance regarding the application of any provision of the Code. This is provided if the person has (a) a genuine and substantial question regarding the application of the Code to its specific factual question; and (b) a commercial interest which would be directly and immediately affected by resolution of the question.

Competition in a Digital Economy

IMDA also sought comments on its identification of future developments in today's increasingly digital economy in its First Consultation. Although the Converged Code will not be based on these developments at present, they will help IMDA understand the perspective and outlook of market and industry players. This ensures that regulatory changes and philosophy keep pace with commercial concerns. On the whole, Respondents tended to agree with IMDA on the potential challenges that will be faced by media and telecommunication markets in a digital economy.

IMDA noted that it would continue to engage the industry to better understand how new digital business models affect competition dynamics. IMDA provided its view that no further changes are needed to the

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competition framework at this point to assess competition dynamics in digital markets, but it would continue to monitor developments in this area and consult the public should it subsequently decide to make changes to its competition framework.

Concluding Remarks

As a general matter, IMDA has in this Second Consultation decided to proceed with most its proposed policy positions taken in the First Consultation. Whilst the Second Consultation is intended to seek comments on the actual drafting of the proposed Converged Code, this still presents interested parties with a final opportunity to make its submissions on any proposed policy positions which they do not agree with. This is also the opportunity for interested parties to review the proposed drafting and to propose any drafting changes to improve clarity and ensure that the drafting reflect their understanding of the proposed positions. The public consultation closes at **12pm, 2 March 2021**.

To prepare for compliance with the Converged Code, businesses should also review the draft Converged Code carefully to understand the implications of the proposed changes to your business, and the steps that would need to be taken by your business to comply with the Converged Code.

We invite you to contact us to discuss if you would like to make a submission to this public consultation and/or to understand the impact of the proposed changes to your business and operations.

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