



**CONSULTATION PAPER ISSUED BY  
THE INFOCOMM MEDIA DEVELOPMENT AUTHORITY**

**ON**

**GUIDELINES ON COLLECTIVE DOMINANCE UNDER SECTION 8 OF  
THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF  
TELECOMMUNICATION AND MEDIA SERVICES 2022**

**19 JULY 2023**

## **INTRODUCTION**

1. IMDA conducted two public consultations between 2019 and 2021 to seek views and comments on policy positions for the Code of Practice for Competition in the Provision of Telecommunication and Media Services (the “**Code**”). The Code aims to maintain effective and sustainable competition, and safeguard consumer interests in the telecommunication, broadcasting and newspaper markets, and has taken effect since 2 May 2022.
2. On the general prohibitions against abuse of a dominant position, anti-competitive leveraging and unfair methods of competition in the telecommunication and media industries pursuant to Section 8 of the Code, IMDA had mentioned during the aforementioned consultations that while the general prohibitions currently provide for abuses of dominant position by a single party, it is possible for one or more parties to leverage their collective market power to conduct an abuse. Hence, IMDA introduced the concept of collective dominance to prevent the abuse of a dominant position by one or more Telecommunication Licensees and/or Regulated Persons (“**RP**”) in the Code<sup>1</sup>.
3. On 25 April 2014, then-Info-communications Development Authority issued the Advisory Guidelines Governing Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition pursuant to Section 28 of the Telecommunication Act 1999 (also known as the “**Telecom Competition Guidelines**”), to set out the framework that IMDA used to determine whether a Telecommunication Licensee has contravened the prohibitions against abuse of a dominant position, unfair methods of competition and agreements involving Telecommunication Licensees that unreasonably restrict competition. With the issuance of the Code, IMDA intends to update the Telecom Competition Guidelines and include advisory guidelines on the application of collective dominance, to provide clarity to industry players on the treatment of the abuse of collective dominance in the telecommunication and media markets.

## **CONCEPT OF COLLECTIVE DOMINANCE UNDER SINGAPORE AND EUROPEAN UNION (“EU”) COMPETITION LAW**

4. The concept of collective dominance is not new or unique. For example<sup>2</sup>,
  - (a) In Singapore, Section 47 of the Competition Act 2004 provides that a collective dominant position may be held when two or more legally independent

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<sup>1</sup> Sub-section 8.1.3 of the Code states that “Telecommunication Licensees or Regulated Persons that have Significant Market Power, *individually or collectively*, in any market in Singapore must not use that dominant position in a manner that unreasonably restricts or is likely to unreasonably restrict, competition in any telecommunication or media market in Singapore.”

<sup>2</sup> IMDA notes that the concept of collective dominance or “shared monopoly” as otherwise referred to in the US, is currently not recognized under US anti-trust laws (i.e., the Sherman Act and Clayton Act).

undertakings present themselves or act together on a particular market as a collective entity; and

- (b) The EU Article 102 of the Treaty of the Functioning of the European Union provides that a collective dominant position may be established when undertakings have substantially the same position as a single dominant company vis-à-vis their customers and competitors, provided that no effective competition exists between them.

#### Approach under Competition Act 2004

5. Under Section 47 of the Competition Act 2004, in assessing whether a conduct amounts to an abuse of a collective dominant position, the Competition and Consumer Commission of Singapore (“CCCS”) will consider 1) whether the undertakings concerned together constitute a collective entity vis-à-vis their competitors, their trading partners and consumers on a particular market, and if so, 2) whether that collective entity is dominant in a relevant market, and 3) whether there is an abuse of that collective dominant position in a market in Singapore.
6. Whether two or more undertakings constitute a collective entity is dependent on the following factors:
  - (a) The existence of an agreement between undertakings, or the way in which an agreement is implemented, which leads the undertakings to present themselves or act together as a collective entity;
  - (b) Connecting factors arising from ownership interests that lead the undertakings to coordinate their conduct on the market; or
  - (c) The market structure as well as the way in which the undertakings interact in the market (e.g., interdependence relationship between firms in an oligopolistic market, where those parties become aware of common interests and consider it economically rational to adopt a common policy that might protect, enhance or perpetuate their collective position in the market).
7. IMDA notes that there is no substantive difference in CCCS’s approach towards assessing dominance, and abuse of dominant position, in single dominance cases and collective dominance cases. For example, CCCS will similarly consider the market power of the collective entity and undertake an economic effects-based assessment to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition, for instance, through conduct which would be likely to foreclose, or has foreclosed, competitors in the market.

## EU's approach

8. In the EU, collective dominance is defined as “a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers”.
9. The existence of a collective entity is established using similar factors as the CCCS, where:
  - (a) When market characteristics give rise to tacit collusion (e.g., oligopolistic markets), collective dominance may be established without the existence of an agreement or of other links in law; or
  - (b) When the market does not give rise to tacit collusion, collective dominance can only be established if sufficient links between the undertakings are present (e.g., where one undertaking held shares in the other undertaking's parent company, and had board members in both the parent company and subsidiary).
10. Similar to the approach under the Competition Act 2004, there is no substantive difference in the assessment of dominance, and abuse of dominant position, in single dominance cases and collective dominance cases by the European Commission. However, while a position of collective dominance may be inferred from a position collectively held by the relevant undertakings in the relevant market, under the EU Competition Law, the abuse of that position does not necessarily have to be via the conduct of all the relevant undertakings together. Instead, undertakings occupying a position of collective dominance may engage in conduct amounting to an abuse of that collective position, either jointly by the collective entity or individually by either one of the undertakings, where the individual abusive conduct is an exploitation of the collective dominant position which the undertakings hold in the market<sup>3</sup>. Essentially, a finding of abuse of collective dominance may result under the EU Competition Law, even if the abusive conduct was taken by only one of the undertakings and not the collective entity as a whole.

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<sup>3</sup> In the *Irish Sugar plc v Commission of the European Commission* Judgement (Case T-228/97), the Commission took the position that whilst the existence of a collective dominant position may be deduced from the position which the economic entities concerned together hold in the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a collective dominant position being held. In this case, the actions taken by Irish Sugar before 1990 with regard to the transport restriction, by both Irish Sugar and its subsidiary, Sugar Distributors limited (“**SDL**”) with respect to border rebates, export rebates and the fidelity rebate, and by SDL with respect to the product swap and selective pricing, were undertaken from a position of collective dominance, and therefore constituted the abusive exploitation of that collective dominant position.

## **PROPOSALS FOR GUIDELINES FOR COLLECTIVE DOMINANCE**

11. IMDA proposes to align with the approach taken under the Singapore general Competition Law in developing the guidelines for collective dominance, as CCCS's positions are largely consistent with those taken in the EU, and are better suited to our local context. IMDA may also have regard to the practices of the EU and other jurisdictions in its assessments, where appropriate and justified.

### **Standard used to test abuse of a dominant position - the "Unreasonably Restricts Competition" standard**

12. Currently, there is no single "test" for assessing whether a Telecommunication Licensee/RP has engaged in conduct that has, or is likely to, unreasonably restrict competition. Instead, IMDA will apply the "unreasonably restricts competition" standard to assess the actual or likely competitive effects of a Telecommunication Licensee/RP's actions, to determine whether a Telecommunication Licensee/RP's conduct contravenes the Code, rather than the Telecommunication Licensee/RP's subjective intent (i.e., what the Licensee hoped to accomplish). In general, conduct that has a minimal or insignificant impact on competition generally does not contravene the Code. Similarly, conduct which may be objectively justified; and agreements that have the potential to restrict competition in a market but from which the resulting efficiencies outweigh the anti-competitive effects, will not be prohibited. For example, most market players want to increase their market share at the expense of their rivals. So long as a Telecommunication Licensee/RP seeks to do so by meeting End Users' needs more efficiently and effectively than its rivals, IMDA will find that its subjective intent does not contravene the Code.
13. IMDA considered adopting different tests such as the "significant impediment to effective competition" test by Body of European Regulators for Electronic Communications for enforcing the abuse of collective dominance. However, IMDA notes that the test was only used in one actual case, with the intent of closing an enforcement gap in the European merger regulation and was ultimately not accepted into the new European Electronic Communications Code. In consideration of the foregoing and taking reference from the CCCS guidelines and EU Competition Law which use the same standards for individual and collective dominance, IMDA considers that there is no merit in adopting different tests for abuses of individual and collective dominance positions.
14. Hence, IMDA proposes to apply the same "unreasonably restricts competition" standard for both abuses of individual and collective dominance positions. While the same standards will apply for abuses of individual and collective dominance positions, IMDA will also consider the nature of the telecommunication and media markets when determining the actual or likely competitive effects of a Telecommunication Licensee/RP's actions.

### Factors for establishing a collective entity

15. IMDA proposes to adopt an approach that is similar to CCCS's approach in determining whether two or more undertakings constitute a collective entity, and targeted at the telecommunication and media markets, as follows:
  - (a) Links or factors that give rise to a connection between Telecommunication Licensees/RPs that may be economical or structural in nature. For example, the Telecommunication Licensees/RPs may enter into cooperation agreements that lead them to adopt a common policy on the market; or
  - (b) There is interdependence relationship between the relevant Telecommunication Licensees/RPs such that they will consider it economically rational to adopt a common policy that might protect, enhance or perpetuate their collective position in the market.
  
16. In ascertaining whether it is economically rational for two or more Telecommunication Licensees/RPs to establish an interdependence relationship, IMDA may take the below factors into considerations. The list is not exhaustive and IMDA may consider other factors in its assessment depending on the circumstances of the case:
  - (a) The incentive for the Telecommunication Licensees/RPs to coordinate their actions in the relevant market;
  - (b) The likelihood of the Telecommunication Licensees/RPs to coordinate their actions in the relevant market;
  - (c) The ability to detect cheating;
  - (d) The enforceability of compliance; and
  - (e) Actual/potential market constraints. For example, existing/potential competition to whom buyers might switch if the alleged Dominant Entity sustained prices above competitive levels.

### Test for assessing whether a collective entity has Significant Market Power

17. Under Sub-section 8.1.1 of the Code, a Telecommunication Licensee/RP that has been classified as a Dominant Entity under Section 2 of the Code shall be presumed to have Significant Market Power ("**SMP**") in the telecommunication or media markets in which it has been designated as a Dominant Entity, except in any specific telecommunication or media markets where it has been exempted from all Dominant Entity obligations as set out in Section 4 of the Code in relation to that market. Specifically, Dominant Entities are entities that either:

- (a) Operate facilities used for provision of telecommunication and/or media services that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication and/or media market in Singapore by an efficient competitor; or
- (b) Have the ability to exercise SMP in any market in which it provides services pursuant to its telecommunication or media licence.

The threshold to be used for initial presumption of SMP is 50% market share for both the telecommunication and media markets.

18. Currently, in assessing whether a Licensee has SMP in a telecommunication or media market in Singapore, IMDA will generally first determine the relevant service, geographic and functional markets (i.e., relevant market(s)) within which the Licensee provides its service or equipment. Thereafter IMDA will conduct a competitiveness assessment, including assessing the level of existing competition, the extent of barriers to entry, the existence of supply substitutability and countervailing buyer power. The Dominant Entity classified under Section 2 of the Code bears the burden of demonstrating to IMDA that it did not have SMP in the relevant market.
19. IMDA is of the view that there is no need to change the current test for assessing dominance given that it remains sound and relevant. For collective entities, similar to the approach undertaken by CCCS and the EU mentioned in paragraphs 7 and 10 above, IMDA proposes to use the same criteria for dominance for an individual entity to determine whether the Telecommunication Licensees/RPs, as a collective entity, has the ability to exercise SMP in the relevant market(s). Specifically, in assessing whether a collective entity has SMP in a telecommunication or media market, IMDA will determine the relevant services, geographic and functional markets within which the collective entity provides its services or equipment, and then conduct a competitiveness assessment, including assessing the level of existing competition, the extent of barriers to entry, the existence of supply substitutability and countervailing buyer power.
20. IMDA will also adopt the same threshold for initial presumption of SMP in individual entity, for a collective entity i.e., IMDA will presume that the collective entity has ability to exercise SMP in any telecommunication or media market, if it holds more than 50% collective market share in that market. For example, if the individual entities each has less than 50% market share in any telecommunication or media market, but collectively hold more than 50% market share in the said market, IMDA will presume that the collective entity has the ability to exercise SMP in the market. The same applies if any of the individual entities has more than 50% market share, and the collective entity also hold more than 50% market share. This presumption may be overcome by evidence that demonstrates that the collective entity is subject to effective competition.

### Abuse of collective dominant position

21. IMDA will find that a Dominant Entity that has SMP has contravened Section 8 of the Code if the Dominant Entity's unilateral use of its SMP has unreasonably restricted competition, or is likely to unreasonably restrict competition, in a Singapore telecommunication or media market where the Licensee has engaged in conduct that has, or is likely to:
- (a) Significantly restrict output below the competitive level, increase prices above cost, reduce quality below the level that end users seek, reduce end users' choice or deter innovation; or
  - (b) Preserve or enhance its dominant position by engaging in conduct that deters or restricts efficient companies from participating in the market by means unrelated to competitive merits.

Specifically, Dominant Entities are prohibited from engaging in practices specified in Sub-section 8.1.4 of the Code.

22. IMDA proposes to apply the above standards against abuse of single dominant position, in assessing whether one or more parties have abused their collective dominance position. IMDA had consulted on the tests to be used for the specific prohibitions against abuse of single dominant position in its review of the Code, and will adopt the same tests laid out in the Closing Note of the public consultations on the Code issued on 18 April 2022 (i.e., paragraphs 69 to 125 of the Closing Note), in assessing whether the conduct of the parties constitute an abuse of collective dominance.

### CONSULTATION OF GUIDELINES & TIMELINE

23. IMDA would like to seek views and comments on the broad proposals to adopt for collective dominance set out in this document and the guidelines appended in the **Annex**, where a new section on "Abuse of a Collective Dominant Position" has been incorporated in paragraph 3.2.1 of the revised Telecom and Media Competition Guidelines. Other amendments have been made to align with sections 8 and 9 of the Code (see paragraphs 64 to 125 of the Closing Note of the public consultations on the Code dated 18 April 2022, on IMDA's decisions for sections 8 and 9 of the Code).
24. All views and comments should be clearly and concisely written, include the necessary explanations in support of the positions taken, and be clearly labelled to identify the specific Section for which they are relevant.
25. All views and comments should be submitted in soft copies (in both Microsoft Word and Adobe PDF format) via email to [Consultation@imda.gov.sg](mailto:Consultation@imda.gov.sg) with the email header "Consultation on Guidelines on Collective Dominance" no later than **17 August 2023**. All views and comments should be addressed to:



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26. Following the close of this consultation, IMDA will give careful consideration to all the views and comments received. Depending on these views and comments, IMDA may conduct further consultations on the matter, before arriving at and in implementing IMDA's decision on the matter. In this regard, IMDA may issue a direction and/or make the relevant changes to the specific regulatory instruments as may be necessary, to effect the same.
27. IMDA reserves the right to make public all or parts of any written submission and to disclose the identity of the source. Respondents may request confidential treatment for any part of the submission that the respondent believes to be proprietary, confidential or commercially sensitive, with supporting justification for IMDA's consideration. In such cases, the submission must be provided in a non-confidential form suitable for publication, with any confidential information redacted as necessary and placed instead in a separate annex.
28. If IMDA grants confidential treatment, it will consider, but will not publicly disclose, the information. If IMDA rejects the request for confidential treatment, it will return the information to the party that submitted it and will not consider the information as part of its review. As far as possible, parties should limit any request for confidential treatment of information submitted. IMDA will not accept any submission that requests confidential treatment for all, or a substantial part, of the submission.