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SINGAPORE MEDIA LAW UPDATE

RECENT DEVELOPMENTS

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The US-Singapore Free Trade Agreement

[325] A major development in Singapore this year — and one that signals significant changes to the legal framework in Singapore — is the signing of the US-Singapore Free Trade Agreement (USSFTA) by US President George W Bush and Singaporean Prime Minister Goh Chok Tong on 6 May. The agreement is the first between the US and an Asian nation. The USSFTA has yet to be approved by the US Congress and is about a year away from taking effect.

The agreement includes provisions on trade in services, investment, trade-related aspects of intellectual property rights, competition, government procurement, electronic commerce, trade-related environmental and labor matters, and other issues. The USSFTA covers a whole gamut of issues ranging from market access for goods, government procurement, trade in services (including telecommunication services and financial services), e-commerce, investment, movement of natural persons to intellectual property.

In this section, we will limit our description of the contents of the USSFTA to only those areas that have a direct or indirect relevance to the scope of coverage of this journal. The following discussion[2] provides a summary of the salient provisions of the USSFTA.

Telecommunications and E-commerce

Service suppliers from both sides will have access to respective public telecommunications networks, including submarine cable landing stations, with transparent and effective enforcement by the telecommunications regulators.

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The USSFTA requires robust competition safeguards to protect against discriminatory and anti-competitive behaviour by incumbent suppliers in areas such interconnection, co-location, access to rights of way and resale.

Both sides will work towards the implementation of a comprehensive arrangement for the mutual recognition of conformity assessment for telecommunications equipment.

[326] Both sides commit to the non-discriminatory treatment of digital products and the permanent duty-free status of products delivered electronically. This is the first time such commitments have been enshrined in an international trade agreement.

Intellectual Property

The USSFTA incorporates strong commitments to enhance intellectual property protection standards on a non-discriminatory basis. These changes will strengthen Singapore's thrust towards a knowledge-based economy and its increased emphasis on developing research and development capabilities in biomedical sciences and info-communications.

In the field of copyright, both sides agreed to align their terms of protection for copyrighted works, performances and phonograms. Both sides will also adopt additional protection standards relevant and applicable in the digital environment. Specifically, both sides:

- will provide strong anti-circumvention provisions prohibiting tampering with technology designed to prevent piracy of copyrighted works over the internet;
- agree to criminalise unauthorised reception and re-distribution of satellite signals;
- will provide immunity to Internet service providers for complying with notification and take-down procedures when material suspected to be infringing are hosted on their servers;
- will strengthen their regimes to protect bio-inventions in relation to patents — specifically, Singapore will accede to the *International Convention for the*

[2] Adapted from the Information Paper on the US-Singapore Free Trade Agreement issued by the Singapore Ministry of Trade and Industry.

Protection of New Varieties of Plants (UPOV) to better protect new plant varieties;

- will commit to its current regime on allowing all inventions, including bio-inventions to be patentable, so long as they do not contradict public order or morality;
- agree to limit the use of compulsory licenses to safeguard against anti-competitive practices, public-non commercial use, national emergencies and other circumstances of extreme urgency (Singapore has, to date, not issued any compulsory licenses); and
- will also introduce safeguards to strengthen patent protection, especially for pharmaceuticals. In particular, both sides will:
  - — grant originators a data exclusivity period of up to five years from the date of marketing approval, instead of the date of application; and
  - — extend patent protection period if there is an administrative delay during the marketing approval process.

Trademarks

All trademarks, including sound trademarks, will also be able to be registered in Singapore.

Both sides will accord stronger protection for well-known marks.

Trademark licensees no longer need to register their trademark licenses in order to assert their rights in a trademark.

The stronger protection rights will be complemented by robust enforcement obligations. Both sides will continue to undertake stringent enforcement against piracy, in close consultation and collaboration with the industry. Both sides agree to:

- provide an additional avenue for right owners to opt for compensation based on a predetermined range of statutory damages for civil proceedings against copyright and trademark infringements;
- prevent and enforce against the illegal manufacture, import and export of pirated goods — particularly, Singapore will formalise its regime of regulating

optical disc manufacturing activities through the imprint of Source Identification Code on optical discs unless specifically exempted by the right owner.

- criminalise companies that make pirated copies from legitimately purchased products.

[327] ***Competition***

Singapore commits to its earlier announced intention to set up a general competition regime by 2005.

Singapore commits to maintain its existing policy of not interfering with the commercial decisions of Government Linked Companies (GLCs), ensuring that GLCs are commercially run, and do not discriminate against US companies.

Services in General

Service suppliers from both sides are assured of fair and non-discriminatory treatment and market access unless specifically exempted in writing (the so-called 'negative list' approach).

US States are to give a Singapore service supplier the same treatment that they give to a supplier of that State or of another US State.

Regulatory authorities are bound to high standards of openness and transparency, including consultations with interested parties, advance notice, reasonable comment period, and publication of regulations.

Mechanisms will be put in place to lock in future liberalisation of exempted measures, including exempted measures of US States.

The benefits of the USSFTA are extended to all Singapore companies that are not shell companies, regardless of ownership.

Investment

Both sides will commit to grant fair market value for expropriation.

Both sides undertake not to impose any unfair performance requirements, such as requiring the investor to export a given level of goods and services, as a condition for the investment.

The USSFTA provides for an investor-to-state dispute mechanism. Investors aggrieved by government actions that are in breach of obligations under the relevant provisions of the USSFTA have the right to take the dispute directly to an international arbitration tribunal for resolution. Further, Singapore investors who enter into investment agreements with the federal government, after the entry into force of the USSFTA, can take the dispute directly to international arbitration for resolution.

Recommendations of the Remaking Singapore Committee

Background

The Remaking Singapore Committee (RSC) was formed in early 2002 with the objective of complementing the Economic Review Committee's (ERC) work through a review of social, political and cultural policies, programmes and practices. Through a wide-ranging consultation process, the RSC attempted to reach out to a wide cross-section of Singaporeans to understand their aspirations and to explore new ideas and directions. It is envisaged that the recommendations of the RSC would have a profound and important impact on the way policy-making develops in Singapore.[3]

[328] In a media release issued on 24 June 2003, the RSC has made several recommendations for a more liberal framework to give artists more space and freedom to express their ideas. These recommendations were made by the Beyond Credit Card sub-committee of the RSC. The sub-committee is chaired by Dr Ng Eng Hen, Acting Minister for Manpower and co-chaired by Mr S Iswaran, Member of Parliament for the West Coast GRC. The sub-committee dealt with a broad range of subject matter but we will only look at the recommendations of the RSC in relation to personal expression and censorship as the other recommendations fall outside the ambit of this publication.

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[3] It should be noted that some of the recommendations made by the Committee have been criticised or rejected outright by some Cabinet Ministers. The recommendations discussed here have, however, not

Enlarging Space for Expression and Freedom

The RSC listed several recommendations with a view to enlarging the space for expression and freedom in Singapore. These are listed in the paragraphs that follow.

Adopt a green/red lane approach for public entertainment licensing — except for a few exempted activities, the majority of public entertainment in Singapore currently requires prior licensing. The RSC proposes that this approach be reviewed. Instead of what it perceives as 'a "catch all" clause and a short exemption list', the RSC proposes that the Ministry of Home Affairs should consider listing the type of activities that are less likely to be approved and would need to go through the licensing process. Activities that are not on this 'red lane' list should be given automatic licensing (that is, 'green lane').

Designate performance venues for relaxing rules — the RSC pointed to the current situation where there are 'designated spaces' where specific rules can be relaxed to facilitate expression and experimentation (such as the Speakers' Corner) and where R(A) movies can be screened in the city area to advance its' case for furthering the concept. The RSC felt that 'spaces' should be designated where rules can be relaxed further to facilitate artistic expression and experimentation. In such 'spaces', artists should be allowed to perform without the need for a public entertainment license. It was felt that law and order can still be safeguarded by measures such as a simple registration process, explicit rules prohibiting content that could cause racial or religious enmity and limiting indoor seating capacity.

Review treatment of performance and forum art — Josef Ng, a performance artist, created a furor in 1994 when he snipped his pubic hair as part of his act, in silent protest against the arrest of 12 men for homosexual solicitation, as well as the news coverage of the arrest. Following the incident, the National Arts Council ceased to fund requests for performance art and forum theatre, both unscripted forms of drama. A S$10,000 bond is imposed on groups that wish to perform forum theatre. The RSC was of the view that the 1994 incident should be viewed as an insolated incident. The RSC recommends removing the bond requirement and permitting performance art and

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met with any outright hostility by any of the Ministers and it is likely that these recommendations will

forum theatre to be considered for government funding along with other art forms, based on merit of content. It was felt that this would send a clear signal of greater government tolerance for more unconventional art forms.

Lighter Touch in Regulation

The RSC presented several recommendations to lighten the hand of regulation in order to encourage expression and participation. These are discussed below.

Set up a Public Entertainment and Meeting Act (PEMA) appeals advisory committee — the RSC recommended the setting up of a Public Entertainment and Meeting Act (PEMA) appeals advisory committee (comprising of lay Singaporeans) to review cases where performances are deemed to have violated the guidelines and make recommendations to the regulatory authority.

Cease prior vetting of play scripts — currently, except for certain exempted theatre groups with proven track records, all play scripts have to be submitted to the relevant authorities before they can be staged. The RSC recommends that the requirement for prior vetting of all play scripts be removed and in its stead, the authorities should set out clear guidelines on what constitutes objectionable content. It was felt that a self-regulatory mechanism was more helpful for the long-term development of art groups. Art groups that consistently violate the guidelines (that is, have a proven record of putting up objectionable performances), would be penalised by having to submit all of their future scripts to the National Art Council for vetting.

[329] *Relax rules for busking* — presently, all persons wishing to busk are required to apply for a permit and undergo an audition. Furthermore, all proceeds from donations must be given to charity and a S$10,000 fine is levied for breach of conditions of the permit. The RSC recommends removing the requirement for buskers to donate all of their proceeds to charity and replacing the S$10,000 fine with first a warning (with the fine coming into effect only if the warning is not heeded).

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heavily influence policy-making.

Extend rating system to more forms of media — the RSC observed that the degree of censorship in Singapore varies according to the type of medium. Free-to-air (FTA) television programmes are subjected to the most stringent censorship as they can penetrate into homes, followed to a lesser degree by movies, live performances and sound recordings. Publications are treated less strictly and within this category, printed words are treated more leniently than pictorials. The RSC felt that in the long run, the advent of information technology would render the existing differentiated controls on different media meaningless, given that the Internet would be more pervasive. As such, it would not be possible for the government to continue the current system of mandating what Singaporeans are allowed to read or view. It was felt that a more sustainable approach is for the public to be educated and make informed choices on the materials that they access.

The RSC recommends that the Government should move towards playing a guiding rather than a gatekeeping role in determining media content. This can be achieved by extending the informative rating system beyond movies to cover other forms of media, and educating parents on how to protect their children from undesirable materials and on the use of the rating system.

Enhancing Platforms for Participation — the RSC was of the opinion that the formation of, and participation in, groups and associations indicate a Singaporean's interest in his surroundings and his desire to contribute. By exercising this interest and desire, a person's attachment to the country will deepen. The RSC felt that the current system treats all societies as a homogeneous group and steers would-be registrants to a gateway for checking and clearance. The RSC proposes adopting a differentiated approach, based on a new assumption that the majority of people organise for the common good. Instead of requiring all societies to seek prior approval, the RSC recommends that the government should list down explicitly the types of societies that would require prior approval. Those that fall outside the list would be automatically approved and registered. The registration of such societies could still be revoked if they are subsequently found to use the society for unlawful purposes.

Reactions to the Recommendations

The recommendations have met with a mixed reception. On the one hand, it was reported in the press that many members of the artistic community have applauded the recommendations and felt that they were long overdue.[4] The moves to relax rules on forum theatre and performance art were especially welcomed as it was felt that these rules undermine the creative process.

Others have, however, been more critical and felt that the hesitation to let go of control of productions touching on 'sensitive areas' is an indication that the government still treats Singaporeans like children.[5] This view is typified in the comments of Lee Weng Choy, an artistic co-director at The Substation, who questions the rationale for pegging the regulatory framework in relation to artistic [330] performances to the 'evolving Singapore society'. In Lee's words, 'it's highly problematic to treat a whole society as if it were a child growing up. Exactly how many more years does it take before Singapore society becomes adult?' Some also felt that the current approach by theatre groups in rating their productions for content already shows a responsible approach to their material. Conservative persons have the option to not attend a performance meant for open-minded persons and should not deprive the latter from viewing such performances.

Code of practice for market conduct in the provision of mass media services

The Media Development Authority of Singapore (MDA) has issued the Code of Practice for Market Conduct in the Provision of Mass Media Services (the Code). The Code was passed pursuant to s 17(1) of the *Media Development Authority of Singapore Act 2002* (the Act) and takes effect from 15 April 2003.[6]

Background

In 2000, the government announced the partial liberalisation of Singapore's print and free-to-air (FTA) broadcast markets. SPH MediaWorks Ltd (SPH MW) subsequently obtained a licence to provide two FTA television channels to compete against the incumbent FTA television broadcaster, Media Corporation of Singapore Pty Ltd

[4] 'Licensing Shows: Try Red and Green Lanes', *The Straits Times* (Singapore), 25 June 2003, H4.
[5] 'Mature Artistes or Growing Kids?', *Today* (Singapore), 25 June 2003, 2–3.

through its subsidiaries MediaCorp TV Pty Ltd, MediaCorp TV12 Pty Ltd and MediaCorp News Pty Ltd. During the same period, MediaCorp Press Ltd obtained a permit to publish a daily newspaper. By introducing limited competition, Singapore sought to foster investment in, and the development of, the mass media Service sector in order to ensure the availability of a comprehensive range of quality mass media services in Singapore. For competition to yield its expected benefits, it was felt that it was necessary to adopt a Code of Practice that would clearly specify the rights and obligations of regulated persons and certain other entities participating in the mass media services markets.

Approach Adopted

The Code seeks to combine 'best practices' from selected jurisdictions, incorporates the experiences of those jurisdictions and reflects the specific characteristics of Singapore and its mass media services markets. In particular, the Code reflects Singapore's unique duopoly/cross-ownership structure.

To the extent feasible, the Code encourages reliance on commercial negotiations and industry self-regulation, subject to general requirements designed to ensure fair and appropriate market conduct. The Code, however, imposes additional obligations and restrictions on 'dominant' entities, which are able to act independently of market forces. The Code also imposes a number of specific obligations on regulated persons that are necessary to safeguard the public interest.

The Code contains 10 parts and two appendices. As mentioned above, the Code seeks to specify the rights and obligations of regulated persons and certain other entities participating in the mass media services markets. The Code contains provisions that cover the following:

- ensure that regulated persons fulfil their obligations to serve the public interest;
- protect customers from improper business practices;
- prevent regulated persons from engaging in unfair methods of competition;

[6] The discussion in this section is adapted from information on the Code contained in documents posted on the MDA's website.

- prevent abuses by 'dominant' operators that can operate independently of market forces;
- prevent regulated persons from entering into agreements that can unreasonably restrict competition;
- prevent consolidations (mergers and acquisitions) involving regulated persons that can unreasonably restrict competition;
- promote competition by ensuring that regulated persons can access essential resources needed to provide mass media services; [331]
- adopt a fair and effective enforcement regime; and
- otherwise safeguard the public interest.

Part 1

Part 1 sets out the goals of the Code. These are:

- to enable and maintain fair market conduct and effective competition in the mass media services markets in Singapore;
- to ensure the availability of a comprehensive range of quality mass media services in Singapore;
- to encourage industry self-regulation in the mass media services markets in Singapore;
- to foster further investment in, and the development of, the mass media services markets in Singapore; and
- to otherwise safeguard the public interest.

Part 1 also explains the legal basis and legal effect of the Code. The MDA will apply the Code to persons specified by the Minister as regulated persons pursuant to s 16(3) of the Act. These regulated persons would include (1) proprietors of newspapers as defined in s 2 of the *Newspaper and Printing Presses Act* and (2) entities licensed under the *Broadcasting Act* to provide FTA television services, subscription television services (including video-on-demand) and radio services. The Code imposes binding legal obligations on these regulated persons as well as on other persons (not being regulated persons) in accordance with the provisions of the Act.

Part 1 also defines certain key terms used throughout the Code. The Code also specifies a number of regulatory principles that will guide the MDA's implementation of its provisions. These include: reliance on private negotiations and industry self-regulation; proportionality; open and reasoned decision-making; non-discrimination; consultation with other regulatory authorities; avoidance of unnecessary delay; and technological neutrality. The Code also contains procedures designed to ensure that unnecessary or unduly burdensome regulatory requirements will be modified or eliminated in subsequent amendments to the Code.

Part 1 also states the MDA has the authority to modify the Code, to exempt a regulated person or other relevant entity from having to comply with any provision of the Code and to waive any provision that imposes an obligation on the MDA, where necessary in the public interest.

Part 2

Part 2 of the Code specifies the public interest duties that regulated persons and certain other entities must fulfil. Given the social and political importance of the mass media services markets, the regulators felt that it is not appropriate to rely entirely on market forces or private commercial negotiations to ensure that regulated persons serve the public interest.

There are four major obligations specified in Pt 2. First, regulated persons providing FTA television or FTA radio services (FTA television licensees and FTA radio licences respectively) must broadcast 'events of national significance' specified by the MDA. The MDA may specify the nature of the coverage, for example, 'live' versus 'delayed' or in its entirety versus selected portions. The Code specifies an initial list of events of events of national significance. In those cases in which the MDA determines that it is not appropriate for more than one broadcaster to provide coverage of an event of national significance, the MDA will designate a 'lead broadcaster'. The MDA may, but is not required to, use a competitive tender. While the MDA will initially designate a regulated person to be the lead [332] broadcaster, it may subsequently allow other persons (not being regulated persons) to perform this function. The lead broadcaster will be given the exclusive right to provide a feed covering the event, but must share the feed with other broadcasters in return for

reasonable compensation. The parties are expected to negotiate in good faith regarding compensation. In the event the parties cannot agree on reasonable compensation, the party seeking to access the feed may request the MDA to conduct a 'dispute resolution procedure', in accordance with Pt 10 of the Code.

Second, a 'designated video archive operator' must compile and maintain an electronic catalogue of the material in its archive, allow entities that provide mass media or ancillary media services to view the archived content, and license for broadcast within Singapore the archived content related to news, current affairs or information programmes first broadcast in Singapore prior to market liberalisation, or events of national significance whenever broadcast, at reasonable prices, terms and conditions. The Code defines a designated video archive operator as any entity that is, or is affiliated with, an FTA television licensee and in addition, owns or controls an archive containing a comprehensive collection of video programmes that were first broadcast in Singapore prior to market liberalisation.

Third, subscription television licensees must comply with restrictions on their ability to acquire exclusive rights in 'reserved programmes'. Reserved programmes, which are expected to be limited to coverage of sporting events, will be selected on the basis of criteria designed to balance public expectation of having free access to certain programmes, the importance of wide availability of those programmes and the impact on subscription television licensees. The MDA will issue two lists. Category A programmes will consist of programmes in which a subscription television licensee may not obtain any exclusive rights. Category B programmes will consist of programmes in which a subscription television licensee can obtain the 'live' exclusive rights but cannot secure the exclusive rights to any delayed rights package that the rights-holder may offer.

Fourth, FTA television licensees must not 'hoard' any reserved programmes. A FTA television licensee that obtains exclusive broadcast rights for Category A programmes must broadcast a 'reasonable portion' of the programme or offer it, at cost, to another FTA television licensee or, if no FTA television licensee wishes to acquire the rights, to a subscription television licensee.

Part 3

Part 3 of the Code specifies a number of duties that regulated persons owe to their customers. These 'consumer protection' provisions will be increasingly important as subscription-based forms of content provision become more prevalent. In particular, Pt 3 states that regulated persons must comply with minimum quality of service standards specified by the MDA and must provide accurate, timely and clear bills to their subscribers. Regulated persons may only use subscriber service information for tasks related to the provision of a service to their subscribers; any other use requires affirmative authorisation from the subscriber.

Part 4

Part 4 of the Code prohibits unfair methods of competition. In addition to the general prohibition on unfair methods of competition (that is, actions by which a regulated person seeks to compete on a basis other than price, quality and availability of a mass media service), the Code contains a number of specific prohibitions.

A regulated person must not use its mass media services to disseminate non-substantiated claims regarding its own mass media services or the mass media services provided by its affiliates or another regulated person. The Code provides that, in the event of a contravention, the regulated person may be required to publicly retract the statement or provide the injured party with an opportunity to respond adequately to the claims.

A regulated person must not take any action, or induce any other party to take any action, that has the [333] effect of degrading the availability or quality of the service of another regulated person, or raising the other regulated person's costs, without a legitimate business, operational or technical justification.

A regulated person must not provide false or misleading information regarding its mass media services to another regulated person. In addition, a regulated person must not interfere improperly with another regulated person's relationship with its customers, advertisers, or providers of ancillary media services.

A regulated person must not engage in predatory pricing.

The Code seeks to strike a balance that allows pro-competitive price-cutting, whilst preventing predation. In general, the Code presumes a regulated person that has a market share of 25 per cent or less is unlikely to be engaging in predatory pricing even if it sells its services at below-cost prices, whilst a dominant licensee is likely to do so. Such presumptions may be rebutted by persuasive evidence regarding the actual or likely effect on competition of the regulated person's pricing. The MDA will conclude that a regulated person's pricing strategy is predatory if:

- the regulated person is selling mass media services at a price, or otherwise receiving revenue for a mass media service at a level, that is less than marginal cost (that is, the company is losing money on every unit of a product or service sold);
- the strategy is likely to drive efficient rivals from the market and deter future efficient rivals from entering the market; and
- entry barriers are high so that after a reduction in the number of operators in the market, the regulated person could increase prices to the extent that it recoups the loss incurred during the period of predation.

Part 4 also includes special provisions for those regulated persons that are affiliated with providers of ancillary media services whose services are necessary for the regulated persons' competitors to efficiently develop or distribute mass media services. Such a regulated person must not access inputs or distribution channels from an affiliate on preferential or discriminatory terms. Further, the regulated person must not participate in a 'price squeeze' scheme by charging its affiliate a price for an input or distribution channel that is so high that no efficient rival could profitably pay the same price.

In order to allow the MDA to prevent an entity that is not licensed by the MDA from using its market position to distort competition in mass media services market, the MDA may require the regulated person to structurally separate its operations from those of its affiliate or to comply with accounting or other non-structural safeguards.

Part 5

Part 5 of the Code contains provisions for the classification of regulated persons as 'dominant' or 'non-dominant'. Dominant licensees are those regulated persons that have sufficient market power to be able to act independently of market forces. Despite the partial liberalisation of Singapore's mass media services markets, the regulators are of the view that the incumbent operators still retain significant market power. They have the ability, therefore, to constrain the development of competition. In contrast, the behaviour of new entrants is more adequately constrained by market forces.

The approach adopted in the Code reflects three basic assumptions regarding the structure of Singapore's mass media services markets:

- first, there are four broad primary mass media services markets: FTA Television; Subscription Television; Radio; and Newspaper Publishing Services;
- second, regulated persons that are members of the same 'licensee group' will [334] generally act as a single economic entity; and
- third, regulated persons that enjoy, or are part of a licensee group whose members historically enjoyed a monopoly position within a primary mass media services market, continue to have the ability to exercise market power in that market.

The MDA will classify a regulated person as a dominant licensee if:

- the regulated person enjoyed, or is a member of a licensee group whose members enjoyed, a monopoly position within a primary mass media services market prior to market liberalisation; or
- the regulated person currently has the ability to exercise market power in a primary mass media services market or sub-market.

When assessing whether a regulated person or a licensee group has 'market power' in a primary mass media services market or sub-market, the MDA may consider the following evidence:

- evidence of actual anti-competitive conduct;

- the proper definition of the relevant market;
- the other participants in the market or sub-market;
- the market share of the regulated person or licensee group and the market shares of each of the other market participants;
- the extent to which the regulated person coordinates its actions with those of other members of the same licensee group;
- the structure and nature of the market; and
- the extent to which the ability of a regulated person or licensee group to exercise market power in the relevant market is constrained by other factors, including the ability of customers or advertisers to switch to alternative providers.

Part 5 also sets out the procedures by which the MDA will classify regulated persons as dominant and the process through which regulated persons can seek re-classification. The MDA can classify or re-classify regulated persons as dominant in one of the three ways:

- first, the MDA will classify current regulated persons at the time that the Code is issued, and may subsequently assess any other regulated person at any time such as when the MDA issues or renews any relevant license under the *Broadcasting Act* (Cap 297);
- second, the MDA may re-classify a regulated person on its own initiative at any time if it considers that a regulated person meets, or does not meet, the conditions specified for the MDA to classify a regulated person as dominant; and
- third, the MDA may re-classify a regulated person in response to a request from a provider of mass media services or ancillary media services.

A dominant licensee may seek exemption from the special obligations applicable to them in any sub-market in which the regulated person can demonstrate a lack of market power. In this case, a dominant licensee must submit a request to the MDA demonstrating why it should be exempted.

Part 6

Part 6 details the obligations and prohibitions that are applicable to dominant licensees. Given that dominant licensee has market power, the provisions in Pt 6 seek to prevent dominant licensees from taking actions that can unreasonably restrict competition.

Whilst regulated persons generally may choose whether or not to do business with other entities, and may enter into agreements on any mutually acceptable terms, dominant licensees must fulfill certain obligations when dealing with customers, advertisers and competitors. The Code sets out three basis obligations:

- first, a dominant licensee must provide its mass media service to any customer upon reasonable request;
- second, a dominant licensee that provides one or more general circulation newspaper(s) must provide fair coverage (in terms of amount of space and prominence) of programmes provided by [335] FTA television or radio licensees in any programme list that the dominant licensee makes available to its customers; and
- third, a dominant licensee must provide access to advertising capacity to any regulated person providing a mass media service on reasonable and non-discriminatory prices, terms and conditions where there are no other comparable sources of advertising capacity.

Part 6 also outlines the specific prohibitions designed to prevent dominant licensees from abusing their market power. In addition to the general prohibition on abuse of a dominant position, this Part prohibits unreasonable price discrimination; price squeezing; mandatory bundling; and the imposition of abusive or over-reaching contract terms.

Part 7

Part 7 of the Code seeks to prevent regulated persons becoming a party to any agreement, decision or concerted practice which has the object or effect of preventing, restraining or distorting competition in any mass media services market.

An agreement can be established through either direct or indirect evidence. An agreement can be express or tacit (that is, the result of multiple parties affirmatively coordinating their conduct even in the absence of an express agreement). However, concerted action between two regulated persons in the same licensee group, or between a regulated person and an affiliate over which it has 'effective control', does not constitute an agreement under Pt 7.

Certain types of agreements are prohibited such as agreements that result in bid rigging, price fixing arrangements, market and customer allocation, and substantial foreclosure of access to ancillary media services necessary for the provision of competitive mass media services.

The Code also prohibits agreements in which parties agree not to do business with a specific competitor, supplier of ancillary media services, advertiser or customer within Singapore (group boycott). Group boycotts typically represent anti-competitive behaviour that many regulators seek to prohibit. However, in certain limited cases, collective action may be an appropriate means to deter conduct that, itself, is anti-competitive or undesirable. Therefore, a regulated person that is a member of an industry association recognised by the MDA may agree with other members of that association not to do business with any entity in any case in which: first, the industry association has adopted an industry code of practice; second, the MDA has recognised the industry code; and third, the association has concluded that the entity has contravened the industry code and expressly authorised its members to engage in a boycott. The MDA will publish by way of notification in the Gazette any industry association recognised by it.

If the permissibility of any agreement is challenged, the MDA will assess it based on its object and competitive effects. In conducting this assessment, the MDA will consider all relevant factors which include the following:

- *The business purpose of the agreement* — whether the purpose of the agreement is to develop new mass media services or to improve the quality of existing mass media services;

- *The likelihood of competitive harm* — whether the agreement has the potential to result in higher prices or reductions in output or quality of a service; and
- *The potential for likely efficiency improvements* — whether the agreement is necessary to achieve significant efficiencies and the potential anti-competitive effects are relatively limited.

Any agreement which has as its object or effect the prevention, restriction or distortion of competition is void under s 20(3) of the Act. However the MDA may, [336] either on its own initiative or in response to a request from the subject regulated person(s), exempt the agreement under s 22 of the MDA Act. Such an exemption may be granted subject to conditions or obligations as the MDA considers appropriate — for example, the revision of the agreement to eliminate the prevention, restriction or distortion of competition.

Part 8

Part 8 of the Code addresses consolidations involving a regulated person with any other regulated person, or with any other person (not being a regulated person) that provides mass media or ancillary media services. While many consolidations increase competition by creating more efficient entities, they can sometimes reduce competition. This is especially likely in markets that are already highly concentrated, such as is the case in the mass media services markets in Singapore.

A consolidation means a merger, acquisition or other transaction that results in two entities that were previously independent economic entities becoming a single economic entity. Alternatively, a consolidation can occur where one entity obtains 'effective control' over another entity or where the assets of one entity are purchased by another entity or transferred to a new legal entity.

The Code excludes from the definition of a consolidation any transaction in which the interests or assets being acquired are valued at less than S$2.5m. This de minimis threshold has been established with regard to the nature of the Singapore market and is set at a level which is consistent with the size and potential valuation of many ancillary media service providers, such as production houses, in the Singapore market.

The Code aims to prevent an anti-competitive consolidation before it occurs. Therefore, any regulated person that wants to enter into a consolidation with any other regulated person or with any other person (not being a regulated person) that provides mass media or ancillary media services must first obtain the MDA's approval by filing a 'consolidation application'. Both the regulated person and the other party to the proposed transaction must file an application.

Where the MDA decides that the consolidation would unreasonably restrict competition in a mass media services market, the MDA may reject the consolidation application or impose appropriate conditions to remove the anti-competitive elements of the consolidation. The conditions imposed may include structural separation, restriction on appointment of individuals to management positions, partial divestiture of assets and/or behavioural safeguards. Behavioural safeguards may include accounting separation, non-discrimination requirements, and limitations on information sharing.

Part 9

Part 9 of the Code sets out the process to be applied in requiring an entity controlling resources to provide access to 'essential resources' (for example, infrastructure) necessary for a regulated person to provide a mass media service. The Code establishes a two step process. The first step establishes the obligation to provide access. The second step establishes the prices, terms and conditions on which access must be provided. Both steps place primary reliance on private negotiation, but provide for regulatory intervention in the event that the parties cannot reach an agreement.

Part 10

Part 10 of the Code details the means by which the MDA will implement and enforce the Code. The Code states a number of remedies that the MDA may impose if it determines that a regulated person has contravened any provision of the Code. The MDA may take the following action against any regulated person found to have contravened the Code. These include:

- warnings;

- orders to cease and desist;
- directions to take specific remedial action; and
- imposition of financial penalties.

[337] The MDA may impose a financial penalty of up to S$1 million per contravention. The MDA will consider any aggravating factors in determining the quantum of the penalty, including the severity of the contravention, the duration of the contravention, and whether the regulated person made any effort to conceal the contravention. The MDA will also consider possible mitigating factors including whether the contravention was minor, whether the regulated person took prompt to action to correct the contravention, and whether the regulated person co-operated with the MDA in the investigation.

Reactions to the Code

It was reported in the press[7] that media companies in Singapore generally welcomed the Code but many were reluctant to say how they may be directly affected by it. A spokesman from Singapore Press Holdings (SPH), however, said that it was disappointed that its input on market classifications had not been adopted. SPH was unhappy that it has been gazetted as a dominant licensee in the newspaper publishing services market as it felt that not all of its newspapers are dominant in each sub-market. According to the report, the spokesman said that its free-sheet *Streats* clearly is not dominant. This is because it has similar distribution and reach as *Today*, published by MediaCorp, but which is not considered a dominant newspaper licensee. The spokesman added that the company will seek clarification with the MDA, and hoped that 'the current level of cooperation and dialogue between market players and the MDA would pave the way for a fair and flexible administration of the code'. Another person who was quoted in the report — lawyer Bryan Tan, one of two members of the public who wrote in to the MDA — said he welcomed the Code but felt there were still some gaps. He had expressed his concern that the Code lacked a mechanism to compensate those affected adversely by the unfair practices, and also questioned whether the prescribed penalties of up to S$1 million would be an effective deterrent.

Developments in relation to Pay-TV in Singapore

The MDA announced on 25 June 2003 that it was inviting tenders for Singapore's second pay-television licence.[8] This follows the ending of StarHub Cable Vision's (SCV) period of exclusivity in the Pay TV market.

As the regulatory body, the MDA recognises that certain types of content may be necessary to a pay TV operator in acquiring subscribers. If a pay TV operator was able to enter into a sufficiently large number of exclusive carriage agreements in these content genres, it might be able to substantially foreclose a necessary content market to other pay TV operators and thereby prevent, restrict or distort competition in the pay TV market. In the light of these concerns, the MDA issued a consultation paper on 26 June 2003 for the purposes of seeking feedback from the public on how (if at all) the MDA should regulate exclusive carriage agreements that may exist either now or in the future between pay TV operators and content providers.

Withdrawal of the .SG Trademark by the Singapore Network Information Centre

The Singapore Network Information Centre (SGNIC) applied for the .sg trademark in 1999. SGNIC is a fully owned subsidiary of the Infocomm [338] Development Authority of Singapore. SGNIC was set up in October 1995 with the main purpose of administering the Internet domain name space in Singapore. It is the central registry delegated by the Internet Corporation for Assigned Names and Numbers (ICANN) to administer domain name registration under the '.sg' domain name.

According to SGNIC, the application was made for the purposes of ensuring equitable and fair access to all users of the .sg domain name and to prevent any other party from filing a similar trademark application and later unfairly restricting use of the domain name. The application caused a stir in the local and international business and legal community with many condemning the move by SGNIC.[9]

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[7] 'Media Firms Welcome New Code, But Reactions Guarded', *The Straits Times* (Singapore), 3 April 2003.

[8] 'End of SCV Monopoly: Government Invites Bids for 2nd Pay-TV License', *The Straits Times* (Singapore), 25 June 2003, H6.

[9] '.SG Trademark Bid Withdrawn', *Computer Times*, 18 March 2003; 'S'pore Drops Claim To .sg Name', *Business Times*, 15 March 2003.

According to SGNIC, at the time the trademark application was made, guidelines on the application of intellectual property rights in cyberspace were ambiguous. Since then, the World Intellectual Property Organisation (WIPO) and ICANN have jointly developed a number of practice guidelines for governments and the Internet community to consider, which recommend against governments filing preventative trademark applications for their country code top level domains (ccTLDs). In 2000, ICANN's Governmental Advisory Committee (GAC) also issued new rules which say that no intellectual or other property rights are attached to country code domain names such as .sg. SGNIC subsequently withdrew its application — and this was announced in mid-March 2003 — but asked ICANN and WIPO to provide supplementary guidance on the trademark question, noting that these organisations had made recommendations on the conduct of governments but had not addressed the issue of trademark applications by other entities, such as the private sector.