

To: Ms Aileen Chua
Director (Economic Regulation)
Info-communications Development Authority of Singapore
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(Yeo_Tiong_Yeow@ida.gov.sg)

30 May 2003

Dear Sir,

Response to:

- (a) **Review of the Code of Practice for Competition in the Provision of Telecommunication Services: Request for Comments regarding the proposed revised Section Nine of the Code;**
- (b) **Request for further comments regarding the proposed telecommunication consolidation guidelines; and**
- (c) **Request for comments regarding the proposed advisory guidelines for tender offer process where the Singapore Code on Take-over and Mergers applies.**

We wish to submit our joint comments on the above in our private capacity as citizens of Singapore.

In short, we think that the Review is timely and appropriate. It seeks to lend flesh to the Telecom Competition Code that is about to celebrate its third anniversary. However, we do have certain specific concerns that we submit for your consideration. We have set these out in further detail in the attached annex. We think this is an opportune time for further refining of the subject matter and we hope our comments will contribute to that process.

Regards

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RESPONSE

Overview

This response is written to respond to an invitation for comments on the following:

1. Review of the Code of Practice for Competition in the Provision of Telecommunication Services: Request for Comments regarding the proposed revised Section Nine of the Code (the “Code Review”);
2. Request for further comments regarding the proposed telecommunication consolidation guidelines (the “Consolidation Guidelines”); and
3. Request for comments regarding the proposed advisory guidelines for tender offer process where the Singapore Code on Take-over and Mergers applies (the “Takeover Guidelines”),

collectively, the “Review”.

The genesis of all the provisions regarding the change in ownership and consolidation of IDA licensees lies in the Telecom Competition Code. This betrays the fact that the policy governing such provisions is in substance that of the Telecom Competition Code – “*to promote the efficiency and international competitiveness of the information and telecommunications industry in Singapore*”, “*to promote **and maintain** fair and efficient market conduct and effective competition between **persons engaging in commercial activities connected with telecommunications** technology in Singapore*” and “*to encourage, facilitate and **promote investment** in and the establishment, **development and expansion** of the information and communications industry in Singapore*”.¹

Therefore, one must bear in mind that the key policy concern regarding transfer of ownership and consolidation of IDA licensees ought to be the effect it has on competition in the telecommunications industry in Singapore and in particular, to the maintenance of fair, efficient and effective competition and the promotion, development and expansion of investment in the info-communications industry in Singapore. We note that the Consolidation Guidelines contain such principles in its section 2 (Consolidation Review Principles)².

We think that the Review is a significant step in the climate facing today’s telecommunications industry. After years of expansion, many operators have considered consolidation activities to rationalize business lines and to take advantage of economies of scale and advances in technology. Further, the unstoppable move towards convergence means that operators in a seemingly incongruous industry can now realize significant synergies. In addition, it recognizes that telecommunications operators do have aspirations of listing their entities for strategic reasons. It also recognizes that the industry has evolved somewhat over the last three years, due in part to industry changes as well as changes brought around by IDA. Therefore, clear guidelines such as those sought in the Review are welcomed.

¹ Article 1.1 of the Telecom Competition Code

² Although we do note with interest in section 6 of the Consolidation Guidelines to “harm public interest” and in section 6.4.5 of the Consolidation Guidelines the reference to “the public interest” which have not been clarified.

In our opinion the industry will appreciate such guidance. In addition, the consumer public will be assured that the consolidation of licensees will not mean a degradation of service levels or increases in prices arising out of a lack of competition. We think that as a whole, the cost of implementing provisions of the Code Review, the Consolidation Guidelines and the Takeover Guidelines should not prove administratively significant once these are clearly spelt out. Indeed, more cost is incurred through ambiguity.

All terms used in this Response which are not defined or construed in this Response but are defined or construed in the Review shall have the same meaning and construction as in the Review.

General Comments

Purpose of Guidelines

Accordingly, we think it would be helpful if the intent of the guidelines are stated clearly as it would help examine the rationale especially when determining the rationale behind the discretionary objectives of IDA. This is especially so for the Takeover Guidelines.

By setting out the policy objectives of the proposed amendments and the issuance of new guidelines, the IDA will be able to state succinctly from the outset, the parameters that the regulatory authority seek to impose or extend for the telecommunications industry.

To this end, we would like to refer the IDA to a similar consultation paper entitled "Regulation of Mergers and Acquisitions in the Telecommunications Market" published in 2001 by the Office of Telecommunications Authority of Hong Kong that sets out clearly the policy objectives of the proposed regulation from the outset.³

Specific Working Group

Given the complexities of this area, it is our suggestion that a specific working group/appeals board be established for the purposes of constantly reviewing the change of ownership and consolidation guidelines whilst receiving feedback from the industry. More importantly, this group will be responsible for handling Requests and Consolidation Applications as well as responses to Requests and Consolidation Applications. This will of course be made up of officers of the IDA, senior civil service figures and perhaps even a minority of business leaders from non-telco industries.

Such a specialist group will facilitate the promotion of competition and provide a level playing field in the market. Accordingly, the group can also conduct public consultations as envisaged in the Consolidation Guidelines.

The Code Review

Application to Certain Services-based Licensee

³ Office of the Telecommunications Authority, Hong Kong, Regulation of Mergers and Acquisitions in the Telecommunications Market Para. 12.

We note that para 3.1.1 of the Consultation Paper and the proposed Section 9.1.1 in the Code Review provide that the said section applies to all FBOs and any SBO that the IDA designates as a Designated Telecommunication Licensee.

Given that SBOs and FBOs are not necessarily companies incorporated in Singapore, and for the avoidance of doubt, the proposed replacement of Section 9 should provide for the applicability of the Section to non-Singaporean licensees. It may be especially so if there are takeover laws which apply to such licensees. It is suggested that IDA should survey its licensees and reserve for itself the option of imposing additional or different considerations where its licensees are subject to other jurisdictions with different takeover laws.

Clause 9.1.2(b)(iii)

The reference to “subsidiary” is misleading as “Subsidiary” is already defined. We believe the intention is to adopt the definition in the Companies Act (Cap 50 of Singapore). However, this may cause problems because (a) subsidiary is as defined in the country of incorporation and in the case where a Parent or Licensee is incorporated overseas, this will lead to a different interpretation from what IDA intends.

We believe that the example of the “sum-the-percentages” methodology can be better. For instance, if an Acquiring Party has 100 percent of A’s shares, A has 40% of B’s shares and B has 30% of C’s shares, then the Acquiring Party will be deemed to have a 12% attributable interest. This example is more extreme and illustrates the difference between this methodology and that currently adopted in Singapore company law.

Clause 9.1.2(c)

We think the words “or Request” should be inserted after the words “a Consolidation Application”.

Clause 9.1.2(k)

We wish to point out that the IPO situation has not been provided for. There may be a need if for instance a large percentage of the shares are placed out so that no one party may acquire a significant share during an IPO.

Clause 9.2.1

We wish to point out that the market share tests should be in relation to a certain time period. This is because where parties are “on the edge” when percentages fluctuate, so that a Licensee may have 10% today and 9.9% tomorrow, this may create uncertainty.

Clause 9.3.3

We wish to draw IDA’s attention to the fact that it now requires Licensees to adopt “effective, on-going procedures” for monitoring ownership interests. This is not present in the current Telecom Competition Code and may present Licensees with operational difficulty. IDA is urged to set out what it expects to be effective on-going procedures with Licensees so that Licensees will not be burdened with uncertainty over IDA’s view of the matter.

Notification Thresholds

We note that the IDA believes that the 5 percent and 12 percent thresholds have been considered to be appropriate for the purposes of the telecommunications sector.

However, with reference to European precedents, a 15 percent threshold has been considered to be a suitable starting point to trigger regulatory concerns as it is the right level representing a significant minority interest at which one can assume a level of influence.

We believe that to foster a deregulated, competition-friendly environment, allowance for greater leeway in notification thresholds will ultimately result in a more competitive environment despite the fact the lower thresholds are for the purposes of the promotion of competition. Accordingly, a higher 15 percent threshold should be considered.

Ex ante regime vs Ex post regime

We note that the proposed amendments provide for a hybrid *ex ante-ex post* regime where IDA's prior approval is not required for acquisitions of an Ownership Interest between 5 to 12 percent but is required for any acquisition of an Ownership Interest of 12 percent to 30 percent.

Given that some developed telecommunications industries are based solely on an *ex post* regime where the regulatory authority's prior approval is not required and the acquisitions are viewed post-acquisition, we recommend that further review of the current proposed amendments should be made in circumspection of the other regimes. In most cases, the Singapore market is considerably smaller than the markets in these other regimes. In the context of a multi-jurisdictional merger, it is unlikely that the parties would be largely influenced by the regulatory competition in one small market. Also, the reality is while a merger may have a possible anti-competitive effect, the subsequent action of the Licensee may determine whether there is actually an anti-competitive effect. In addition, we note that IDA has reserved for itself ex-post facto powers such as power to order divestiture.

Unreasonably Restrict Competition

The Code Review sets out the test for competition for changes in Ownership Interests as "a manner that would *unreasonably restrict* competition or in a manner that is contrary to public interest".

We are of the view that to allow for more specific powers for the IDA to oversee the industry, the test should be where the acquisition "substantially lessens the competition". Accordingly, this would be in line with international standards in countries such as Australia, the United States and Hong Kong.

We do appreciate that the term "*unreasonably restrict competition*" does appear in other areas of the Telecom Competition Code. However, these areas relate to action that is frowned upon. Whereas in a merger scenario, the merger only has the potential for that act and may not necessarily lead to acts that unreasonably restrict competition. It may

be better to have a narrower and more defined power to block a consolidation and wider powers if the consolidated entity goes on to carry out anti-competitive acts.

Clause 9.6.3.3

We wish to point out that although a Licensee may conceivably have powers over officers and employees of a Licensee, the shareholders of a Licensee are separate legal entities whose participation in a Licensee is a separate concern and may be out of the jurisdiction of IDA.

Clause 9.6.3.4

We find the requirement of IDA to inspect physical facilities as unusual and not in the current provisions. Perhaps IDA would wish to explain the rationale for this provision.

Clause 9.6.5

We are concerned that IDA's powers under the Telecom Competition Code that extends to Licensees only may now be extended to non-Licensees such as Applicants, who may be exposed to enforcement action.

Clause 9.7.3

We would like to submit that there should be more flexibility in the imposition of Conditions. Take the instance that IDA has decided that a Condition is to require a party to perform X and the party can show that it has already done X and Y or that X is non-achievable. In that case, IDA's concerns may be well-met after the party is allowed to propose different Conditions which may be accepted by IDA.

Clause 9.9.1

It is not clear why in paragraph (a), IDA has to determine that the acquisition is "*likely to unreasonably restrict competition or harm the public interest*" but in paragraph (b), there is no such requirement. Logically, an Indirect Ownership Interest theoretically poses a lesser evil, but it seems IDA may make an order more easily in the case of an acquisition of an Indirect Ownership Interest.

Consolidation Guidelines

Unreasonably Restrict Competition

The Consolidation Guidelines sets out the test for competition as “a manner that would *unreasonably restrict* competition or in a manner that *is contrary to public interest*”.

We are of the view that to allow for more specific powers for the IDA to oversee the industry, the test should be where the acquisition “substantially lessens the competition”. Accordingly, this would be in line with international standards in countries such as Australia, the United States and Hong Kong.

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Competition Analysis

We recommend that explicit guidelines should be stated for the consideration by the IDA of the structural features of the market that influence the level of competition for the market.

It is our recommendation that other features should be included in the Consolidation Review Principles in the Consolidation Guidelines, for example:-

- a) Import Competition;
- b) Barriers to Entry;
- c) Countervailing power;
- d) Industry Dynamics

The list is not exhaustive given the dynamic nature of the telecommunications industry and should be constantly reviewed by the Working Group as proposed in the aforesaid.