

# First Triennial Review of the Code of Practice for Competition in the Provision of Telecommunications Services

***IDA Consultation Document of 7 October 2003***

**A Response by Cable & Wireless  
5 December 2003**

## Company Particulars

This document is the submission of:

- Cable & Wireless Regional Businesses Pte Ltd, holder of a service based license; and
- Cable & Wireless Global Pte Ltd, holder of a facilities based license.

Hereafter in this submission, both companies are referenced collectively as Cable & Wireless (C&W).

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## Summary of Major Points

- C&W welcomes the IDA's review of the Code of Practice for Competition in the Provision of Telecommunications Services. However, C&W has a number of concerns with the Draft for Consultation of 7<sup>th</sup> October 2003.
- Although the IDA should have the right to amend the Telecommunications Code as and when appropriate, there should be a requirement for public consultation before any modification of the Telecommunications Code occurs.
- Competition regulators are increasingly recognizing the possibility of "joint dominance" in a market. The Telecommunications Code should allow for the possibility of joint dominance within the definition of Significant Market Power.
- The Telecommunications Code should also note the possibility of Significant Market Power being leveraged between related markets. This is a potentially relevant feature of market power in the telecommunications industry. For example, Significant Market Power in customer access can be used to derive Significant Market Power in downstream services.
- Guidelines for the assessment of Significant Market Power would be helpful in Singapore, and should be referenced in the Telecommunications Code.
- The Dominant Licensee tariff filing process must include a period of pre-implementation publication of the tariffs, in order to allow competitors a chance to raise issues or concerns for the IDA's review.
- The Dominant Licensee tariff assessment process must explicitly, and as a matter of course, include a test of whether the filed tariff constitutes a price squeeze as prohibited by the Draft Telecommunications Code.
- The Dominant Licensee should be required to publish detailed documentation of its accounting separation and RIO service costing methodology, and to make these details available for public comment, including details of retail prices and costs excluded in any "retail-minus" calculation. An enforcement mechanism is required for the eventuality that the Dominant Licensee does not abide by the accounting separation requirements issued by the IDA.
- Cost based pricing must be the default method for pricing Mandated Wholesale Services, unless the IDA specify otherwise (e.g. "retail-minus") for a transitory period of time.
- The Long Run Average Incremental Cost (LRAIC) standard should be used in the IDA's predatory pricing analysis.

- Removing the obligation on the Dominant Licensee to construct new loops on request could significantly hinder the ability of competitors to gain access for new build customer locations. Furthermore, wholesale leased lines should be included as a mandated wholesale or interconnection service provided by the Dominant Licensee.
- It is not appropriate for the IDA to have discretion in deciding to intervene in disputes arising from the implementation of an interconnection agreement with a Dominant Licensee. All disputes with a Dominant Licensee will require resolution by the IDA.
- Requirements on licensee's wishing to discontinue a service are unnecessary for non-dominant carriers. A discontinuance of service provision is only required for services in which the licensee possesses a degree of market power.



## **Statement of Interest**

C&W is a leading supplier of global voice, data and IP services, operating networks in major business centers throughout the world. C&W has significant investments and presence in Singapore and the Asia-Pacific region, and is committed to serving business customers by enhancing choice, quality, value and global reach of the communications services it provides. C&W believes that this objective is consistent with the info-communications environment that the IDA is seeking to create in Singapore.

C&W, through its two companies in Singapore, holds both a Facilities Based Operator license and a Service Based Operator license.

## Comments

### *Introduction*

C&W welcomes the IDA's review of the Code of Practice for Competition in the Provision of Telecommunications Services ("the Telecommunications Code"). However, C&W has a number of concerns with the Draft for Consultation of 7<sup>th</sup> October 2003 (the "Draft Telecommunications Code").

### *Modification to the Telecommunications Code*

Section 1.6.3 of the Draft Telecommunications Code provides the IDA with the ability to "...modify this Code on its own initiative at any time." Clearly, it is important that there is provision for the IDA to modify the Telecommunications Code as and when appropriate. However, in view of the importance of the code to all industry participants, and potential impact of any modifications, there should be a requirement for public consultation before any modification occurs.

### *Significant Market Power - Criteria*

Section 1.9(p) of the Draft Telecommunications Code contains a definition of single company dominance. However, this definition needs to be supported by clear guidance on the criteria that will be used to assess dominance and, more specifically, the market thresholds that should be used for a presumptive dismissal or acceptance of dominance pending more detailed analysis.

In the case of the European Union, the European Commission's "Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services" (2002/C 165/03) (hereafter referred to as the EC Guidelines on Market analysis and Assessment of SMP), provides some specific criteria as follows:

...a dominant position is found by reference to a number of criteria and its assessment is based...on a forward looking market analysis based on existing market conditions. Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, **undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position** on the market concerned. In the Commission's decision making practice, **single dominance concerns normally arise in the case of undertakings with**

**market shares of over 40%**, although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. According to established case-law, **very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.** An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time.

Guidelines on Market analysis and Assessment of SMP, Article 75.  
(Emphasis added.)

When analysing market power in more detail, Article 78 of EC Guidelines on Market Analysis and Assessment of SMP lists, *inter-alia*, the following criteria for structural factors that lead to dominance:

- overall size of the undertaking;
- control of infrastructure not easily duplicated;
- low countervailing buying power;
- economies of scale and scope.

#### *Significant Market Power – Joint Dominance*

Further, the IDA should take account that competition regulators are increasingly recognizing the possibility of “joint dominance” in a market. For example, Directive 2002/21/EC (the European Union’s Telecommunications Regulatory Framework Directive) defines significant market power as follows:

An undertaking shall be deemed to have significant market power if, either individually **or jointly with others**, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

European Commission Framework Directive, Article 14.2. (Emphasis added.)

Articles 86 to 106 of the EC Guidelines on Market Analysis and the Assessment of SMP provides amplification of how the concept of joint dominance can be used. In reality, the conditions that make joint dominance possible are not often achievable. Even if the existing market players were able to exploit market power on a joint basis, this can easily be disrupted by entry into the market of a new player. However, joint dominance is possible in a situation where market entry is restricted. This can happen in certain telecommunications markets. One example is where limitations on radio spectrum availability mean that only a finite

number of companies can provide a certain set of services, and further market entry is not possible (see, for example, Article 105 of EC Guidelines on Market Analysis and the Assessment of SMP). Another example could be a case where the cost of building new facilities allows protection from market forces to two or more existing facility owners. Examples of these may be cable landing station facilities and backhaul, where there is evidence that costs in Singapore are higher than in comparable countries.

For this reason, the IDA should include the possibility of joint dominance within the definition of Significant Market Power used in paragraph 1.9(p) in a similar way to that adopted in the European Union.

### *Significant Market Power - Leverage*

The IDA should also note that the European Union's Regulatory Framework Directive explicitly refers to the possibility of significant market power being transferred between markets:

Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.

European Commission Framework Directive, Article 14.3.

This is also a potentially relevant feature of market power in the telecommunications industry, as amplified in Articles 83 and 84 of the EC Guidelines on Market Analysis and the Assessment of SMP. For example, significant market power in the provision of access facilities may be transmitted to other down stream markets that require local network access (e.g. international data services).

### *Significant Market Power - Guidelines*

The IDA should note that the European Union's Regulatory Framework Directive also explicitly refers to the use of guidelines for the assessment of significant market power:

The Commission shall publish...guidelines for market analysis and the assessment of significant market power...

European Commission Framework Directive, Article 15.2.



The EC Guidelines on Market Analysis and the Assessment of SMP have been referenced above. Guidelines, explicitly referenced in the Telecommunications Code, would be helpful in Singapore in clarifying the analysis of Significant Market Power.

#### *IDA Tariff Review Process*

Section 4.4.2 describes the IDA's tariff filing review process for a Dominant Licensee. In view of the impact that the tariffs of the Dominant Licensee will have on competition, the process must include a period of pre-implementation publication of the tariffs, in order to allow competitors a chance to raise issues or concerns for the IDA's review.

Section 4.4.3.1 of the Draft Telecommunications Code describes the criteria the IDA will adopt in assessing tariffs filed by Dominant Licensees. It would be helpful if this process explicitly, and as a matter of course, included a test of whether the filed tariff constitutes a price squeeze as prohibited by Section 8.2.1.2 of the Draft Telecommunications Code. It would be relatively simple for the IDA to require submission of the relevant data to enable such a test to be routinely carried out.

#### *RIO Service Costing Methodology*

Effective competition is crucially dependent on the accuracy of the Dominant Licensee's accounting separation reports and costing methodologies for interconnection and regulated wholesale services. If interconnection and regulated wholesale services are priced above cost, or if anti-competitive cross-subsidies appear between competitive and non-competitive services, competition will be damaged to the ultimate detriment of consumers.

Appendix 1 of the Draft Telecommunications Code states that a "Forward Looking Economic Cost" methodology should be used for costing interconnection and related services, where cost is defined as long run average incremental cost. Use of these concepts is consistent with world best practice. However, almost all telecommunications regulators in other developed countries have found it necessary to require the dominant incumbent to publish detailed documentation of how these principles are applied, and to make these details available for public comment. The IDA should clearly do the same, including details of retail prices and costs excluded in any "retail-minus" calculation.

Without such disclosure, public comment on the Dominant Licensee's Reference Interconnection Offer (RIO), as stipulated in Section 6.3.7(a) of the Draft

Telecommunications Code, will be meaningless, since respondents will have no basis on which to comment on the prices for interconnection and wholesale services.

### *Accounting Separation*

The comments on the costing methodology for RIO services also apply to the methodology for accounting separation employed by the Dominant Licensee, and required by Section 8.2.1.3 of the Draft Telecommunications Code. There must be opportunity for public comment on the methodology used by the Dominant Licensee to implement accounting separation and, furthermore, in the interests of transparency, the actual separated accounts must be published. Since the separated accounts simply attempt to break out the financial situation of services where the Dominant Licensee possesses market power, there can be no objections to publication on the basis of competitive confidentiality, since the services being reported are essentially “non-competitive”.

As a final point, the Telecommunications Code must include an enforcement mechanism for the eventuality that the Dominant Licensee does not abide by the accounting separation requirements issued by the IDA. This appears to be missing in the existing Draft Telecommunications Code.

### *Pricing of Mandated Wholesale Services*

Section 6.3.5(b) of the Draft Telecommunications Code, and Appendix 2, Section 7.2, states that Mandated Wholesale Services must be priced at “retail-minus” unless otherwise specified by the IDA. However, it is generally acknowledged that cost-based pricing is more economically efficient and, in particular, more likely to encourage competitive challenge to the existing incumbent pricing structures. There are cases where “retail-minus” pricing may be appropriate on a short-term basis, such as when the incumbent is required (for whatever reason) to maintain a non-cost orientated tariff structure, but these cases should be an exception, and individually justified.

The wording of Section 6.3.5(b) of the Draft Telecommunications Code, and Appendix 2, Section 7.2, should be amended to make cost based pricing the default method for Mandated Wholesale Services, unless the IDA specify otherwise (e.g. “retail-minus”) for a transitory period of time.

### *Predatory Pricing*

Section 8.2.1.1 states that the IDA will use a “marginal cost” standard in determining whether or not a price is predatory. However, in the case of telecommunications network services, marginal cost is:

- a difficult concept to define (e.g. because of the lumpiness of capacity);
- a difficult concept to measure; and
- arguably inappropriate if the pricing of a whole service is being considered.

Given that the Dominant Licensee is required to construct a long run average incremental cost model of its network services, it seems preferable that the long run average incremental cost standard be used in the IDA’s predatory pricing analysis. Indeed, this is the predatory pricing test that is advocated as appropriate for the telecommunications sector by the European Commission, as set out in its “Access Notice”.<sup>1</sup>

#### *Services Covered in the RIO*

C&W is surprised that:

- The IDA propose removing the obligation on the Dominant Licensee to construct new loops on request. This could significantly hinder the ability of competitors to gain access for new build customer locations.
- More significantly, there is no mention of including wholesale leased lines within the RIO. As the IDA is aware, all major competitive carriers have provided compelling evidence of the need to include wholesale leased lines as a mandated wholesale or interconnection service, in order to enable fuller competition to business and corporate customers in Singapore. See, for example, C&W’s submission – “Designation of Singapore Telecommunication Limited’s Local Leased Circuits as Mandatory Wholesale Service, Consultation Paper of The Infocomm Development Authority of Singapore, Response by Cable & Wireless”, 30 June 2003. SingTel’s prices are significantly above those of similar markets (e.g. Hong Kong) and clearly not constrained by competitive forces. Regulation is clearly necessary.
- The IDA should also give serious consideration to including in the Dominant Licensee RIO dark fibre supplied to customer sites, as a regulated interconnection service. This will supplement the options available to

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<sup>1</sup> Notice on the application of the competition rules to access agreements in the telecommunications sector, Framework, Relevant Markets and Principles, 98/C 265/02. Available at [http://europa.eu.int/eur-lex/pri/eu/oj/dat/1998/c\\_265/c\\_26519980822eu00020028.pdf](http://europa.eu.int/eur-lex/pri/eu/oj/dat/1998/c_265/c_26519980822eu00020028.pdf)

competitive carriers to obtain access to customer sites, where SingTel has a dominant market position.

### *Dispute Resolution Procedure*

Section 11.3 of the Draft Telecommunications Code describes the dispute resolution procedure. C&W does not understand the need for the IDA to have discretion in deciding to intervene in disputes arising from the implementation of an interconnection agreement with a Dominant Licensee. By cause of the asymmetry of bargaining power, all disputes with a Dominant Licensee will require resolution by the IDA.

### *Discontinuance of Services*

Section 3.2.4.4 of the Draft Telecommunications Code places requirements on licensee's wishing to discontinue a service. However, these requirements are unnecessary for non-dominant carriers, since alternatives will be readily available to consumers in the market and, in the interim, users will be protected by their contractual terms and conditions.

However, a discontinuance of service provision is required for services in which the licensee possesses a degree of market power.

## **Conclusion**

C&W welcomes the IDA's revision of the Draft Telecommunications Code. This presents an opportunity to enhance the level of efficient competition in the industry, to the ultimate benefit of consumers. C&W, therefore, has made a number of detailed comments, and trusts that the IDA will give them its full consideration.

Of most significance is the need to:

- Ensure that facilities and services, over which the Dominant Licensee has Significant Market Power (such as wholesale leased circuits), are offered under the RIO or as mandated wholesale services on the most economically appropriate pricing basis (which should be presumed to be a cost basis unless there are specific reasons otherwise).
- Require that the methodology employed by the Dominant Licensee to calculate the prices of regulated interconnection and mandated wholesale

services, and for accounting separation, is published in sufficient detail to enable public comment.

- There is sufficient protection of competition against price squeezing or other anti-competitive pricing by the Dominant Licensee.

This will require measures such as pre-implementation publication of the tariffs filed by the Dominant Licensee, in order to allow competitors a chance to raise issues or concerns for the IDA's review.

The Dominant Licensee tariff assessment process must explicitly, and as a matter of course, include a test of whether the filed tariff constitute a price squeeze as prohibited by the Draft Telecommunications Code.