

**FIRST TRIENNIAL REVIEW OF THE CODE OF PRACTICE
FOR COMPETITION IN THE PROVISION OF
TELECOMMUNICATION SERVICES**

5 DECEMBER 2003

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IN THE ASIA PACIFIC**

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STATEMENT OF INTEREST

The Infocomm Development Authority of Singapore (IDA) is required, pursuant to Section 1.5 of the Code of Practice for Competition in the Provision of Telecommunication Services (the Code), to conduct a “Triennial Review Process” in order to ensure that the Code remains a “robust regulatory framework” that helps “foster competition in a fully liberalised telecommunication market in Singapore.”¹

To commence the Triennial Review, the IDA issued a Consultation Document on 7 October 2003, seeking public comment on its proposed revisions to the Code.

The carriers involved in preparing the joint submission (“Submission”) are AT&T Worldwide Telecommunications Services Singapore Pte Ltd, T-Systems ITC Singapore Pte Ltd, Cable & Wireless Global Pte Ltd, Macquarie Corporate Telecommunications Pte Ltd, MCI WorldCom Asia Pte Ltd and Reach International Telecom (Singapore) Pte Ltd. Some of the carriers will also be separately preparing their own more detailed submissions.

As competitive providers of communications services to the business or residential users of Singapore, we have a significant interest in ensuring that the Triennial Review results in improvements to the Code. We are desirous of seeing the benefits of competition flow through to users of communication services by way of lower prices, increased choices and better services. In addition, as a key trading country, it is important for Singapore to have a robust regulatory framework that promotes competition in the communications industry. Our interest and goal in this regard is consistent with that stated by the IDA at the outset of its Consultation Document; to ensure that the revised Code “mandate[s] a robust regulatory framework that fosters competition in Singapore.”

¹ See paragraph 1.1 of the IDA’s Triennial Review Consultation Document issued on 7 October 2003.

SUMMARY OF MAJOR POINTS

With this Submission we ask that the IDA consider our joint input in five key points as outlined below.

1. The Code's proposed framework for classification of Dominant Licensees requires further detail in several key areas.

- The definition of "significant market power" lacks evaluation criteria.

2. The Code's proposed framework for regulating access to the Dominant Licensee's facilities and services is not rational and must be simplified.

- Propose the adoption of two methods of regulating Licensee access to the Dominant Licensee's facilities and services: (a) RIO regime (interconnection and wholesale services) and (b) the tariff regime (retail/resale and wholesale tariffed services).

3. The Code's proposed tariff filing process, including publication, is welcomed but in need of further clarification.

- Clarify the guidelines for the tariff filing process.
- Include the requirement to publish tariff filings and allow for public comment prior to the approval of such tariff filings.

4. Section Four of the proposed Code should include the requirement that the Dominant Licensee have a duty to maintain separate accounts.

- Require Dominant Licensees to maintain accounting separation.
- Delete the requirement for non-dominant Licensee to maintain accounting separation.

5. Section Eight of the proposed Code – Unfair Methods of Competition – should include further detail and a timeline of the promulgation of guidelines.

- The IDA must remain proactive in preventing abuses of dominance.
- Include guidelines as to how complaints will be processed and the criteria to be used in assessing whether a Licensee has acted anti-competitively.

COMMENTS

This part of the Submission provides more detailed comments on each of our five key points.

Key Point 1: The Code's Proposed Framework For Classification of Dominant Licensees Requires Further Detail In Several Key Areas

Background

Section Two of the proposed Code sets out the definition for the classification of Licences, including the standards and procedures for classifying and re-classifying Licensees as either Dominant or non-dominant.

Our Joint Comment

Section Two contains many elements of the dominance classification found in other jurisdictions throughout the world. There are, however, key elements of the definition and classification of dominance that are missing from the proposed Code. For instance, the Significant Market Power definition lacks precise market share evaluation criteria. For example, Article 75 of the EC Guidelines on Market Analysis provides that a Licensee with 40% or greater market share is normally considered to be a dominant Licensee whereas a Licensee with market share of 25% or less is normally considered to be non-dominant. We believe strongly that the IDA should include more precise presumptive market share indicators to determine dominance, consistent with the approach taken by the European Commission.

Key Point 2: The Code's Proposed Framework For Regulating Access To The Dominant Licensee's Facilities and Services Must Be Simplified

Background

Section Four of the proposed Code sets out the Dominant Licensee's obligations to provide services to both other Licensees and End Users on just, reasonable, and non-discriminatory prices, terms and conditions. In this regard, it sets forth three different methods of regulation by which the Dominant Licensee may provide services to other Licensees. In summary, these three different methods of proposed regulation are described as:

- Resale of an End User Service: Under the proposed Code, the Dominant Licensee must make available to other Licensees, services at the same prices, terms and conditions as those offered to an End User, to enable other Licensees to resell that service or to use it as an input to its own service. The Dominant Licensee cannot refuse to provide the End User service to the non-

dominant Licensee (i.e. the Dominant Licensee may not restrict resale) but it is not required to provide the non-dominant Licensee with any discount below the retail price (*Proposed Section 4.2.2.2*).

- Voluntary Wholesale Service: The proposed Code stipulates that the Dominant Licensee is “required” to offer non-dominant Licensees a discount (“retail - minus”) for “voluntary wholesale services,” and as such the Dominant Licensee is not in fact required to provide the service at all (*Proposed Section 4.3*).
- Tariffed Services: The proposed Code imposes a tariff filing obligation for the Dominant Licensee’s retail services to its business and residential customers. In addition, the tariff filing obligation extends to the two categories of service described above – “resale of End User services” and “voluntary wholesale” services. Finally, the tariff filing obligation may extend to “any other telecommunications service” that the IDA directs. (*Proposed Section 4.4.1(a)-(d)*).

Neither the existing Code, nor the proposed Code specifies what services the IDA anticipates should fall into each of these three categories.

In addition to the aforementioned three methods of Dominant Licensee regulation described in proposed Section Four, the IDA has two additional methods of regulating access to Dominant Licensee infrastructure as set forth in Section Six of the proposed Code:

- Interconnection Related Services: The Dominant Licensee is obligated to offer specified services in its Reference Interconnection Offer (“RIO”). Such services include, for example, Co-location, voice interconnection for Origination, Termination, Transit and Connection Services at Submarine Cable Landing Stations. The Code specifies that prices for these interconnection and access related services “must be cost-based.” (*See Proposed Section 6.3.3 and 6.3.5*).
- Mandated Wholesale Services: As with “Interconnection Related Services” these are a specified set of services that the Dominant Licensee is obligated to include in its RIO. To our knowledge, there are no services currently designated in this category (the two that were previously included, Dark Fibre and International Private Leased Circuits, were removed from the RIO offering from July 2002). When such services are required under the RIO, the Code as proposed states that “unless otherwise specified” by the IDA, the prices for these services must be “retail-minus.” (*See Proposed Sections 6.3.3.5, 6.3.5, and 7 – 7.2*).

Our Joint Comments

We believe that this regime - with five separate methods for regulation of the Dominant Licensee across two Sections of the Code - needs to be simplified if it is to be rational and effective.

We ask that the IDA simplify and more clearly target regulation of non-dominant Licensees access to the Dominant Licensees' facilities and services as follows:

- The RIO Regime: Interconnection and Wholesale Service: We propose that all interconnection and essential access services continue to be included in the RIO.² At present, services in the RIO include Co-location, voice interconnection for Origination, Termination, Transit, Unbundled Local Loops and Connection Services at Submarine Cable Landing Stations. Most recently, the IDA indicated it plans to designate Local Leased Circuits as a Wholesale Service under the RIO.

We propose one modification to the RIO framework. The existing and proposed Code states a preference for “retail – minus” for Mandatory Wholesale Services under the RIO, though it leaves the IDA discretion to use another pricing methodology. We ask that this approach be modified slightly, revising the Code to stipulate that for all RIO services, whether interconnection related services or Mandatory Wholesale, the preferred pricing methodology is cost-based. We agree, however, that the IDA should retain the ability to use retail – minus for a particular service, upon its review of industry comment as to whether cost-based or retail–minus is the preferred methodology for the specified service.³

- The Tariff Regime: Retail / Resale & Wholesale Tariffed Services: There are some services that are not interconnection or essential access services but that the IDA nonetheless believes should be made available to competitive operators in order to enable competition. Under the proposed Code, the rates, terms and conditions of these services are to be governed by the IDA's Tariffing regime. The proposed Code sets out two categories in this regard: “Resale of End User Services,” and “Voluntary Wholesale Services.”

We urge two important modifications to the proposed Tariffing framework.

The Retail / Resale tariffed services should be made available on a retail-minus basis so as to encourage efficient entry by new service providers and enhance

² We note that this approach is consistent with the approach taken across European Union countries, where the RIO in each country typically governs interconnection and essential access services that are not competitive including PSTN interconnection, Local Leased Circuits, Unbundled Local Loops, and increasingly wholesale DSL offerings.

³ See Appendix One Paragraph 2.2.1 of the proposed Code specifying Long Run Average Incremental Cost as the cost standard for IRS services but not for Mandatory Wholesale Services.

competition.⁴ In addition, the set of Retail / Resale services should be clearly defined, with the tariffs including specific definitions clearly describing service levels, as well as repair and delivery times. Examples of services that could fall into this category include retail International Direct Dial (IDD) service, domestic frame relay or local call services.

The Wholesale Service tariffed services should be made mandatory, with the IDA listing which services must be tariffed under this category. We anticipate that these may be services that have either yet to be designated for inclusion in the RIO or which do not have a retail analog (so do not fall into the Retail/Resale category). Nevertheless, where the Dominant Licensee offers such services to itself or its affiliates, so should they be made to offer to other Licensees under a mandatory wholesale tariff. Examples of services that could fall into this category include backhaul or a wholesale xDSL service. The IDA, in its tariff framework, should require that the Dominant Licensee offer such services at wholesale rates, as determined by benchmarks to other jurisdictions and principles of non-discrimination.

Key Point 3: The Code’s Proposed Tariff Filing Process, Including Publication, Is Welcomed But In Need Of Further Clarification

Background

Section 4.4 of the proposed Code is titled “*Tariffed Services*” and imposes an obligation for the Dominant Licensees to make tariff filings for retail services to its business and residential customers. In addition, the tariff filing obligation extends to the two categories of service described above – “resale of End User services” and “voluntary wholesale” services. The tariff filing obligation may also extend to “any other telecommunications service” that the IDA directs. (*Proposed Section 4.4.1(a)-(d)*).

Section 4.4.2 – 4.7 of the proposed Code outlines the processes and review procedures for the tariff filings.

Our Joint Comments

We applaud the IDA’s inclusion of detailed guidelines and a publication requirement in the proposed Code but ask for further clarification in several significant areas.

⁴ We feel strongly that the proposed Code – stipulating a “resale” requirement for other Licensees with no price discount and imposition of a discounted wholesale rate but only on a “voluntary” basis - is so severely flawed as to be nonsensical. In theory and in practice, a “resale” service bought by a carrier at the retail price without discount cannot be profitable due to the additional costs (e.g., marketing and administrative costs) it incurs in re-selling the service to its End User. With regard to the “Voluntary Wholesale Service”, we cannot think of an instance where the Dominant Licensee would “voluntarily” offer a wholesale service when it is required to price the same at “retail-minus.” We urge the IDA to consider the modifications we proposed in the text above to avoid codification of an un-workable framework.

- Information To Be Included: The Dominant Licensee’s tariff filing should contain a clear product description of the service it is offering. As currently drafted, the proposed Code provides that the Dominant Licensee is required to file *inter alia* a clear statement of the “prices, terms, and conditions” of the service. In our experience in Singapore and other markets a product description is also required in tariff filings. (*Proposed Section 4.4.2.1*)
- Review Criteria For End User services: The IDA should provide some further elaboration on the procedure and criteria it will use to determine that the Dominant Licensee’s prices are “not less than those offered by Licensees that provide a comparable service.” (*Proposed Section 4.4.3.1(b)*)
- Review Criteria For “Resale” And “Voluntary Wholesale” Services: The IDA should modify these two paragraphs to reflect the deletion of the flawed “voluntary wholesale” concept in favor of the regimes as discussed in Key Point 2. In addition, we urge the IDA to stipulate in the Code that any retail-minus price determination will allow for comment from the industry. (*Proposed Section 4.4.3.1(b) and (c)*)
- Review Procedures: The IDA should make the Dominant Licensee’s tariff filing publicly available for a reasonable period of time on the IDA website to allow for comment to be received by the IDA prior to the tariff being approved. (*Proposed Section 4.4.3.2*)
- Duty To Publish Effective Tariffs: We urge the IDA to require that publication of the tariff filing include a clear product description of the service in addition to a description of the prices, terms and conditions. (*Proposed Section 4.5*)

Key Point 4: Section Four of the Proposed Code Should Include The Requirement That the Dominant Licensee Have A Duty to Maintain Separate Accounts

Background

Section Four of the proposed Code contains the various duties of the Dominant Licensee in providing telecom services on just, reasonable, and non-discriminatory terms. This section does not mention accounting separation requirements, although this is a standard requirement on Dominant Licensees by National Regulators Authorities. Other than a passing reference in Section 8.2.1.3 the paragraph proscribing cross-subsidization, accounting separation is not mentioned anywhere else in the proposed Code.

Our Joint Comments

We propose that Section Four be modified to include a requirement for Dominant Licensees and their downstream subsidiaries to file and publish accounting separation

reports. The inclusion would ensure consistency with international regulatory practice. The inclusion of accounting separation as a requirement on Dominant Licensees under Section Four would also enable the IDA to bring an enforcement action against the Dominant Licensee for non-compliance under Section 11 of the Code. This is important because an enforcement mechanism is critical for any regulatory tool to be relevant and useful.

Also consistent with international regulatory practice, we note that there is absolutely no compelling reason to continue to require non-dominant Licensees to file accounting separation reports because non-dominant operators presumptively are not in a position to engage in effective anti-competitive practices such as cross-subsidies, price squeezes or predatory pricing. We urge the IDA to abolish the requirement of accounting separation on non-dominant Licensees.

Key Point 5: Section Eight Of The Proposed Code – Unfair Methods of Competition – Should Include Further Detail And A Timeline For The Promulgation Of Guidelines

Background

Section Eight of the proposed Code sets forth the various means by which non-dominant Licensees are permitted to make a case, *ex post*, that the Dominant Licensee is “abusing its dominant position in the Singapore market.” The various means include cases against the Dominant Licensees for: predatory pricing, price squeezes, cross subsidization, and discrimination. Such cases are brought pursuant to the procedures for enforcement actions set out in Section 11 of the proposed Code.

The Dominant Licensee, as a vertically integrated company, has significant ability to abuse its dominant position. For example:

- Cross-subsidization: A Dominant Licensee could in certain circumstances charge high amounts for a service in which it is dominant (e.g., Local Leased Circuits) to foreclose competition in a market that might otherwise be competitive (e.g., IP VPN).
- Price Squeeze: A Dominant Licensee could raise its rivals’ costs for an access input (e.g., Local Leased Circuits) to a price level so high that a rival cannot compete in the market profitably (note that the ‘market’ in which the rival is squeezed out of could be either the simple resale of the access input or it could be the provision of an end-to-end service using the access input, such as Internet access to corporate users).
- Predatory Pricing: A Dominant Licensee could bundle a tariffed service at the tariffed price (e.g., local voice calls) with an un-tariffed service (e.g., IDD retail voice) to its End User priced at or below marginal cost.

Our Joint Comments

Protecting against abuse of dominance to allow for competition should be a two stage process.

As a threshold phase, the IDA must remain a pro-active regulator with *ex ante* rules in place. For example, where the Dominant Licensee controls essential access inputs and the supply of interconnection services, these services should be provided under the RIO at cost-based prices.

The IDA should also strongly enforce such *ex ante* rules and such enforcement should be effective and proportionate to the extent of the abuse. For example, as discussed in Key Point 4, Dominant Licensees should be required to file accounting separation reports, whereas non-dominant Licensees who are presumptively not in a position to abuse dominance should not have to file such reports.

Second, in instances where non-dominant Licensees must rely on an *ex post* means to seek redress for dominant behavior (price squeeze, predatory pricing etc), the Code should provide clear guidelines as to (a) how such complaints will be processed and (b) what criteria it will use in assessing whether a Licensee has acted anti-competitively. Section Eight of the proposed Code as drafted is lacking in this regard. We propose that Section Eight of the Code should be modified to include a statement that the IDA will develop guidelines, within a specific timing deadline, providing detailed standards and processes on which IDA will evaluate the proscribed abuses of dominance contained in this Section.