

**ANOTHER RESPONSE TO THE IDA'S INVITATION
FOR PUBLIC COMMENT (2ND ROUND) ON THE
PROPOSED REVIEW OF THE CODE OF PRACTICE FOR
COMPETITION IN THE PROVISION OF
TELECOMMUNICATION SERVICES (2004)**

Prepared by:

As/Prof **Burton Ong**
Faculty of Law
National University of Singapore

Address: 13 Law Link, Singapore 117590
Date: 22nd June 2004
Telephone: 68746463
E-mail: lawongb@nus.edu.sg

Summary of Major Points:

This memorandum raises and briefly discusses further issues which arise from the IDA's proposals to review the Telecom Competition Code. The issues discussed below relate to the Facilities-based Competition philosophy adopted by the IDA, the definition of "dominance" and the identification of dominant firms, the publication of tariffs and the reconsideration process.

Statement of Interest:

The author has an academic interest in competition law issues and has taken the opportunity presented by the IDA's public consultation efforts to contribute to the refinement of the Competition Code.

A. Introduction

The comments below are made in response to the IDA's request for feedback in the Second Public Consultation on the First Triennial Review of the Code of Practice for Competition in the Provision of Telecommunication Services (11 May 2004). Particular emphasis has been placed on the key issues identified by Ms Aileen Chia (Director, Competition and Market Access, IDA) in her presentation at a discussion session on 28 May 2004 before the various parties who participated in the First Public Consultation.

B. Facilities-based competition (FBC) vs. Service-based competition

The IDA's decision to continue its policy of promoting FBC as far as possible is understandable given its interest in attracting further infrastructure-related investments in Singapore – "wiring up" the island – while entrenching competition between the owners of competing infrastructural networks. To this end, the IDA may wish to give further consideration to two issues that I believe are closely connected to the FBC model which it envisages.

Firstly, more attention could be paid to strategies which help lower the cost of investing in the relevant infrastructural facilities needed to engage in FBC. The prohibitive costs of laying cables in built-up areas can be ameliorated if the IDA were to liaise closely with the government agencies responsible for carrying out public works in Singapore. New telecommunication cables could be laid, for example, simultaneously whenever public roads or pavements are excavated to lay subterranean water pipes, electricity cables, or MRT tunnels. Similarly, when new housing estates are being built, or new commercial districts developed (e.g. Marina South), the IDA could take a more pro-active role in creating opportunities for firms wishing to lay their own cable networks to do so in conjunction with the other utility lines or infrastructural features. This could lead to

significant cost savings which may make infrastructural investments more attractive to these firms.

Secondly, to better support its objective of promoting FBC wherever possible, the IDA will have to adopt a more robust approach in resolving network interconnection issues. It is highly unlikely that the existing island-wide network will be replicated in its entirety and any new cable networks, including investments made in newly developed parts of the island currently not served by the existing networks, will be limited in size and scope. These local networks will need hassle-free connections with the existing network: IDA would therefore need to establish a clear and commercially viable framework to facilitate these interconnections in order to achieve the levels of FBC desired by the IDA.

C. Dominance Definition

The proposals to shift the approach currently taken towards the regulation of dominant firms from an entity-based approach to a market-by-market approach are highly commendable. Not only is this shift essential to achieve conceptual coherence within the regulatory framework – after all, the very concept of dominance is necessarily tied to a particular market setting – it is also an important milestone in the liberalization process of the telecommunications industry.

The IDA should not allow itself to be weighed down by the slow pace at which reforms in this area of competition regulation are taking place elsewhere in the world. It should not adopt a “wait-and-follow” approach where it is clear that this is the correct way forward. In taking active steps to modernize its approach towards dominance definition, and taking the lead in changing the way it classifies dominant firms, the IDA will be seen as a progressive regulator with a sound grasp of the competition principles which underlie this aspect of the regulatory framework. As a practical matter, the regulatory reach of the IDA remains unchanged even it were to carry out this shift in approach: the inherent elasticity of the concept of “dominance” will permit it to investigate and remedy an abuse of dominance in an adjacent or related market apart from the market in which the firm occupies its position of dominance.

D. Tariff Filing – Publication of Tariffs

The proposal to publish the tariffs of a dominant licensee should be approached with caution. There may be a possibility for some form of “tacit collusion” to take place if the dominant licensee’s competitors use the published tariffs as “signalling devices” (see §9.2 of the proposed Code) to adjust their prices accordingly. Depending on the availability of data and the scope of the disclosures required by the IDA, these published tariffs may have the unintended effect of stifling price competition. It might be worth considering limiting the availability of certain pricing information to just the IDA alone, so that it may monitor the pricing behaviour of the dominant licensee to ensure that it

does not engage in anti-competitive conduct that is inconsistent with its status as a dominant firm (e.g. predatory pricing, loyalty or fidelity rebates, price squeezing etc.).

E. Reconsideration Process

After reviewing the initial submissions made in the first round of public consultation, the IDA's proposal to adopt a sequential review process that allows for a reconsideration of its decision and an appeal to the Minister seems somewhat incongruous given the current developments elsewhere in the area of Singapore's domestic Competition Law. The proposed Competition Commission and Appeals Board, to be set up by the Ministry of Trade and Industry to administer the soon-to-be-enacted Competition Act, are prime candidates for the IDA to consult with or otherwise involve in the reconsideration process.

Instead of reconsidering the issues just after it has decided them, it might be more productive for the IDA to allow a "fresh" set of eyes to review the case – one or more of the regulatory authorities responsible for the Competition Act could perform this function. Further appeals could, for example, be made to the Appeals Board and later to the courts if necessary. Integrating the appeals process in Telco disputes with the mainstream competition regulatory framework is desirable for a number of reasons. Firstly, there will be greater cross-pollination of experience and expertise between the various agencies involved. Secondly, greater consistency will be achieved across the various sectors of industry, facilitating greater coherence within the law and clarity as to its objectives. It would be somewhat disappointing if, for example, the regulation of a dominant licensee in the telecommunications industry were vastly different from a dominant firm in the banking or insurance sectors. Thirdly, an integrated hierarchy of other agencies in the dispute resolution process will avoid creating the impression that the IDA is the prosecutor, judge and executioner in the regulation of the telecommunications industry.

F. Conclusion

Given the detailed attention that has been given to submissions made earlier in the first round of public consultation, this note has not sought to revisit some of the debates which the IDA has evaluated and resolved over the past 6 months. Instead, this note was intended to raise further issues which the IDA ought to consider in light of the policy choices which it has already made in reviewing and reintroducing the *Telecom Competition Code (2004)* on 11th May 2004.