

MACQUARIE CORPORATE TELECOMMUNICATIONS

**SUBMISSION IN RESPONSE TO IDA'S PUBLIC CONSULTATION: REQUEST BY
SINGAPORE TELECOMMUNICATIONS LIMITED FOR EXEMPTION FROM
DOMINANT LICENSEE OBLIGATIONS WITH RESPECT TO THE INTERNATIONAL
CAPACITY SERVICES MARKET PURSUANT TO SUBSECTION 2.6.1 OF THE CODE
OF PRACTICE FOR COMPETITION IN THE PROVISION OF
TELECOMMUNICATIONS SERVICES**

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SUBMISSION IN RESPONSE TO IDA'S PUBLIC CONSULTATION: REQUEST BY SINGAPORE TELECOMMUNICATIONS LIMITED FOR EXEMPTION FROM DOMINANT LICENSEE OBLIGATIONS WITH RESPECT TO THE INTERNATIONAL CAPACITY SERVICES MARKET PURSUANT TO SUBSECTION 2.6.1 OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES

EXECUTIVE SUMMARY

- The IDA's approach to determining SingTel dominance is critical to the success of the telecommunications regime and the ability of Singapore to meet its goal of becoming a competitive telecommunications hub.
- The IDA should therefore take a rigorous approach, not only in assessing non-dominance applications.
- Macquarie strongly submits that the IDA should reject SingTel's application for non-dominance in International Capacity Services (ICS) markets for a number of reasons, first and foremost because it does not comply with Code requirements for an exemption request and so is invalid.
- SingTel has failed to provide verifiable data showing it no longer meets the criteria for dominance. In particular it has not provided market share data, presumably on the basis that this would be damning to its application.
- To the extent that SingTel has purported to provide data, this is seriously flawed. For example, it misrepresents overseas precedent in Hong Kong. It also fails to point out key differences between Hong Kong and Singapore that make the conclusions of that precedent less relevant. Similarly it fails to point out how changes in market conditions should lead IDA to different conclusions.
- SingTel's application should also be rejected outright as it is inconsistent with the Code requirement to demonstrate why each dominance obligation is no longer necessary. IDA should see it as a particular concern that SingTel seeks permission to engage in conduct such as refusal to supply end users without justification.
- While we believe the SingTel application should be rejected outright, if the IDA does proceed to consider it, we urge IDA to be rigorous in its assessment.
- The IDA must take a fresh look at SingTel's dominance in ICS markets and in Singapore, rather than slavishly follow earlier analysis in relation to International Telephone Services or findings of competition in other jurisdictions, operating under fundamentally different conditions at another time.

EXECUTIVE SUMMARY (cont.)

- It should only include true ICS as part of the consultation process, that is, IPLCs. The true ICS product market does not include the other services in SingTel's application such as value-added data services. ATM, FR and IP VPN for example are not substitutable for IPLCs and were excluded from the ICS product market in Hong Kong. This is one instance where market conditions are the same.
- IDA should also find that the ICS market has a geographic definition of Singapore to other countries on a route by route basis, again with reference to substitutability. Customers of ICS these days are more demanding than a few years ago and are specific in their requests for quality of service and direct routing, rather than hubbing.
- Further IDA should find wholesale and retail levels to the market given different entry conditions, amongst other reasons. Within the wholesale market, it should include SingTel self-supply and move away from the use of the "addressable market" concept, which only serves to distort the picture of competition as it really is.
- Having correctly defined the markets, Macquarie submits that it is clear that SingTel dominates them. We do not provide data at this stage as the onus is on SingTel to do so and we are hopeful that the IDA will not move without this.
- However, should IDA proceed with the consultation, Macquarie believes that industry must have a further chance to respond to proper data provided by SingTel.
- Having said that, we are hopeful that IDA will not let SingTel get away with an incomplete exemption request a second time. SingTel is now aware of what is required (if it was not before) and IDA should enforce Code requirements on it to ensure fairness to competitors and end users.

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1. STATEMENT OF INTEREST

Macquarie Corporate Telecommunications Pte Ltd (**Macquarie**) provides this submission in response to the IDA's "Public Consultation: Request By Singapore Telecommunications Limited For Exemption From Dominant Licensee Obligations With Respect To The International Capacity Services Market Pursuant To Subsection 2.6.1 Of The Code Of Practice For Competition In The Provision Of Telecommunications Services" issued on 18 June 2003 (**IDA ICS Consultation**) and the attached application by SingTel (**SingTel Application**). Macquarie has a strong interest in the IDA ICS Consultation as the holder of an SBO (Individual) Licence (**SBO(I)**). Under this licence, we provide a wide range of international telecommunications services to corporate customers in Singapore.

In order to provide our services, we acquire International Capacity Services (**ICS**) from other operators and then use these as an input to our downstream products. By ICS, we mean true bandwidth services such as IPLCs, rather than the value added data services claimed to be ICS by SingTel. Macquarie therefore has a direct interest in the ICS Consultation as an acquirer in the wholesale market for ICS. We may also occasionally act as a supplier in the retail market for ICS by reselling IPLCs. However, at the retail level, Macquarie's principal concern with the ICS Consultation is more to do with the inclusion of non-ICS in the SingTel Application, particularly value-added data services. Macquarie directly competes with SingTel in the retail supply of services such as ATM, FR and IP VPN.

In addition, Macquarie has a broader interest in the IDA ITS Consultation since we would like to see IDA succeed in its goal of making Singapore a competitive telecommunications hub. Correct application of Code provisions based on sound analysis is key to this and any decision that sets important precedent for identification of SingTel's dominance must be taken seriously – by competitors, by SingTel and most importantly by the IDA.

In this context, we thank the IDA for the opportunity to comment as part of the IDA ICS Consultation. We trust that these comments will be given due regard and that the IDA will take a fresh look at SingTel's dominance in ICS markets and in Singapore, rather than slavishly follow earlier analysis in relation to International Telephone Services (**ITS Decision**)¹ or findings of competition in another time and place, such as OFTA's 2002 conclusion on REACH's non-dominance in Hong Kong External Bandwidth Service markets (**OFTA EBS Decision**).²

¹ "Explanatory Memorandum issued by Info-communications Development Authority of Singapore: Request by Singapore Telecommunications Ltd for Exemption from Dominant Licensee Obligations with respect to the International Telephone Services Market", 12 November 2003.

² "Application by Reach Limited for Declaration of on-dominance in the Market for External Bandwidth Services, Statement of the Telecommunications Authority", 15 March 2002. EBS are equivalent to ICS.

2. SINGTEL APPLICATION SHOULD BE REJECTED WITHOUT FURTHER CONSIDERATION

SingTel application is invalid under the Code for lack of verifiable data

Macquarie submits that IDA should reject the SingTel Application as it does not contain the verifiable data required by the Code Of Practice For Competition In The Provision Of Telecommunications Services (**Code**). The application is therefore invalid. The fact that this matter has even been allowed to go to consultation is in stark contrast to the detailed reviews of dominance conducted in other best practice jurisdictions such as Hong Kong and UK.

Aside from the lack of key data such as market shares, even where SingTel has provided information, in most instances it is not supported by facts about the Singapore ICS markets. Most of the claims in the SingTel Application are made in reliance on OFTA's EBS Decision and the facts as they existed in Hong Kong markets. Clearly, SingTel's obligation to provide verifiable data on competition in Singapore markets has not been met as no reasonable regulator could treat competition in overseas markets as ipso facto evidence of competition in Singapore. On this basis alone, the IDA should reject the SingTel Application outright and should warn SingTel that its disrespect of the Singapore regulatory regime will not be tolerated.

Not only has SingTel sought to rely on overseas analysis rather than Singapore facts to support its case, it has also misrepresented the overseas analysis. For example:

- SingTel claims OFTA included managed/switched services such as ATM, FR and IP VPN in the EBS market when it specifically excluded them;
- SingTel claims OFTA included backhaul in the EBS market when it simply assessed whether backhaul was competitive to determine whether it was a barrier to entry in the EBS market – it did not assess backhaul as being substitutable for ICS nor did it apply a cluster market analysis as SingTel has attempted to do.

As one would expect, SingTel has also failed to point out key differences between Hong Kong and Singapore, including:

- the international and domestic incumbents in Hong Kong are structurally separated whereas SingTel is vertically integrated;
- in Hong Kong, the international incumbent controlled a smaller proportion of cable landing stations and cables than SingTel does in Singapore;
- in Hong Kong, OFTA specifically found that the international incumbent had a low market share by any assessment, with figures cited of less than 25% whereas Macquarie believes it safe to assume that SingTel has well over the 50% share giving rise to the presumption of dominance.

SingTel also presents its case as if the market conditions for supply of ICS have remained static since the OFTA EBS Decision in 2002. In actual fact, given that it is now a buyer's market, demand conditions have changed with customers now being very specific in their demands for ICS. SingTel inadvertently provides support for this in the SingTel Application. In a number of instances, including para 5.59 it refers to the fact that customers are now very sophisticated and are very concerned with quality of service etc. to the point where they will issue tenders requiring capacity on certain routes and even certain cables. While SingTel uses this data for other purposes, it fails to point out that the data supports a change in analysis from the OFTA EBS Decision:

- If customers are demanding ICS on certain routes/cables, then it is more appropriate now to consider ICS markets using a route-by-route analysis.
- If customers are demanding greater quality of services, it is not appropriate to see hubbing as an effective constraint on the direct supply of ICS.

These are but a few of the many examples we could provide of how the limited analysis that SingTel has provided is flawed. Macquarie does not feel it should address the SingTel Application on a ‘blow-by-blow’ basis given that the application should be rejected outright. However, if the IDA determines to proceed with the IDA ITS Consultation, we urge it to closely review the OFTA EBS Decision and related material. The IDA should also discuss with industry to understand the distinctions between Hong Kong EBS markets and Singapore ICS markets, as well as how market conditions may have changed since the OFTA EBS Decision.

No explanation for why specific Code provisions unnecessary

SingTel has simply asserted it is not dominant and thus should not be subject to the various dominance obligations in the Code. It has not gone through each provision to show why it is unnecessary, in contrast to the requirement in s2.6.1 of the Code. For example, SingTel has not indicated why it wants to be allowed to offer end users unfair terms or predatory price and, more importantly, has not explained why such conduct is not damaging. We believe IDA should question SingTel further in this regard.

SingTel suggests that it is only seeking removal of ex ante dominance regulation. However, it has also sought exemption from dominance provisions in section 7 of the Code, which are Singapore’s only current form of ex post dominance protection. It would be unprecedented for a regulator to handcuff itself from using such provisions as a back up protection even if it were to remove ex ante protections of a more administrative nature such as tariff approval. It is incorrect for SingTel to assert that in other countries such as Australia dominance regulation no longer applies to ICS -this is untrue. The Australian competition regime still applies in relation to ICS and empowers the Regulator to take action to enforce the prohibition on anti-competitive conduct such as refusal to supply or predatory pricing conduct. The situation in the UK and EU is also similar. There are strong competition laws backing up sector specific regulation.

We note our view that this is the best regulatory model as industry codes and guidelines by themselves are relatively weak. However, we understand that review of this issue is beyond the scope of the IDA ITS Consultation and that for the moment the IDA must work within the existing Code framework. Nevertheless, in considering whether to wind back Code provisions it should bear in mind that the Singapore regime lacks some of the broader economy wide safeguards found in other jurisdictions. Given that the current draft of the Competition Bill specifically excludes telecommunications, IDA must be even more mindful of the importance of ex post competition safeguards in the Code to constrain SingTel as a last resort.

With regard to the above, Macquarie submits that the IDA should reject the SingTel Application as the failure of SingTel to explain why each dominance obligation should not apply:

- renders the SingTel Application non-compliant with s2.6.1 of the Code;
- should raise concern about why SingTel wants to be able to engage in conduct such as refusal of supply, predatory pricing etc. if not to harm end users and competitors.

The need for adequate explanation by SingTel is even more important given the absence of a general competition law to act as a backstop for the telecommunications industry.

2.2 SingTel's dominance justifies quick rejection of application

Presumption of dominance appropriate

At this nascent stage of telecommunications competition in Singapore, SingTel continues to dominate across all key markets, including ICS. Macquarie submits that SingTel's high level of dominance is unquestionable. Despite reducing since 2000, SingTel's control over all markets has not yet reached that 'grey area', which might warrant regulatory investigation of whether effective competition exists. SingTel has also failed to address the ability and incentive that it has to leverage its market power from one market to impact competition in another related downstream market.

Macquarie has not undertaken a detailed analysis of market share in the ICS and non-ICS markets included in the SingTel application but believes that this should not be necessary as the onus is on SingTel to provide evidence of this. However, we are sure that a cursory look by IDA at SingTel's position in all markets related to the IDA ICS Consultation will immediately reveal that SingTel has high market share.

Assessment of dominance based on proper economic theory is a complicated exercise, particularly where markets have matured to the point where the persistence of dominance is questionable. Proper competition analysis involves detailed examination of a wide range of factors such as barriers to entry, vertical integration etc, with quantitative factors such as market share and concentration being only one part of the equation. However, it has been widely recognised by regulators in developed jurisdictions such as Hong Kong, UK and the EU that, while a 'grey area' exists warranting a proper competition analysis, on either side there are areas where it is safe to either presume dominance or effective competition based on market share, without compelling evidence to the contrary. The typical market share over which dominance can be presumed is **50%**. We refer the IDA to our submission in relation to the ITS Decision, where we outline relevant precedent in this regard.

As a result, we strongly urge the IDA to reject the SingTel Application outright. SingTel's high market share justifies a presumption of dominance and it has provided no verifiable data that would counter this presumption. We do not believe that IDA should waste its own and industry resources in considering exemption requests such as the SingTel Application in this context.

3. ANY FURTHER CONSIDERATION SHOULD BE LIMITED TO PROPERLY DEFINED ICS MARKETS

IDA must be rigorous in its approach to market definition and require this of SingTel

Macquarie submits that even if the IDA does proceed to consider the SingTel Application, it must exclude most of the services identified by SingTel as these are outside of the ICS market. IDA should limit its reviews of exemption requests to services that are within the same market. In this case, the focus of the SingTel Application is on ICS and so only ICS markets should be considered. If SingTel wishes to request exemptions in other markets it should submit separate applications.

To consider requests across several markets risks distortion of competition analysis and makes the process too complex and onerous. In the extreme, it would allow SingTel to casually lump together services as diverse as local and international products in the same application, loosely argue a market definition and then say that IDA should still consider the application even if it finds many different markets. In fact, this is exactly what SingTel has done here. It is ridiculous for IDA and industry to have to respond to such loose requests as each market requires detailed

analysis. Reference to best practice overseas underscores that non-dominance applications should be considered on a market by market basis.

As well as being rigorous in restricting the IDA ICS Consultation to ICS markets, the IDA must be rigorous in its approach to defining those markets. Macquarie stresses three points which it expands on below:

- It must define products by reference to substitutability analysis leading to an ICS product market definition of international, point-to-point, dedicated cable capacity.
- The same analysis must lead to an ICS geographic market definition by country route.
- Differences in supply and demand conditions also point to wholesale and retail levels of this market.
- The wholesale level of the market includes SingTel's supply of ICS to its downstream retail operations, and thus assessment of its dominance in wholesale ICS markets must include this self-supply.

Product market must be limited to international, point-to-point, dedicated cable

Macquarie has already alluded to the fact that SingTel has wrongly defined ICS markets to include a number of non-ICS services that we provide such as ATM, FR and IP VPN. We also submit that other international services in the SingTel Application are not within the ICS markets, including satellite, broadcast and Internet related services. These services are not substitutes for what is commonly understood as ICS – IRU and IPLC bandwidth services. Similarly, the domestic backhaul service included in the SingTel Application is not substitutable for any international service and so cannot be within the ICS market. Macquarie therefore submits that if the IDA insists on proceeding with review of the SingTel Application, it should restrict its consideration of possible exemptions to ICS as specified by SingTel.

The only ICS listed by SingTel are IPLCs. Section 2.6.1 requires that exemption requests relate to specific services. This means that it would be wrong to exempt other ICS such as IRUs that SingTel has not specified, although it is relevant for IDA to consider SingTel's dominance of ICS markets with regards to its supply of IRUs. It would also be wrong for IDA to let SingTel get away with the loose references it has used to its list of services for exemption to the effect that it is an inclusive list and SingTel may slip in other services at will.

Macquarie does not believe the onus is with competitors to provide a detailed substitutability analysis: the onus under the Code is on SingTel. However, we do make limited comments in relation to our above statement that the ICS market does not include the services in the SingTel Application other than IPLCs. We believe it is most helpful to point IDA to the OFTA EBS Decision which found:

- Cable is not a substitute for satellite in relation to point-to-multipoint or broadcasting.³
- Broadcasting is in a separate market.
- Satellite is not a close substitute constraining cable even if cable might be a viable substitute for satellite point-to-point.⁴

³ Para 45 of the OFTA EBS Decision.

- ‘Switched’ or ‘on-demand’ services, including IDD, Internet and VPN services are not in the EBS market. OFTA specifically stated that services based on ATM or IP protocols belonged to this category.⁵
- Managed network services that provide what appears to customers as dedicated capacity would be close substitutes to IPLCs. However, OFTA did not specify any and said that IPLCs were the main product in the EBS market. Other lesser forms of managed network services were closer to ‘switched’ or ‘on demand’ services.⁶

In relation to the basic product market analysis, the above points from the OFTA EBS Decision can be used as a base for defining the markets in Singapore. There are no local conditions that change the basic assessment of substitutability of these services. However, Macquarie notes that there are local conditions which mean that IDA should apply the basic assessment in a different way from OFTA. In particular, while finding that satellite did not constrain cable, OFTA went on to include satellite in its decision because the cable market was so competitive that it did not matter.

Macquarie notes that backhaul was not specifically excluded from the EBS market by OFTA but nor was it specifically included. It was discussed simply as relevant to the EBS market. We submit that logic dictates that a domestic product is not substitutable for an international service. Domestic backhaul is also a wholesale product and not relevant to retail markets.

We urge IDA to reject SingTel’s analysis that backhaul is clustered with ICS. We are all too familiar with such cluster arguments being used by the incumbent in Australia. As is clear from the approach here and in the OFTA EBS Decision discussion of cluster markets and local connectivity, complementary products should only be clustered where the only practical option is to acquire them together. In Singapore, backhaul can be, and is, acquired by operators separately from ICS.

Geographic market is ICS out of Singapore by route

It is clear that capacity out of another country does not assist customers in Singapore that need capacity that connects Singapore. As a matter of substitutability, this means that the geographic market for ICS must be based in Singapore. Arguments about regional networks competing simply don’t make sense.

Further, capacity from Singapore to one country cannot be substituted by capacity from Singapore to another country such that markets must be defined on a route by route basis. Arguments about hubbing are limited as customers now demand greater service quality as outlined above. SingTel has itself pointed out that customers are putting out tenders requesting specific routes and even cables. This means that hubbing is not an effective constraint on direct routes and market definition should be route specific. As already commented, this change in customer demand means that IDA should deviate in this regard from the OFTA EBS Decision analysis.

IDA should also distinguish the Hong Kong approach as in Hong Kong, the EBS market was more competitive whereas the lack of competition in Singapore justifies a more conservative approach of checking competition on each route.

⁴ Para 48 of the OFTA EBS Decision.

⁵ Para 53 of the OFTA EBS Decision.

⁶ Para 56 of the OFTA EBS Decision.

Wholesale and retail functional markets

Macquarie believes that there are separate wholesale and retail functional levels to the ICS market given different supply and demand conditions. We provide just a couple of examples of different entry conditions. Entering the wholesale market at the facilities level is much more difficult than at the retail level, with higher sunk costs in buying or building cable and significant bottlenecks in terms of cable station access and connection as well as backhaul. Further, to operate properly at the wholesale level requires an FBO licence as an SBO(I) only allows resale of IPLCs.

Wholesale market includes SingTel self-supply

As was evident from the market share figures used in the IDA ITS Decision, and as we understand from our competitive carriers group, IDA defined ITS markets to exclude SingTel's supply from its wholesale to retail operations. Macquarie believes that this approach is fundamentally flawed and out of line with approaches to market definition elsewhere. We urge IDA to revisit this issue so that it gets an accurate picture of the state of competition in ICS markets.

From a market definition and substitutability perspective, clearly the ICS that SingTel supplies itself are substitutes for those it supplies to third parties. From a dominance and market share perspective, it is only by including SingTel self-supply that one can get a true picture of who supplies the most ICS in the market and has consequent advantages such as economies of scale.

4. SINGTEL DOMINANCE NEEDS TO BE DISPROVEN BY SINGTEL

Onus on SingTel

Macquarie has already made clear its view that the SingTel Application is invalid as SingTel has not provided verifiable data evidencing that it is not dominant. We can only assume that the poor quality of content it is request is due to the fact that it has no evidence of non-dominance because it remains in control of Singapore ICS markets.

If IDA is minded to think otherwise, it must still require SingTel to prove its case rather than rely on industry. Macquarie therefore resists the temptation at this stage to provide lengthy submissions on why SingTel is dominant, the high barriers to market entry, SingTel's advantages from vertical and horizontal integration, SingTel's conduct indicative of market abuse etc. We believe that this is unnecessary and a waste of industry resources when the SingTel Application is so flawed.

Need for further industry input on dominance if IDA ICS Consultation proceeds

Should SingTel provide proper information for us to comment on, Macquarie would do so. We trust that the IDA will ensure that industry has a right to respond to further SingTel material should the IDA ICS Consultation be continued. If SingTel is only required to provide information as part of a second round of consultations then a third round will be necessary so that industry will have its first chance to comment on verifiable data from SingTel. Alternatively, IDA could require SingTel to provide proper information prior to having a second round of consultations so that the second round allows an industry response to a substantive exemption request.

5. CONCLUSION

Macquarie strongly submits that, based on:

- the invalidity of the SingTel Application under s2.6.1 of the Code.
- SingTel's high market share across ICS and other relevant markets, however defined.
- lack of evidence provided by SingTel countering the compelling presumption from its market share.
- the clear damage to end users and competition that will result from SingTel's request to be allowed to act anti-competitively,

IDA should reject the SingTel Application without the need for further investigation of ICS markets or other non-ICS services that SingTel has sought to include.

As we do not believe the SingTel Application has any merit, and because the onus is on SingTel to prove non-dominance, we have not provided a full competition analysis in this submission. Nevertheless, we trust that the IDA will have due regard to our submission and we are willing to clarify any aspect of it or discuss competition in ICS markets more broadly with IDA as part of the IDA ICS Consultation.

If the IDA does proceed to consider the SingTel Application, Macquarie would ask that industry be given the opportunity to make further submissions. If Macquarie has a clearer picture of how the IDA intends to approach this matter and if SingTel has provided the verifiable data required by the Code, we would then wish to be able to provide a proper counter-analysis to the SingTel Application.