

MEMORANDUM: COMMENT ON SINGTEL EXEMPTION REQUEST

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1. Introduction

This memorandum was prepared in response to the Info-Communications Development Authority's ("IDA") invitation to comment on SingTel's request for exemption pursuant to section 2.6.1 of the Telecommunications Act (Code of Practice for competition in the provision of telecommunications services) ("the Code") in relation to the market for international telephone services market.

The comments below reflect the personal opinion of the author and contain general observations relating to the assertions made by SingTel in support of its exemption request. References are made to the paragraph numbers used in the document submitted by SingTel that was uploaded on the IDA's website for public comment.

The purpose of this memorandum is to address some of the competition issues which the IDA may wish to consider more closely when evaluating the strength of SingTel's submissions in its exemption request.

2. The basic justification for the exemption

The basic argument forwarded in support of SingTel's request to be exempted from duties imposed on it by ten sections of the Code is that these statutory obligations are not necessary to promote competition in the market for international telephone services ("ITS"). By asserting that "competition is well-entrenched"¹ in the liberalised market for ITS, SingTel suggests that there is no further need to regulate this market through the continued application of these statutory provisions.

However, it must be noted that the fact that there is active competition in the market for ITS does not necessarily point to the conclusion that regulatory intervention (through the operation of the Code) is no longer required. On the contrary, it is very likely that such competitive behaviour is the *result* of, or is *facilitated* by, the presence of these statutory obligations within the regulatory framework. The sections of the Code which impose basic duties on the Dominant Licensee set out certain competitive "ground rules" which enable smaller competitors to effectively plan and execute their respective competitive strategies.

¹ Paragraph 1.6.

2.1 Potential anti-competitive conduct

Without these statutory duties, the Dominant Licensee may, depending on its degree of dominance, engage in various forms of anti-competitive conduct to which its rivals may not be able to effectively respond. For example, if the Dominant Licensee were relieved of its duty to provide unbundled telecommunication services², it would be able to engage in bundling practices that may amount to exclusionary anti-competitive conduct. Customers may be compelled to accept an entire package of services if the Dominant Licensee were to leverage, for example, on the market power it possesses in respect of certain basic telephony services, especially if the Dominant Licensee were also relieved of the obligation to provide individual unbundled services to an End User upon reasonable request³.

The freedom to engage in such bundling activity would enable the Dominant Licensee to compete in a manner which prevents its smaller rivals from competing effectively in response. If IDD services were bundled with international calling card and other international telephony services, then smaller rivals who do not offer the same range of ITS may find their customers “tied up” in the packages offered by the Dominant Licensee.

If the Dominant Licensee were relieved of its responsibility to provide services at just and reasonable prices, terms and conditions⁴, it would be in a position to enter into exclusive dealing arrangements with its distributors, thereby foreclosing its competitors from these distribution channels. The Dominant Licensee would, for example, be able to insist that those who distribute its prepaid calling cards agree not to carry similar products offered by its rivals. It would then be able to refuse to deal with distributors who do not commit themselves to such exclusive supply agreements.

2.2 Dominant status in the market for ITS

Despite the evidence of rigorous competition which it points to, SingTel does not deny the fact that it continues to occupy a position of dominance within the market for ITS. As a general rule, the fact that there is a single dominant firm in any market already suggests that the market is sub-competitive in some way.

While the dominance of a single firm is not objectionable per se, the possibility of such dominance being abused should remain high on the competition regulator’s watch-list. Jurisdictions with mature competition laws recognise that the dominant firm possesses a “special responsibility” to ensure that the maintenance and development of the level of competition in the market is not hindered by its actions⁵. Section 3.3 of the Code reflects this impulse and codifies key examples of conduct by a Dominant Licensee that may

² Section 3.3.5 of the Code.

³ Section 3.3.1 of the Code.

⁴ Section 3.3.2 of the Code.

⁵ See, for example, the European approach in *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461, [1985] 1 CMLR 282, para 57 and 91.

impede competition in the market. To grant the blanket exemption from these statutory duties that SingTel is seeking, while acknowledging that it remains a dominant firm in the market for ITS, appears to be inconsistent with basic principles of competition regulation. It seems more sensible to grant exemptions from the special duties imposed by statute on the Dominant Licensee on a case-by-case, and provision-by-provision, basis.

3. Market Definition

The exemption request appears to cover two different markets which seem to have been conflated in the market definition exercise⁶. There is, on the one hand, the retail market for ITS which one would assume is confined to the domestic market, though the exemption request makes ambiguous statements that suggest a wider geographical market⁷. On the other hand, there is the wholesale market for ITS and hubbing services that appears to be regional in character.

It is submitted that if SingTel seeks blanket exemptions from the entire range of special duties it is obligated to bear as the Dominant Licensee under the Code, then it has to be more precise in identifying the boundaries of the market it is referring to. No attempt to assess SingTel's market power can be carried out by the IDA until these market boundaries have been more clearly delineated. The conspicuous absence of any figures relating to the market shares of SingTel and its rivals in respect of any of the international telephony services makes it impossible to evaluate the degree of dominance SingTel has over the market. This, in turn, makes it impossible to assess whether the exemptions sought by SingTel are justifiable or not.

3.1 Product Substitutability

SingTel's decision to merge all its various international telephony services into a single product market was made purely as a matter of convenience. It should be noted that the list of 18 services identified as comprising the ITS market can be subdivided into more logical product categories. For example, it would have been more sensible to construct a market for "retail international telephony services paid for by the calling party in Singapore": this would include IDD and all its direct substitutes – prepaid calling cards, VOIP and the like. Call-back services for calls originating from foreign countries, fax services, overseas collect calls made from abroad cannot be considered as proper substitutes for IDD services. These services are utilised in circumstances in completely different from instances when someone in Singapore needs to make a call to a foreign location. Likewise, the wholesale voice services listed are not product substitutes for consumers in the retail market.

⁶ Paragraphs 4.14 to 4.25.

⁷ See paragraph 4.25: "Retail and wholesale functional levels may also exist in the product dimension of the ITS market, where there are many product offerings from competing providers both in Singapore and outside Singapore. The geographic market with respect to retail is that of all international calls made to and from Singapore." These statements may be interpreted to mean a market definition that extends beyond the domestic market. The ambiguity is compounded by the fact that SingTel does not actually identify which specific competitors comprise the retail market for ITS and whether they are all domestically based.

It is submitted that a more rational approach would be to divide the product markets according to the profiles of the various groups of consumers that require ITS. The retail market may, for example, comprise two distinct sub-markets – residential users and business users – who may have very different ideas about what telephony services may serve as substitutes for conventional methods of communicating with an overseas party.

4. Market Assessment

SingTel's exemption request is predicated primarily on the assertion that the ITS market is presently sufficiently competitive to warrant IDA relieving it from the Dominant Licensee obligations under the code. This assertion that the ITS market is "vigorously competitive"⁸ is supported by evidence of the "competitive nature of the international direct dial (IDD) market"⁹.

The reasoning employed appears flawed in at least two ways. Firstly, it assumes that competition among providers of IDD services is representative of the rest of the market for ITS. It is doubtful, as mentioned above, whether IDD services belong in the same product market as other ITS services which do not involve a means of communicating with an overseas party from Singapore that is paid for by the caller in Singapore.

Secondly, and more importantly, this line of reasoning equates the competitive behaviour of firms with the competitive nature of a market. The former may well be the result of having effective competition regulation that operates in a market that is otherwise uncompetitive in nature. While SingTel does examine the structural features of the market in paragraphs 5.5 to 5.20 of the exemption request, its repetitive reliance on the behaviour of firms in the market for IDD services, to justify its conclusion that the ITS market is already competitive, should be more closely scrutinised.

4.1 Barriers to Entry

While SingTel points to the absence of ownership restrictions and transparent licensing framework as indicators of low entry barriers which contribute to a competitive market structure, the ease with which a new competitor may enter the market may actually be impeded by the nature of the telephony services in question. Some of the services on SingTel's list of ITS may face greater entry barriers than others. New IDD services may, for example, be feasible only if the firm already offers fixed line services. Consumers may also be barred from accessing the IDD services of a firm with whom they do not have a pre-existing relationship in the fixed or mobile telephony services market. The financial investments that need to be made may thus vary greatly between a firm which wishes to provide a new IDD service, as compared to someone who wishes to launch a new prepaid calling card service.

⁸ Paragraphs 5.1 and 5.4.

⁹ Paragraphs 5.2 and 5.3.

Secondly, when assessing the claim that entry barriers are low enough to indicate a market structure where potential competition serves as a check on the conduct of the Dominant Licensee, it is just as important to consider the *likelihood* of new entry quite apart from the *ease* of entry by such potential competitors. One important factor which IDA may wish to consider here is the reputation which SingTel has developed since the liberalisation of the telecommunications market. Firms which have acquired an aggressive reputation for taking “tough” stances when dealing with their competition are likely to erect invisible entry barriers to would-be competitors. Potential competitors would be less likely to enter a market that is occupied by a dominant firm that possesses such a reputation.

4.2 Number of Competitors

The large number of competitors which SingTel refers to in its exemption request¹⁰ may be misleading given the nature of the products it amalgamates together in the relevant product market. As mentioned above, these competitors may very well compete in discrete sub-markets of substitutable services or niche markets for particular international telephony services. The total number of competitors may simply reflect the many competitive fronts at which SingTel has to defend itself given the extensive range of services in its portfolio. All that these firms have in common may be the fact that they compete with SingTel in some way. They may not necessarily compete with each other and hence belong in separate product markets. Some firms may very well cater to very specific groups of customers¹¹.

It is submitted that only those competitors which compete directly with each other for the same consumers should be taken into account in the market definition exercise and in the assessment of the competitive structure of the market.

4.3 Growth in ITS Traffic / ITS Price Declines

Similarly the growth in ITS Traffic pointed to in the exemption request¹² need not necessarily indicate that there is effective competition in the ITS market. It may be the result of demand growth or a rise in volume as a result of price competition among firms. Even if the growth in ITS Traffic is attributable to intense competition in the market, it is important to distinguish competitive pricing behaviour from a market that is competitive in nature. As suggested earlier, it is quite possible that competitive pricing behaviour may have been *facilitated* by competition regulation (such as the Code which imposes special duties on Dominant Licensees) in an otherwise sub-competitive market presided over by a dominant firm.

¹⁰ Paragraphs 5.15 to 5.18.

¹¹ Prepaid calling cards may cater, for example, specifically to foreign workers or students from particular jurisdictions. Providers of such services would not necessarily compete with those who provide high-resolution teleconferencing services to the corporate sector.

¹² Paragraphs 5.21 to 5.23.

Finally, SingTel's reliance on evidence of substantial ITS price declines to validate its assertion that end users will not be adversely affected, because "customers will only be offered the current or lower price for ITS"¹³, downplays the magnitude of the exemptions it is seeking. The blanket exemption sought by SingTel, if granted, will enable it to engage in non-price related commercial behaviour (e.g. bundling) that may potentially result in anti-competitive outcomes (e.g. foreclosure of smaller rivals) to the detriment of consumers in the long run.

5. Conclusion

In the absence of local competition law jurisprudence that defines the boundaries of permissible conduct that a dominant firm must stay within, the Telecommunications Competition Code (S412/2000) plays a crucial role in articulating the standards in conduct expected of a Dominant Licensee in Sections 3.3.1-3.3.5, 5.8.1-5.8.3 and 7.2.1-7.2.2. These special duties lay the ground rules on which all the Dominant Licensee's rivals rely upon in planning and executing their competition strategies. They thus form an integral part of the competition landscape in the telecommunications market and should not be obliterated through a grant of a blanket exemption. It is submitted that Section 2.6.1 of the Code should be exercised on a case-by-case and provision-by-provision basis, requiring the Dominant Licensee to explain and justify each instance of behaviour that is inconsistent with its special duties under the Code before the IDA grants a limited exemption from the relevant statutory provisions.

If the firm wishes to relieve itself of all these special duties under the Code, it should have to first succeed in reclassifying its licensee status to that of non-dominance¹⁴. For so long as it remains a Dominant Licensee, it must continue to accept the responsibilities and obligations that come with the position of dominance. Only then can the competitiveness of the telecommunications sector be nurtured, strengthened and sustained.

¹³ Paragraph 5.27.

¹⁴ Section 2.5.1.2 of the Code.