RESPONSE TO THE IDA'S CONSULTATION ON ITS FIRST TRIENNIAL REVIEW ON

THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES

Submission Date: 5 December 2003

OVERVIEW

The present Telecom Competition Code ("Code") came into effect on 29 September 2000. In the absence of a general competition law regime in Singapore, the present Code has been the sole legal framework aimed at setting the competition framework governing the provision of telecommunication services in Singapore following full liberalisation of the sector on 1 April 2000.

British Telecommunications plc ("BT") has a presence in Singapore, operating via its wholly owned subsidiary BT Singapore Pte Ltd. BT also has an 11.8% investment holding in StarHub-SCV.

As Singapore is one of BT's four key markets in the Asia Pacific region, BT thanks the IDA for the opportunity to respond to the IDA's consultation on its first triennial review of the Code issued on 7 Oct 2003. BT's comments are respectfully submitted.

BT's response to the IDA's consultation on the Telecom Competition Code review is premised on the need to create a competitive telecommunications industry in Singapore in encouraging the promotion of investments and offering benefits to consumers. To the extent that market forces are not able to achieve a competitive regime, regulatory intervention and the application of appropriate remedies would be necessary to replicate the existence of a competitive market.

EXECUTIVE SUMMARY

Investment in the telecommunications sector is capital and resource intensive. Certainty in the business climate and a level playing field in which effective and healthy competition can exist are critical to an investor. To achieve this, BT recommends that transparency obligations need to be strengthened via rigorous accounting separation by dominant licensees, the publication of filed tariffs including full terms and conditions. There is also a need for the conduct of market reviews to assess the extent of competition in markets, and proportionate regulation applied to rectify any market failure.

Competition Code vs. Competition Law

By international standards, sectoral regulation via the present Code is a relatively weak piece of legislation as it lacks the support of a legal framework to adequately address and rectify anti-competitive behaviour and the abuse of dominant position. BT welcomes and supports the Singapore Government's move to enact a General Competition Law in 2005 that would be applied across all sectors of businesses in Singapore and the establishment of an independent competition authority. Once markets are sufficiently mature, competition law should be the main protection against abuses of market power, however regulation will remain relevant in cases where ongoing oversight is required, e.g. accounting separation, price control, or monitoring of non-discrimination obligations. Even then, competition law would not remove the need for all regulation.

Elsewhere, competition law will suffice and should be applied in uniform fashion across all sectors of the economy. However, it is clear that certain sections of the telecoms market in

Singapore are not yet sufficiently mature and thus some form of on-going ex-ante regulation is critical.

Assessment of Competition – Market Reviews

BT would urge the IDA to conduct detailed market reviews to assess the competitiveness of Singapore's telecommunications market. This will enable the IDA to pinpoint market failure and address the bottlenecks with relevant and effective regulation.

Enforcement Issues – Guidelines

While the Code embodies internationally adopted regulatory concepts such as Significant Market Power (SMP), price squeeze, predatory pricing etc, implementation details are lacking, giving rise to potential enforcement issues. Legally binding guidelines are needed to supplement the Code and lend credibility to businesses that the Code provisions can be enforced. Specifically, guidelines should be established on: -

- Criteria for the assessment of Significant Market Power, including the market definition process
- Tests on anti-competitive behaviour (cross subsidisation, predatory pricing, price squeeze)
- Methodology on costing approaches adopted (retail minus, cost based, LRIC, LRAIC)
- Methodology on accounting separation

As these issues have been addressed by regulators around the world, international best practice can be rapidly assimilated into Singapore.

Accounting Separation

Accounting Separation is a critical regulatory tool in policing anti-competitive behaviour such as non-discrimination and pricing abuses. Notwithstanding that certain licensees are subject to accounting separation as a licence condition and that there are Accounting Separation Guidelines (ASG) for the preparation of accounting separation statements, accounting separation should nevertheless be folded into Section 4 as a duty of dominant licensees so that any cases of non-compliance by dominant licensees may be subject to enforcement proceedings under Chapter 11 of the Code.

The existing policy subjecting non-dominant licensees to accounting separation is a regulatory oversight as it places an enormous administrative burden (in terms of resources that need to be allocated and cost of establishing systems to produce the accounting separation statements) on licensees who do not possess market power to engage in anti-competitive behaviour. Accounting separation for non-dominant licensees should therefore be abolished. Applied in a market with a population size of 4-5 million where margins are already thin will hamper further investment and stifle competition. Moreover, the imposition of accounting separation requirements on non-dominant licensees does not result in direct benefits to consumers (in terms of lowering prices, creating more choices and offering better services) and hence, should be abolished for non-dominant licensees.

Transparency Obligations – Publication and Public Consultation

The publication of tariffs by a dominant licensee is a positive achievement towards enhancing transparency obligations. However, overall, there is still scope to further enhance transparency obligations under the Code, which should also be extended to national regulatory authorities in the exercise of powers and decision making. To achieve this, it is recommended that: -

- Dominant licensees be required to file and publish tariffs (including discount structures), full terms and conditions on all those services (retail, resale, wholesale, interconnection services) where it is deemed to possess SMP
- The proposed tariffs, full terms and conditions should be subject to a public consultation
- The IDA publish its decision on the website

The enforcement of transparency obligations outlined above would significantly minimise the potential for dominant licensees to discriminate, delay the provision of service and engage in anti-competitive behaviour (such as near refusal to supply, e.g. delays or discrimination in provisioning)

CHAPTER 1 – INTRODUCTION

Chapter 1 sets the framework for the Code by outlining the approach and regulatory principles that will be adopted.

1.5.1 Reliance on Market Forces

BT Recommends:

- ***There are certain sectors in Singapore's telecommunications market that are not yet competitive, e.g. local leased circuits. Market forces would not achieve competitive outcomes in such markets – regulatory intervention is needed***

The first regulatory principle outlined by the IDA is the reliance on market forces. "Market forces are generally far more effective than regulation in promoting consumer welfare", states the Code at Section 1.5.1 and continues that where markets are competitive, IDA will place primary reliance on private negotiations and industry self-regulation. This is sound economic reasoning. However, there are many parts of the Singapore telecommunications market which are not sufficiently competitive to be able to rely on market forces alone. A comparison with how the European Union has dealt with liberalisation and regulation is pertinent here. Early on in the European liberalisation process, the trigger for establishing Significant Market Power (SMP) and thus regulatory safeguards was 25%. Now that these markets are maturing and competition has become more developed, the trigger has been raised to dominance, with a presumption of market power at 40%.

Singapore can be proud of its liberalisation achievements in the telecommunications market – starting with the mobile and paging markets in April 1997. The result is that mobile penetration in Singapore at 81.9% exceeds fixed line at 45.7% (as at October 2003). In addition, Singapore has surpassed its telecommunication liberalisation commitments to the WTO in having brought forward the liberalisation timetable 7 years to open the sector in April 2000. These efforts are commendable.

As regards network competition in Singapore, licensees are still dependent on the incumbent for network elements necessary to deliver a retail product – this is particularly true for the critical access services such as local leased circuits. SingTel's Financial Results for the Quarter ended 30 September 2003 reveal that local leased circuits account for the largest component contributing 46% of total data revenues in the quarter compared to 40% a year ago[1]. These figures demonstrate the importance of local leased circuits to new entrants and the development of competition. Notwithstanding the availability of other suppliers such as MCI, StarHub, these do not yet offer a comparable service to the incumbent in all geographic areas. Regarding the provision of local leased circuits, the IDA cannot rely on market forces to achieve a competitive outcome in the short term and regulatory intervention is necessary.

In determining the level of regulation appropriate to stimulate competition where market forces fail, the first step would be for the IDA to conduct a review of the markets identified. Moreover, even where markets or sub-markets are deemed competitive, it is important of make further

[1] p.21 Singapore Telecommunications Limited and Subsidiary Companies "Management Discussion and Analysis of Unaudited Financial Condition and Results of Operation for the 2nd quarter and half year ended 30 September 2003".

analysis of the level and extent of competition. The analysis should be sufficiently detailed and strong protections should be in place to identify spill over effects of market power from dominant areas to non-dominant areas before placing reliance on market forces to ensure consumer-favourable market outcomes. There will also be areas where specific objectives that may only be achieved by regulatory intervention.

Market share tests are used as first principles in competition law to assess the competitiveness of a market. Based on market share data published in Singapore Telecommunications Annual Report 2001/2002, BT would submit that many sectors in Singapore's telecommunications cannot yet claim to be competitive based on European Commission market share thresholds. Indeed, European competition law thresholds would deem SingTel to have SMP in the markets identified below and thus, would be imposed with a range of regulatory obligations. The IDA may wish to refer to the European Commission's 9th implementation report[2] for comparison with Europe on this topic.

SingTel Service	*Market Share*
International	87%[3]
Broadband	60%
Mobile	50%

Even where certain markets are deemed competitive, protections need to be put in place to ensure no spill over from non-competitive into competitive markets, e.g. through margin squeeze activities or price discrimination. Even in markets which are some years ahead of Singapore in dealing with liberalisation, regulation is still in place in many areas, particularly monopoly wholesale access. On-going regulation continues to be critical in nurturing competition and providing investment incentives.

Unless markets are truly competitive, there would be a need to retain some regulatory oversight. Up until the late 1990's, the New Zealand government chose to rely on market forces to deliver efficient and competitive outcomes in the telecommunications market. The results were disastrous – new entrants were unable to negotiate commercial agreements with the incumbent and there was no effective regulation in place to provide a solution. Parties had to rely on competition law which led to protracted legal suits. Critically, the information required by new entrants to take such competition actions was simply not available. The incumbent was in a position to keep competition at bay until the introduction of the Telecommunications Act in 2001.

[2] The European Commission's 9th Implementation Report can be found at: http://europa.eu.int/information_society/topics/ecomm/all_about/implementation_enforcement/annualreports/9threport/index_en.htm

[3] SingTel Groups' results for the second quarter and half year ended 30 September 2003 updates – "SingTe's share of the international telephone market is 77%, a significant achievement given that the market has been fully liberalised for more than three years." News Release from http://home.singtel.com/news_centre/news_releases /2003_11_06.asp

1.5.4 Proportionate Regulation

BT Recommends:

- ***BT endorses the application of proportionate regulation. In selecting remedies, the IDA must ensure that the remedies are appropriate to the individual issues raised in the circumstances of the specific market in each case. This determination should be preceded by the conduct of rigorous market reviews to assess the state of competition in each of the markets identified***

BT supports the application of proportionate ex-ante regulation in Section 1.5.4 to markets which are not yet competitive. However, as stated above, it is necessary to define what is meant by 'competitive' and set out the processes by which a market will be classified as dominant or non-dominant. The European Union is presently undertaking such a review of its telecommunications markets and the national regulatory authorities, undertaking the review at a national level, are suggesting appropriate regulatory measures where markets are not yet truly competitive. BT would suggest that the IDA carries out a similar review of markets in order to determine the level of competitiveness of Singapore telecommunications markets and the measures necessary to address imbalances.

The present European review process provides a useful start point for the definition of 'competitive'. Once a market is defined using competition law principles, an analysis is made to determine whether any operator in that market has Significant Market Power, SMP, (defined as the ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers). Again, according to competition law principles, there is a presumption of SMP if any firm has a market share of 40% or more. Of course other factors are taken into account in making the final determination (such as degree of market concentration, barriers to entry etc) but this presumption proves an extremely useful starting point. BT would request the IDA to issue guidelines on how 'competitive' will be assessed and to consider a presumption of dominance based on market share.

Finally, effective regulation plays another key factor in the development of less mature markets by encouraging investment in telecommunications. This view is supported by a report[4] by Jones Day Reavis & Pogue.

Excerpts of the Jones Day Reavis & Pogue Report are reproduced in the Annex 1.

Among several fundamental objectives, the Jones Day Reavis & Pogue study examined the extent to which the new EU regulatory regime in selected European countries encouraged investment in telecommunications infrastructure. The effectiveness of regulatory regimes was scored against investment per capita over the period 1997 – 1999. The graph shows a correlation coefficient of 0.76, indicating that greater regulatory effectiveness is more likely to attract investment than the other way around. This indicates a real benefit therefore of effective regulation: greater investment in telecommunications.

The lack of a level playing field backed by sound decision making and enforcement procedures will deter both internal and external investment.

[4] "Report on the relative effectiveness of the regulatory frameworks for telecommunications in Belgium, France, Germany, Italy, Ireland, the Netherlands, Spain, Sweden and the United Kingdom" published on 5 Sep 2002

1.6.3 Right to Modify

BT Recommends:

- ***Transparency obligations would prescribe that any proposed modifications to the Code must be accompanied with an obligation to notify affected licensees and an opportunity for licensees and the public to comment***
- ***In addition, licensees should also be given a right to appeal any proposed modification to the Code which could pose a material detriment to a licensees' business in Singapore***

Section 1.6.3 states that the IDA may exercise its sole discretion to modify the Code at any time. As the Code practically sets out the framework for competition in the telecommunications industry in Singapore, any modification to the Code would have a direct and consequential impact on the market structure. BT is concerned that the IDA would independently modify the Code without first consulting with the public and industry as is the existing practice for any proposed material changes. Such a move would also raise concerns of lack of transparency in the regulatory regime in Singapore and create uncertainty in the telecommunication investment climate.

BT submits that the right for IDA to modify the Code unilaterally and independently severely compromises the integrity and transparency of the Code and negatively impacts investor confidence. As such, BT takes the view that any proposed modifications to the Code by IDA must be subject to an obligation to notify Licensees of any such modifications and an opportunity for licensees to comment on the proposed changes. Additionally, licensees should be given a right to appeal against any modifications to the Code that could materially impact on their initial investment, business plans and existing operations in Singapore.

For example, the announcement to bring forward full competition in the telecommunications sector from 1 April 2002 to 1 April 2000 barely a month preceding StarHub's launch caused disruption to StarHub's plans as the effect of competition materially changed the dynamics of the operating environment and the viability of StarHub's initial business case. Investment in the ICT sector involves large fixed cost for development and/or network build and would require the need for certainty of return.

CHAPTER 2 – CLASSIFICATION OF LICENSEES

2.2 Initial Classification of Licensees

BT Recommends:

- ***IDA outlines the process by which classifications will be made***
- ***IDA provide detailed guidelines on the assessment of SMP and market definition***

Section 2.2 of the Code defines the classification of licensees, who will be classified either as dominant or non-dominant. BT would like to make several comments about the initial classification process and the definitions relating to dominant licensees.

As regards the initial classification, the Code states that the IDA will classify a licensee either as dominant or non-dominant but does not outline the process by which this decision will be made. BT would suggest that it is absolutely necessary for the IDA to provide an outline of the process

that the IDA will use in making this classification. Certain factors that will be taken into account are set out further in Section 2, but for the sake of business certainty, the process by which IDA will make its decision should be clear and transparent to all licensees. For example, as stated above, in assessing whether an operator has the ability to exercise Significant Market Power will the IDA undertake a full market definition and market analysis?

Moreover, the factors listed in Sections 2.6.1 and 2.6.2 are to be considered by parties seeking to demonstrate whether or not a licensee meets the dominant licensee criteria and by dominant licensees seeking an exemption. BT would request the IDA to confirm whether the IDA shall take into account the same factors in making its initial decision.

Finally, according to Section 2.2(b), the classification will be applied on a 'licensed entity" basis. For the reasons set out further below, this blanket classification may stifle competition and innovation.

2.2.1 Dominant Licensees

According to Section 2.2.1 of the Code, a licensee will be classified as dominant if:

(a) it is licensed to operate facilities used for the provision of telecommunication services in Singapore that are sufficiently costly or difficult to replicate that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient operator; or

(b) it has the ability to exercise Significant Market Power in the provision of telecommunication services in Singapore.

Taking the first definition at (a), the wording suggests that this definition will be based in regulatory jurisprudence rather than on competition law principles. BT would also enquire how widely the IDA will interpret the definition of (a) above. According to Section 2.6.1, the definition does not require market definition and analysis of that market. Rather, it focuses on an analysis of the "facilities" in question. This may lead to a situation where an operator of a niche facility is deemed to be a dominant licensee (applicable to all the services that licensee offers) even though the licensee may have an insignificant position in the provision of downstream services. BT is concerned that the threat of such an outcome might hinder innovation or development in the Singapore market.

As such, BT would request that the IDA issue guidelines to provide further explanation of the factors set out at Section 2.6.1. (See European Commission guidelines on market power assessment for electronic communications, Brussels 9 July 2002[5]) This is particularly relevant because of the lack of application of standard competition law principles.

The other way in which a licensee may be found to be dominant is set out at Section 2.2.1(b) – the ability to exercise SMP.

SMP is defined as "the ability to unilaterally restrict output, raise prices, reduce quality or otherwise act, to a significant extent, independently of competitive market forces." This is a

[5] http://europa.eu.int/comm/competition/liberalization/others/i02_1016_en.pdf

similar definition to the one recently adopted by the European Union in Directive 2002/21/EC on a common regulatory framework for electronic communications and services (Framework Directive). Article 14.2 of the Framework Directive states that "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".

As explained above, the Framework Directive has led to a major review by national regulatory authorities in Europe of national telecommunications markets, defining the relevant markets and identifying operators with SMP. In order to ensure consistency of responses EU wide, and to aid the analyses undertaken, the Commission issued guidelines "on market analysis and the assessment of significant market power…" (European Commission Guidelines) The guidelines state that "markets will be defined and SMP will be assessed using the same methodologies as under competitive law". The Code sets out the methodology for assessing SMP at Section 2.6.2. BT would inquire whether this assessment will also be made under competitive law methodology and whether the IDA intends to conduct a similar review of the Singapore telecommunications market?

2.6.2 Ability of Licensee to Exercise Significant Market Power

As regards the factors noted in Section 2.6.2, BT would make the following comments. If the IDA is to follow competition law principles, it will presumably advocate that the market is defined according to demand and supply-side substitution, as well as geographic market factors etc. BT would urge the IDA to issue further guidelines to licensees on assessing market definition of Singapore telecommunication markets.

In assessing SMP, BT also believes that it would be useful if the IDA issued further guidelines on how the assessment will be made. For example, Section 2.6.2(c) refers to the licensee's market share, as one of the factors that will be taken into account. It would be helpful if the IDA could give some indication of the market share level which would lead to a presumption of SMP. (In the European Commission Guidelines, a market share of no more than 25% leads to a presumption of non-dominance, whilst a market share of over 40% will usually lead to a presumption of dominance).

The Commission Guidelines list a number of other factors which also need to be assessed, some of which the IDA may wish to include in its list of factors in Section 2.6.2. For example, it is important to assess the level of vertical integration and any transparency mechanisms or lack thereof and control of monopoly access infrastructure.

Another concept which the IDA may wish to consider is the concept of collective dominance i.e. where the SMP is held by two or more economic entities which are legally and economically independent of each other. This concept is further examined in our comments on Section 8.

Section 2.6.2 states that the analysis of whether a licensee has the ability to exercise SMP is carried out either by a party seeking to demonstrate whether or not a licensee has SMP or a dominant license seeking an exemption. In BT's experience, it is very difficult for a new entrant or small operator to make such an analysis as most of the necessary market information may not be publicly available. Indeed, it is usually the incumbent that holds the most salient market

information and, absent specific regulation, it is often up to the incumbent whether or not it chooses to share this information. BT would therefore suggest that the IDA actively involves itself in the market definition and analysis of SMP process and assists with collation of relevant information, particularly where publicly available market information is not readily available. (This also applies to complaints made under Chapter 8 of the Code). In this regard, IDA should exercise its investigatory powers under the Telecoms Act[6] and IDA Act[7] in obtaining the required information to conduct its market reviews. [Cross reference to Section 11]

Finally, according to the Code, once a licensee is classified as having the ability to exercise SMP in a market, that classification applies on a "licensed entity" basis i.e. the licensee will be classified as dominant for all facilities it operates and for all services it supplies, unless it applies for an exemption. As the licensee will have been found to have SMP in a particular market, it seems incongruous to seek to extend that finding to other markets (services) automatically and without undertaking the necessary market analysis to decide whether the dominant licensee is extending its dominance into other markets. Again, this may be unduly restrictive, especially as regards niche operators and may stifle the promotion of competition and innovation.

CHAPTER 3 – DUTY OF LICENSEES TO END-USERS

3.2.1 Duty to Comply with IDA's Quality of Service Standards

Section 3.2.1 states that licensees are required to comply with the IDA's Quality of Service (QoS) standards. This provision is practical to the extent that the licensee operates infrastructure to provide telecommunication services. In reality, there are many licensees (including Facilities Based Operators) who purchase network elements from another licensee as an input to the provision of their telecommunication services or for resale to end-users. In these circumstances, the licensee purchasing service would only be able to comply with the IDA's QoS to the extent that the supplying licensee has complied.

In such circumstances, it should be sufficient for the purchasing licensee to indicate the source of service supply. BT requests this be reflected in Section 3.2.1.

3.2.3 Prohibition on Disproportionate Early Termination Charges

Section 3.2.3 states that where an end user terminates service prior to the agreed termination date, the amount of any termination liability must be reasonably proportionate to the extent of any discount or special consideration that the licensee has provided and the duration of the period during which the licensee took service.

[6] Telecoms Act, Part VIII Section 59 Enforcement Powers and Procedures; Power to require information – The Authority or any officer authorised by the Authority in that behalf may, for the purpose of discharging its functions under this Act, by order – (a) may require any person to furnish the Authority with information in his possession which relates to any telecommunication service or telecommunication system.

[7] IDA Act, Section 7 (1) – Subject to this Act, the Authority may carry on such activities as appear to the Authority to be advantageous, necessary or convenient for it to carry on for or in connection with the discharge of its functions and duties under this Act or any other written law, and in particular, the Authority may exercise any of the powers specified in the Second Schedule.

There are circumstances where service may be terminated prematurely owing to the licensees' inability to continue supplying service, for example, refusal or delay by a third party to supply telecommunication services that the licensee uses as an input. In such circumstances, the customer should not be liable to incur pre-termination charges. For completeness, BT requests that Section 3.2.3 be expanded to include this point.

3.2.4 Restrictions on Service Suspension or Termination

Section 3.2.4 specifies the circumstances under which a licensee may suspend or terminate service provided to an end-user. Specifically, it covers conditions under which a licensee may suspend or terminate services on notice (section 3.2.4.1), with immediate effect (section 3.2.4.2), service suspension without immediate termination (section 3.2.4.3), service termination due to licensee's discontinuance of operations or specific services (section 3.2.4.4) and service suspension or termination for other reasons (section 3.2.4.5).

BT is of the view that it is unnecessary to specify the circumstances governing service suspension or termination as this is a commercial decision based on a licensee's assessment or business risk and unduly stifles a licensee's operations. BT would propose that the IDA replace this Section 3.2.4 with the broader and more general provisions in the existing Code[8].

3.2.4.3 Service Suspension without Immediate Termination

Section 3.2.4.2 (b) provides that where an End User (individual or corporation) is declared a bankrupt or becomes insolvent, the licensee may not terminate service but may immediately suspend service. In the meantime, the licensee may require a security deposit from the End User offering assurance that the End User would pay for the service. BT does not agree with the treatment of bankrupt end users proposed in Section 3.2.4.3 as experience has shown that bankrupt / insolvent end users have little means to fulfil payment and thus default on payment, constituting a material breach of a service contract under which a licensee would have rights to terminate service with immediate effect.

On this basis, BT takes the view that where end users are declared bankrupt, become insolvent or cease to carry on business, a licensee must have the right to terminate service with immediate effect.

CHAPTER 4 – DUTY OF DOMINANT LICENSEES

Under Chapter 2, licensees are classified as dominant or non-dominant. As dominant licensees possess market power and thus are more able to use their economic and financial muscle to

[8] Section 3.2.4 of existing Code – Suspension or Termination of Service by Licensee

A Licensee that provides a telecommunication service or that leases telecommunication equipment must specify prominently in the service agreement or equipment lease: (a) any basis on which it reserves the right to suspend or terminate that service agreement or equipment lease and (b) the procedures for providing the End User with advance notice of any proposed suspension or termination, the basis for the action and the means by which the End User can avoid such suspension or termination. A licensee must obtain the IDA's written approval before adopting or revising any provision that would allow it to suspend or terminate a service agreement or equipment lease. IDA will not permit any Licensee to suspend or terminate a service agreement or equipment lease on the ground that the End User is using the service or equipment to engage in illegal or improper activities. Instead, in such a situation, the Licensee should inform the relevant authority and act in conformity with the authority's directions or guidelines.

engage in anti-competitive behaviour, they should be subject to heightened regulatory supervision to minimise the potential for such conduct. Chapter 4 deals with these duties.

4.2.1.3 Duty to provide Unbundled Telecommunication Services

BT Recommends:

- ***Any bundled offering by a dominant licensee packaging telecommunication and non-telecommunication services should be filed and be subject to review by the IDA to ensure non-exclusionary effect on competition***

Section 4.2.1.3 allows Dominant Licensees to offer customers the option of purchasing a package that contains multiple telecommunication and non-telecommunication services or equipment. The ability to offer a bundle comprising telecommunication and non-telecommunication services could potentially constitute an abuse of a dominant position and the IDA needs to ensure that any bundling does not constitute a breach of the Code under Section 8. The IDA needs to consider the effect on competition of all such initiatives.

Cross-industry marketing initiatives may take the form of loyalty programs, joint-marketing, single billing etc. While such initiatives may not be anti-competitive in themselves, the ability for a dominant licensee to bundle telecommunication and non-telecommunication services as a package could potentially constitute a form of abuse of a dominant position by virtue of its exclusionary effect on competition. BT would request that the right for dominant licensees to bundle should be made subject to strict overview by the IDA in terms of filing requirements to prevent any abusive effect on competition.

4.2.2.2 Duty to allow Resale of End-User Telecommunication Services

BT Recommends:

- ***As the Code does not list the specific services which would be classified as Resale, Wholesale services, it is not possible at this junction to comment on the most appropriate pricing methodology – retail minus or cost plus could be more appropriate depending on the characteristics of the service in question***
- ***However, as a matter of principle, BT strongly objects to the pricing of services that a dominant licensee supplies to another licensee which could include Interconnection, Wholesale (including so called Resale) services on a retail basis due to its effect on foreclosing entry by potential competitors***
- ***IDA make known the list of services that will be categorised as Wholesale including so called resale services (similar to the RIO list under Section 6.3.3) before a policy decision is made on the treatment and pricing methodology for such Wholesale services – a subsequent consultation should be issued once the scale of Wholesale services are known and a uniform view can be given on the appropriate regulation***
- ***Provision of Wholesale services on simple retail tariff is wholly inappropriate***

Under the existing Code, the duty to allow resale of end-user telecommunication services by dominant licensees ('Resale Services') is provided for under Section 5.8.1[9]. In practice, it has been impossible to implement Section 5.8.1 due a lack of measures allowing IDA to enforce compliance. The issues which BT Singapore has faced in relation to Section 5.8.1 relate to service delays which border on behaviour short of refusal to supply service. For example, while SingTel has acknowledged its duty under Section 5.8.1 to offer Resale Services as requested, it has often claimed that there is currently no Resale Service available as it has yet to develop corresponding resale schemes for its retail services.

As Section 5.8.1 is silent as to the prices, terms and conditions on which Resale Services are to be made available and hence, are subject to commercial negotiations, there are often lengthy delays before the dominant licensee delivers a resale offer, and even non-delivery in certain circumstances. Commercial negotiations are ineffective where services are provided by a sole supplier, resulting in an imbalanced bargaining position between the parties. As the burden of request is placed on the licensee, it is more often than not the result of a one-sided effort and initiative by the requesting licensee. Under competition law, unreasonable service delay and providing service on unreasonable terms and conditions may constitute an abuse of a dominant position as behaviour short of refusal to supply (see Chapter 8 for further explanation).

Section 4.2.2.2 of the Code is a marginally improved version of the previous Section 5.8.1 in that it has attempted to address the compliance gap by requiring dominant licensees to file tariffs for Resale Services upon request for service. Nonetheless, BT considers the procedure for procurement of so called Resale Services under Section 4.2.2.2 rather haphazard as it seems to function on an ad-hoc basis, i.e. as and when a licensee requests service. It places the onus on licensees to initiate a request for Resale Services. This should not be the case. Rather, there should be a published Wholesale service list (including so-called Resale services) which licensees may refer to and request service from.(similar to the RIO list in Section 6.3.3 and Appendices 1 and 2), including the prices, terms and conditions. A published list affords licensees a measure of certainty in providing them with knowledge of what services are available – this is critical for effective network and service planning and development of cost structures. A published list, including prices, terms and conditions gives licensees a measure of certainty in their product planning and development process, thereby encouraging innovation and competition. In the absence of a resale service list, it would not be possible to comment its proposed treatment.

As regards the proposed pricing of so called resale services to be on a retail basis**,** BT strongly objects to this approach as it forecloses the efficient entry of potential services in the downstream market by efficient providers. In principle, any service including Interconnection, Wholesale (including so called Resale) services that are supplied by a dominant licensee to a licensee should not be priced at the same level as a retail service. A cost based approach which could be either retail minus or cost-plus should be used, depending on the characteristics of the service (cross reference comment on Section 6.3.5)

For example, in the case of BT's original 'reseller' service, known as 'Calls and Access', it was priced at retail-minus. In the UK, there is a hierarchy that has been established as follows[10]: -

[9] Section 5.8.1 of existing Code – A Dominant Licensee must allow any other Licensee to purchase telecommunication services that the Dominant Licensee makes available to End-Users. The Dominant Licensee may not prevent the Licensee from reselling the Service to other Licensees or End-Users.

[10] Note: Under the new EU rules, this is changing.

- End-user - retail prices
- Resellers / Service Providers – retail minus. The 'minus' should include discounts, special pricing packages etc. minus the costs avoided by selling through this channel. The avoided costs would be retail billing, retail marketing, retail customer service etc to the extent these are provided by the service providers.
- Interconnection for other network operators at costs (FLEC plus LRAIC as above) plus a reasonable return on capital. In the UK, Oftel determines what costs are reasonable, and what the level of reasonable return is.

Setting prices for resale services at retail minus on a cost basis, either retail minus or cost plus with an enforced non-discrimination principle ensures that a dominant licensee cannot 'squeeze' the margins of competitors buying inputs on a 'wholesale' basis to such an extent that an efficient competitor cannot compete in the retail market. Retail minus involves setting the maximum charge for the service equal to the retail price less the retail costs fairly incurred by the retail activity of the dominant licensee or its subsidiaries. Careful consideration should also be given to selecting the retail price level which the minus (discounts) would apply.

4.3 Voluntary Wholesale Services

BT Recommends:

- ***Abolish the distinction between voluntary and mandatory wholesale services as it could result in discriminatory service provision***
- ***As the Code does not list the specific services which would be classified as Resale, Wholesale services, it is not possible at this junction to comment on the most appropriate pricing methodology – retail minus or cost plus could be more appropriate depending on the characteristics of the service in question***
- ***However, as a matter of principle, BT strongly objects to the pricing of services that a dominant licensee supplies to another licensee which could include Interconnection, Wholesale (including so called Resale) services on a retail basis due to its effect on foreclosing entry by potential competitors***
- ***IDA make known the list of services that will be categorised as Wholesale services including so called Resale services (similar to the RIO list under Section 6.3.3) before a policy decision is made on the treatment and pricing methodology such Wholesale services – a subsequent consultation could be issued once the scale of wholesale services are known and a uniform view can be given on the appropriate regulation***

Section 4.3 essentially states that the default position regarding voluntary wholesale services is that a dominant licensee is not required to offer any telecommunication service on a wholesale basis but may choose to do so if it wishes! As such, Section 4.3 is a totally ineffective and non-committal provision as it is a *carte blanche* for dominant licensees to refuse to supply service and discriminate amongst licensees on service provision. Moreover, this sub-section is the very antithesis of the regulatory principles set out by the IDA in Section 1.5.

BT disputes the concept of "voluntary" wholesale services. As a matter of principle, a dominant licensee should be regulated in the supply of all services where it is deemed to possess SMP. BT in the UK is regulated in the supply of its wholesale services where it has SMP and is obligated to offer wholesale services on a non-discriminatory basis to other providers of communication services pursuant to a published wholesale offer. BT submits that any licensee that is classified dominant under Section 2.2 of the Code should be subject to the same obligations.

As such, BT does not agree that there should be a distinction between voluntary and mandatory[11] wholesale services. BT queries the IDA's rationale and basis for having such a distinction as it would be inconsistent with the requirement for dominant licensees to provide service on a non-discriminatory basis in Section 4.2.1.2.[12] Would not the ability for dominant licensees to exercise a choice as to whether to provide service contradict the principle of non-discrimination?

BT also notes that there are no attempts to clarify what is meant by a ' wholesale basis' in the Code. In the UK, the term 'wholesale' is used to describe services provided, either on the basis of interconnection, or, in the case of non-facilities based providers, on a reseller basis, to communications providers who would use them to provide services to end-users. Based on the description of the conditions prescribed on Resale Services under Section 4.2.2.2, it would seem to suggest that wholesale Services would also include resale Services? BT would insist that there should be a clear definition and list of wholesale services (which would also include so called resale services).

BT would propose that the list of wholesale services could include: -

- local leased circuits
- international private leased circuits
- backhaul
- domestic toll free lines
- broadband access (xDSL)
- mobile
- PBX voice lines
- Domestic data (ATM, Frame Relay)
- Internet access using a variety of access options (e.g. dial up, PSTN, cable modem, xDSL, HFC, others)

As regards the proposed approach to pricing wholesale services under the Code on retail minus basis, BT would not comment on its appropriateness as it is not known what the services are. Both retail minus or cost plus approaches could be used in the pricing of wholesale services depending on the characteristics of the service (cross reference comments on Section 6.3.5)

BT welcomes the opportunity to comment on the proposed treatment and pricing methodology for resale and wholesale services once the list of services are made known.

[11] Reference Sections 6.3.3 and 6.3.3.5

[12] Section 4.2.1.2 Duty to Provide Service on a Non-Discriminatory Basis – A Dominant Licensee must provide telecommunication services required to be tariffed pursuant to Sub-Section 4.4.1 of this Code to Customers at prices, terms and conditions that are not discriminatory.

4.4.3.1 IDA Tariff Review Process – Review Criteria

BT Recommends:

- ***Long Run Incremental Cost (LRIC) should be used in evaluating the adequacy of proposed tariffs instead of Marginal Cost (MC)***

Section 4.4.3 is a new provision which explains the criteria IDA will adopt in reviewing the tariffs filed by a dominant licensee for tariffed telecommunication services. BT welcomes the inclusion of Section 4.4.3 in the Code as it promotes transparency and would like to comment on some of the criteria proposed.

Section 4.4.3.1(a) states that the IDA would benchmark the proposed prices against those in a "basket" of jurisdictions to determine whether the proposed prices are excessive. While BT agrees that benchmarking is a useful sanity check tool to compare how one performs vis-à-vis others in the "basket" of jurisdictions, identifying the "basket" of jurisdictions is the first most crucial step in obtaining a meaningful and relevant benchmarking result. Fundamentally, the pricing methodology adopted would determine the rating of the proposed tariffs filed by the dominant licensee. For example, SingTel's tariffs are likely be above the benchmarked range when being compared with jurisdictions adopting cost based approach to setting tariffs (e.g. EU, UK) but could well fall within the benchmark range when compared with countries that tariff telecommunication services on a retail basis. BT queries the criteria that the IDA intends to adopt in identifying the jurisdictions that constitute the "basket".

Section 4.4.3(a) has proposed that marginal cost will be used in determining whether the proposed prices are inadequate. Marginal cost is not a term that has a generally accepted interpretation in telecommunications and this raises questions as to how marginal cost would be defined in this context. For licensees with infrastructure, marginal cost might be considered the cost of lighting an extra circuit or carrying an additional minute of traffic. Given the nature of telecommunication networks, the general consensus is that this is too low a floor for pricing to enable any reasonable level of infrastructure competition to develop. As such, BT is of the view that the use of marginal cost is inappropriate and would suggest that Long Run Incremental Cost (LRIC) be adopted instead.

On Section 4.4.3.1(b), BT would suggest that the IDA also cross check that the provision of Resale Services to the dominant licensees' downstream affiliates must be transacted on an arms' length, non-discriminatory basis at transfer prices.

4.5 Duty to Publish Effective Tariffs

BT Recommends: -

- ***The public should be given an opportunity to comment on proposed tariffs including full terms and conditions of service via a public consultation***
- ***The approved tariffs including full terms and conditions should be published in a web-based format not more than 7 working days following approval by the IDA of such tariffs, terms and conditions***
- ***Dominant licensees should also be required to publish the prices, terms and conditions on which it offers services to its subsidiaries***

BT welcomes the publication of effective tariffs (including discount structures) by dominant licensees as it promotes transparency and non-discrimination and is also consistent with international best practice in the UK and the EU. Apart from just and reasonable tariffs, a dominant licensee must also be required to offer services on terms and conditions that are not onerous and unduly burdensome as licensees requesting services from a dominant licensee often do not have the choice of an alternative supplier and as such, would be "forced" to accept the dominant licensee's terms and conditions for service as they have little bargaining power to negotiate. Terms and conditions should be scrutinised to ensure that they are fair and just to customers, particularly, pre-termination and liability provisions.

As such, BT would propose that a dominant licensee be required to file and publish the tariffs, including the full terms and conditions for all services it is designated to have SMP. In addition, the proposed tariffs and terms and conditions that are filed with the IDA should also be subject to public consultation to provide the public an opportunity to comment. This would minimise or obliterate any petition that could arise against a dominant licensee's tariffs (cross reference comment on section 4.7).

Dominant licensees should not be allowed to confer preferential treatment to its subsidiaries in the provision of services. To enforce this, dominant licensees should also be required to publish the prices, terms and conditions on which the dominant licensee offers services to its subsidiaries. The price list should include applicable discount structures; terms and conditions should for include service delivery, repair times, quality of service standards, pre-termination liability, etc.

For the avoidance of doubt, Section 4.5 should additionally state that information subject to publication should also include: -

- A description of the services;
- Criteria qualifying the eligibility of such discounts, for example, based on volumes, contract tenure etc. Any discount structure should be scrutinised to ensure that there is no abuse of dominant position (cross reference comments on Chapter 8)

As regards the form of disclosure, BT considers that a web-based system with suitable level of granularity would be most appropriate in this era of electronic communication. To avoid unnecessary delays in service procurement by licensees as a result of tariff non-publication, there should be a timeframe stipulated to govern the publication of effective tariffs, terms and conditions. BT considers that dominant licensees should be required to publish effective tariffs, terms and conditions within a stipulated timeframe following the approval of such tariffs by the IDA.

At present, licensees requiring pricing information on Interconnection Related Services (IRS) are required to submit an application to the IDA requesting such information – this procedure unduly lengthens the time for licensees to obtain IRS. In this respect, BT would propose that prices of IRS supplied by a dominant licensee be similarly subject to publication on the same basis as for tariffed services.

4.6 Duty to Provide Service Consistent with Effective Tariffs

Section 4.6 (b)(iii) suggests that a dominant licensee may retrospectively file the prices, terms and conditions of tariffed services subsequent to providing such services. The provision of any

tariffed telecommunication service that has not been filed with the IDA would constitute a breach of Section 4.4.1 and should attract enforcement proceedings under Section 11.4. Section 4.6 (b) (i) should therefore have an "and" inserted at the end of the sentence to read: -

4 (b) (i) take enforcement action against the Dominant Licensee pursuant to Section 11 of this Code; and

4.7 Review of Effective Tariffs

BT Recommends:

- ***A more disciplined approach to tariff reviews by stipulating the timeframes for conduct of such reviews***
- ***IDA consider the introduction of retail price caps on tariffed services***
- ***A dominant licensee's proposed tariffs, terms and conditions should be subject to public consultation. This would obliterate incidences of petition by the public against a dominant licensee's tariffs***

Section 4.7 further states that the IDA will review tariffs periodically. From experience, unless a commitment is made upfront to undertake such reviews (and resources allocated for the task), 'periodic' reviews rarely do occur. For certainty, BT requests that the IDA stipulate timeframes where it would conduct such reviews, for example, annually, bi-annually, quarterly etc.

To ensure maximum efficiency within the industry and that the prices of telecom services remain competitive, BT would like to propose that the IDA consider the introduction of price control regulation (for example, Retail Prices Index-X) on services offered by dominant licensees as a built-in mechanism for reviewing the prices of tariffed services. Oftel in the UK introduced price controls on BT in August 1997 with the aim of protecting customers and achieving the best possible deal for consumers in terms of quality, choice and value for money. These price controls placed a cap or ceiling on the increases that BT was allowed to make on those services where BT was deemed to have SMP, thereby controlling the increases that BT could make to the prices of these services.

In implementing price control regulation, the key aspects that IDA must consider are: -

- the services to be covered by the price cap
- the length of the control
- the customer groups to be covered
- the use of safeguard caps (which would limit price increases to the rate of inflation)
- the value of X

BT agrees that while spurious claims by parties petitioning the IDA to review effective tariffs should not be accepted, as the burden of proof rests on the petitioner (who may be ambivalent to IDA's review criteria), IDA may wish to consider issuing a set of guidelines outlining the information it would require in evaluating a petition to assist interested petitioners by guiding preparations in their case for review. However, petitions against a dominant licensee's tariffs can be avoided by subjecting a dominant licensee's proposed tariffs to public consultation (cross reference comment on Section 4.5)

Other Duties of Dominant Licensees – Accounting Separation

BT Recommends:

- ***Section 4 should include the requirement by dominant licensees to be subject to accounting separation***
- ***Dominant licensees be required to file and publish accounting separation reports***
- ***Accounting Separation methodology should be subject to public consultation***
- ***IDA review its existing policy requiring non-dominant licensees to be subject to accounting separation requirements***

The existing Accounting Separation Guidelines (ASG) issued by the IDA subject Facilities Based Operators (FBOs) to accounting separation requirements regardless of whether they are classified dominant or non-dominant. Under Section 8.2 of the ASG regarding audit and compliance requirements, licensees subject to accounting separation are required to appoint an independent auditor to audit their Accounting Separation Statements to be submitted to the IDA. There is no enforcement mechanism against any breach of accounting separation requirements in the ASG.

As Accounting Separation is a critical regulatory tool in policing abusive behaviour such as discrimination, margin squeezes, etc, there should be adequate enforcement mechanisms to ensure compliance. BT submits that the non-inclusion of accounting separation in the Code constitutes a major omission and should be included in Section 4 as a duty required by dominant licensees with non-compliance and breaches subject to enforcement action under Section 11 of the Code.

Furthermore, BT would urge that the IDA review its requirement of accounting separation on non-dominant licensees as it places a regulatory burden on licensees that do not have the market power to behave anti-competitively. Such a policy is also inconsistent with the Code and IDA's regulatory principles as promulgated in Section 1 on the application of proportionate regulation. As significant resources need to be committed to the preparation of accounting separation systems and resources without conferring a corresponding benefit in enhancing consumer welfare, BT would submit that it represents a regulatory oversight, i.e. regulating where unnecessary. This discourages investment (minus point in the licensing decision between FBO vs. SBO licences) and hence, competition. As such, BT would urge the IDA to seriously consider a review of this aspect of its accounting separation policy.

As regards dominant licensees, they should be subject to more rigorous accounting separation requirements, including the publication of both accounting separation reports and the methodologies on which the numbers have been prepared. The reports should demonstrate: -

- the costs of the separate elements of the wholesale services;
- how these combine into the cost of these services;
- how those costs compare to the prices for those services;
- that the key retail activities buy these services on a non-discriminatory basis without any margin squeeze;
- that the published methodologies have been followed, which can be achieved through the inclusion of an audit report to that effect.

Furthermore, the proposed published accounting separation methodology must be audited and supported by published methodologies and be subject to public consultation. Once agreed, the high level principles should only be amended with the agreement of the IDA.

CHAPTER 5, 6 & 7 – INTERCONNECTION AND INFRASTURCURE SHARING ARRANGEMENTS BETWEEN LICENSEES

6.2 Options for entering into an Interconnection Agreement

Section 6.2 outlines the options available to licensees seeking interconnection services from a dominant licensee.

6.2.1 Option 1: Interconnection Pursuant to an Approved Reference Interconnection Offer

BT Recommends:

- ***Interconnection tariffs should be subject to regular reviews during the 3 year period the RIO is effective***
- ***IDA consider the introduction of network price caps on interconnection services***

Option 1 allows licensees to request Interconnection Related Services (IRS) from dominant licensees under an approved Reference Interconnection Offer (RIO), which is valid for a 3 year period. However, the Code is silent as to any reviews on the RIO during this 3-year period, in particular, the prices for IRS. Interconnect tariffs should be reviewed regularly particularly if there has been any material reduction in costs in that period.

The original model in the UK was that Oftel made annual determinations of interconnection prices once BT's regulated accounts were published. Oftel would decide whether the published costs were reasonable and then make a decision on prices which was retrospectively applied for the year in question. BT and operators would exchange payments (plus rolled up interest) for any over or under charging. In practice, this was a difficult and lengthy process for all concerned – BT, the operators and Oftel. In 1997 Oftel replaced this mechanism with network price caps. Oftel set a series of network price caps of RPI - X on BT that lasted four 4 years. The initial X values were 8%. BT would recommend the same approach in Singapore.

Though less common than retail price caps, network price caps are now standard practice among telecom regulators in many parts of the world. This approach would necessitate direct regulatory intervention by the IDA. The initial step involves setting starting prices for the cap or caps, after due analysis of the dominant licensee's costs, on a LRAIC basis, of providing IRS. All relevant local conditions would need to be assessed such as trends in unit costs, expected future volumes, the relevant cost of capital, and how costs would be expected to vary with volumes in future.

A price cap is in effect a prediction of how unit costs will vary over the life of the cap. By modelling a dominant licensee's costs, the IDA could set a cap which would give the dominant licensee the right incentive to increase efficiency and reduce costs. To the extent that a dominant licensee would be able to identify greater efficiency savings than implied by the cap, it would keep these gains during the life of the cap – this produces a built-in mechanism in

incentivising the dominant licensee to become a more efficient operator. Meanwhile, licensees have the certainty that prices will change at known rates for a known period and this aids them in planning their own competing services. Price caps provide the incumbent with the right incentives to drive for efficiency gains, thus promoting competition by giving alternative operators cost-based prices and certainty.

6.3.4.1 Absolute Prohibition on Discrimination

Section 6.3.4.1 prohibits dominant licensees from discriminating in its service provision to competing licenses vis-à-vis its subsidiaries. However, Section 6.3.4.1 is silent as to how this non-discriminatory provision is to the policed. For completeness, BT submits that Section 6.3.4.1 should state that dominant licensees should be required to file and publish detailed accounting separation statements (cross-reference comment to Section 4 on accounting separation).

Non discrimination is critical and needs strong transparency mechanism.

6.3.5 Pricing of Interconnection Related Services and Mandated Wholesale Services

BT Recommends:

- ***Supports the adoption of Forward Looking Economic Cost (FLEC) and Long Run Average Incremental Cost (LRAIC) in computation of tariffs for Interconnection Related Services (IRS)***
- ***Retail minus or cost based could be used to price wholesale services***
- ***Tariffs for IRS and wholesale services should be subject to publication***

BT supports the adoption of cost based pricing for Interconnection Related Services (IRS) supplied by a dominant licensee. As regards the cost base, BT is agreeable to the adoption of Forward Looking Economic Cost (FLEC) based on current cost accounting methodology. Current cost accounting is a process of revaluing assets at their replacement cost, which has the advantage of removing differences on costs relating to the age of the asset base. The price of digital switching and transmission equipment generally falls while the capacity of physically similar-sized equipment tends to rise. It is forward-looking because revaluing the assets in this way requires a view of what technology would be installed now to deliver the same functionality, i.e. operators have to look forward a few years to predict what new technologies should be adopted to replace today's assets. Hence, for interconnect costs which comprise switching and transmission, having the charges based on current cost accounting costs result in lower interconnect prices.

BT also supports LRAIC as a cost standard for establishing the cost of an IRS. LRAIC is premised on the concept that interconnecting operators should pay only for the costs that the incumbent incurs in providing the services that they buy, plus a mark up to allow for the recovery of fixed common costs.

As regards pricing of wholesale services in Section 6.3.5 (b), retail minus or cost based approach may be used depending on the appropriateness of the pricing approach to the characteristics of the service. In the absence of a Wholesale List, BT would not be able to

comment on whether "retail minus" would be the appropriate pricing approach for wholesale services.

Article 13(2) of the EU Access & Interconnection Directive requires that National Regulatory Authorities (NRAs) ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. Based on this principle, Oftel in the UK intends to consider all the short-term and long-term costs and benefits that may result to consumers from imposing some form of charge control. For example, in markets where the investment involves significant risk, cost-based charge control (i.e. where the permissible return on capital employed is equal to the firm's average cost of capital) may adversely affect the incentives to invest and a lower level of investment is likely to damage consumers. Hence, only in those circumstances where Oftel believes that the benefits brought by charge control are enough to counter the costs it generates, would Oftel introduce such a control. These considerations will also impact on Oftel's decision of what form of charge control it is appropriate to apply. Bearing in mind the above, Oftel considers that, in general: -

a) in markets which are not effectively competitive (i.e. there is an SMP operator or operators), but where market power is found to be diminishing it may be sufficient to rely on the imposition of a general non-discrimination obligation implemented by requiring that charges are based on the 'retail minus' principle or by directing that prices should be set at 'retail minus'.

b) in markets which are not effectively competitive and there is little prospect of competition developing (e.g. because there is persistent upstream SMP which limits development of the downstream market) it is generally appropriate to introduce price regulation in the form of cost based prices. This form of price regulation differs from retail minus as it determines the absolute level of prices rather than just the relative level, and sets a direct limit on the level these prices can reach. A retail minus charge on the other hand will include any supernormal profits in the retail price and thus is likely to be higher than a cost-based charge in most cases; and

c) when new or innovative services are being launched which involve a high degree of risk, even if the SMP operator has a substantial market share, it is generally appropriate to avoid any cost-based form of regulation. In such markets, either no charge control or, if at all possible, a retail minus form of regulation, may be more appropriate. Oftel believes that in these cases uncertainty about the level of costs and demand justifies a less interventionist position. Any attempt to set a limit on the absolute level of charges is likely to mean the regulator substituting its judgement about the circumstances and prices under which the new service or investment is likely to be viable to the one of a better informed market player. This could distort commercial and investment decisions to the point of deterring investment and discouraging innovative market offerings to the detriment of consumers.

For consistency and increased transparency, the tariffs for IRS and wholesale services should be subject to publication on a similar basis as proposed in Section 4.5 for tariffed services. The existing procedure for requesting tariffs for IRS which requires licensees to submit a request to the IDA is administratively cumbersome and at times, could result in delays on service request.

6.4.1.7 IDA Conciliation

Section 6.4.1.7 states that conciliation has to be at the submitted at the joint request of both parties (cross reference section 11.2). Where negotiations involve a dominant licensee, the other licensee would often not have the choice of an alternative supplier, creating an imbalance in bargaining position that is often the cause of stalled negotiations. In these circumstances, either party should have a right to request the IDA to provide conciliation.

CHAPTER 8 – UNFAIR METHODS OF COMPETITION

BT Recommends:

- IDA issues guidelines for establishing what behaviour amounts to an abuse
- IDA includes more examples of abuse in the Code

8.2 Abuse of Dominant Position in the Singapore Market

Section 8.2 of the Code covers abuse of a dominant position in the Singapore market. This provision is a vital tool for promoting and sustaining a level playing field and fair competition in the market. As previously stated, investors and new entrants are attracted to markets with strong competition rules and regulation, as well as a good track record of enforcement. It is critical that such a provision is widely defined to cover all possible types of abuse and that guidelines are written to assist in its effective and timely enforcement.

BT would like to make some general points on this concept, followed by some more detailed points on the types of behaviour that may constitute an abuse in telecommunications markets.

The concept of “abuse of a dominant position in a market” is well understood and documented in the field of competition law. There is a great deal of publicly available economic learning and experience gained by other jurisdictions which have used the concept for some time. IDA will thus be able to draw on this wide experience.

Most jurisdictions follow the same pattern of analysis in establishing whether there is a dominant position and whether that position has been abused. Once the product and geographic markets have been defined and dominance established, attention turns to the dominant firm’s behaviour. One particular aspect which is relevant to consider is the concept of individual or collective dominance. Individual dominance is covered by the provisions of section 8.2. [Collective dominance is conduct on the part of more than one undertaking that amounts to an abuse of a dominant position.

As stated above, it is then necessary to analyse whether there has been an “abuse” of the dominant position. According to Section 8.2 of the Code, there are various types of conduct which constitute an abuse. BT would like to make the following observations on the examples listed by the IDA and then suggest some further important types of abuse, particularly relevant to the telecommunications industry, which BT strongly recommends should be included in the Code.

Pricing abuse is one of the most common forms of abuse of a dominant position. Unless the necessary checks and balances are in place, it can also be extremely difficult to prove. BT

would therefore urge IDA to issue further guidelines on how it will examine and curb such abuses.

8.2.1.1 Predatory Pricing

As regards Section 8.2.1.1, which examines predatory pricing, BT considers that a test which requires the IDA to establish that the dominant licensee is selling below marginal cost, and such pricing is likely to drive efficient rivals from the market or deter entry, and entry barriers are so significant that the dominant licensee could subsequently impose an increase in price sufficient to enable it to recover its losses, will be difficult, if not nearly impossible, to meet.

Predatory pricing is notoriously difficult to prove and cost structures in the telecommunications industry have shown that a straight forward application of the test is not always appropriate. BT would therefore suggest that a more relevant test for predatory pricing would be an assessment of whether the dominant licensee is pricing below Long Run Average Incremental Cost (LRAIC), which would lead to a presumption of predatory pricing. In such a case it would be for the licensee in question to rebut the presumption. As a second tier of the test, where the dominant licensee's prices are above LRAIC but revenue fails to cover total costs, this would be predatory if it can be established that the purpose of the conduct is to eliminate a competitor. This two tier test would allow the IDA/operators a more realistic opportunity to establish predatory pricing. BT would recommend that the IDA, in making its assessment, takes note of the principles set out in the EU Access Notice.

8.2.1.2 Price Squeeze

As regards the definition of price squeeze in Section 8.2.1.2, BT agrees that there must be careful treatment of abusive behaviour.

In examining whether or not a price squeeze has occurred, the IDA will need to give close consideration to the method of cost allocation adopted by the dominant licensee (e.g. it may conceal a price squeeze by allocating to its upstream activities costs that are actually incurred as a result of downstream activities). The IDA is urged to consider consulting and then issuing guidelines on how costs should be allocated; this methodology should be consistent with the Accounting Separation reports.

8.2.1.3 Cross-Subsidisation

Section 8.2.1.3 covers cross-subsidisation and lays down the circumstances in which the IDA will find that a dominant licensee has engaged in cross-subsidisation and abused its dominant position. BT would inquire when exactly a finding on cross-subsidisation will be made by the IDA, as the current section 8.2.1.3 is rather vague on this point. It would be helpful, for example, if the IDA could give some examples of the specific tests it will use so that operators can determine if they are suffering from cross subsidisation practices.

For example, a test whether the revenue over the lifetime of a service would exceed the LRIC, including the cost of capital, would allow the IDA to determine whether a dominant licensee's revenues from an activity might be expected to fail to cover the costs associated with that

activity over its economic lifetime. Further, a combinatorial test could establish whether the prices of services in groups that share common costs cover both the incremental and common costs of supplying those services. If they did not, this would indicate that the group of services was being cross-subsidised. In assessing whether revenue from providing a service would exceed LRIC, the IDA might wish to perform a Discounted Cash Flow analysis. For mature services, a profitability analysis based on accounting data could be used to determine whether there has been a cross-subsidy.

8.2.2 Other Abuses

The forms of abuse of market power are non-exhaustive and the list certainly extends beyond the examples cited in Section 8.2. For completeness, BT would recommend that the IDA also includes the following pricing and non-pricing abuses in Section 8 of the Code.

Pricing Abuses should also include: -

(a) Price Discrimination

Price discrimination may be an abuse where a dominant licensee applies dissimilar conditions to equivalent transactions (i.e. charging different prices to different customers or charging excessively high prices to certain customers) with the effect of excluding competitors from the market in question.

(b) Discounting

Discounts may be a form of price discrimination where the discounts are offered to certain customers that do not reflect underlying cost differences. For example, SingTel is known to give better discounts to its retail customers than it provides to a licensee. It is therefore critical that the publication of tariffs by dominant licensees include all discount structures applicable to the tariffed services.

Examples of discounts which may amount to an abuse and require close examination include:

(i) loyalty rebates where the discount is dependent on the customer not taking, or restricting, supplies from competitors;

(ii) discounts calculated across a range of product markets including those where the licensee is dominant;

(iii) volume rebates calculated on the basis of total telecoms expenditure across a range of competitive and regulated markets; and

(iv) discounts targeted at a narrow group of customers.

(c) Excessive Pricing

Finally, excessive pricing may also constitute an abuse where a price bears no reasonable relation to the economic value of the product. A classic case of excessive pricing in the telecommunications industry is where a dominant operator charges excessive prices for the

supply of network inputs required by competitors in a downstream market. In general, excessive prices are abusive only if they have persisted in the absence of continuing innovation and/or without stimulating successful new entry or significant loss of market share.

Non-Pricing abuses should also include: -

(d) Refusal to Supply and behaviour short of refusal to supply

Refusal to supply is a classic example of abuse of a dominant position and in the telecommunications sector, it often appears as a refusal to grant access to new or existing services, or as discriminatory refusal to supply, or as a withdrawal of access from an existing customer. It may also take the form of a refusal to supply information in relation to technical or network information. Moreover, behaviour short of refusal to supply (e.g. unreasonable delay, imposing unreasonable terms and conditions etc) is another important example of an abuse where there is no objective justification.

As exemplified in Section 4.2.2.2, behaviour short of refusal to supply can be addressed by requiring the dominant licensee to file and publish a list (including prices, terms and conditions) for its Resale and Wholesale Services.

(e) Bundling

Bundling is another important example of abuse where it has an exclusionary effect on competition. (Cross reference comments on Section 4.1.2.3)

8.3 Anti-Competitive Preferences

Section 8.3 deals with anti-competitive preferences. This section extends certain provisions of the Code to licensees whose affiliates have SMP or who have SMP in a non-telecoms market either inside or outside Singapore. BT considers that this provision is very far reaching and would question the economic justification for it.

CHAPTER 9 – AGREEMENTS INVOLVING LICENSEES THAT UNREASONABLY RESTRICT COMPETITION

General Comments on Chapter 9

Chapter 9 deals with agreements involving licensees that unreasonably restrict competition and is unusual in some aspects. It makes a distinction between agreements between competing licensees (horizontal agreements) and agreements between licensees and entities that are not direct competitors (non-horizontal agreements) and has different rules for each. BT would respectfully submit that this is a very confusing way of analysing such agreements and does not produce particularly relevant results. Moreover, it is contrary to standard competition law relating to anti-competitive agreements and will be difficult to apply in practice. BT would suggest that it is not the relationship between the parties to an agreement that is important – rather it is the effect on competition that is key and this important factor should be the basis of any analysis.

Of course, in assessing the effect on competition, the relationship between the parties should be taken into account, but it is only one of the many factors to be considered. BT would suggest this section is reworked to provide a general prohibition followed by an analysis of the pro-competitive factors. BT also found this chapter over-complicated. For example, there is a general prohibition but for which there is an exemption process in Section 9.4. This runs alongside other agreements which will also be examined in the same way under the exemption process. Surely these two processes could be melded into one simpler process?

Finally, BT would suggest that the provisions of Chapter 9 of the Code will not afford any business certainty to parties affected by its provisions. The chapter examines agreements differently depending on the parties involved and covers general prohibitions, some exemptions and an analysis of competitive effects. Most operators will struggle to establish whether or not they will be in breach of the Code under this system and it is likely to prove unworkable in practice. BT would suggest that this Chapter is reworked so can it can be more simply applied by those affected by its provisions and/or the IDA issues guidelines so that businesses have a better understanding of the application of pre-competitive benefits in Section 9.3.3 and 9.4, thus allowing greater business certainty.

9.1.2 Overview

Section 9.1.2 provides an overview and states that the IDA may take enforcement action against any licensee that enters into one agreement with another licensee or any non-licensed entity that has the effect of unreasonably restricting competition in the telecommunication service or equipment market in Singapore. BT would inquire what constitutes “unreasonably” in this context and whether the IDA will offer a test of unreasonableness.

9.3.2 Specific Prohibited Agreements

Section 9.3.2 provides a list of prohibited agreements together with the circumstances in which the IDA will offer an exemption to this general prohibition in Section 9.3.3. There is a broad prohibition in Section 9.3.2.2 – bid rigging. Would this preclude competitors from co-ordinating a joint bid where a customer had requested it, or where neither could provide the service requested alone? It is not entirely clear whether this scenario would benefit from the exemption in section 9.3.3 and 9.4. BT would request that the IDA reworks this section to make its intentions clear. Again, as regards Section 9.3.2.4 – group boycotts, there may be situations in which licensees may have a legitimate reason for refusing to deal with a specific supplier, competitor or end user, e.g. bad debtor, bankrupt etc.

9.4 Agreements that will be assessed on Competitive Effects

It would be useful if the IDA could further expand on the factors listed in Section 9.4 or issue guidelines explaining how they will be applied in practice.

CHAPTER 10 – CHANGES IN OWNERSHIP AND CONSOLIDATION

IDA has previously conducted a public consultation regarding the procedures applicable to Consolidations and other Acquisitions of Ownership Interests. IDA is not seeking further comments on these issues at this time.

CHAPTER 11 – ADMINISTRATIVE PROCEDURES

BT recommends:

- ***Efficient and effective remedies and procedures are key to the effective implementation of competition and regulatory rules***
- ***IDA needs to tighten its investigatory procedures and timescales and have broader and more proactive powers of investigation***
- ***Financial penalties should be increased to heighten the deterrent effect***

Chapter 11 deals with administrative procedures and, in particular, enforcement of the Code. Enforcement provisions are absolutely key to the effective implementation of competition and regulatory rules and to attaining the ensuing benefits to consumers. Without efficient and effective processes, any competition provisions will be rendered redundant in practice. Moreover, the enforcing authority must establish itself as a strong, impartial and proactive regulator to achieve a deterrent effect. BT would like to make some comments on the procedures outlined by the IDA and in some cases, recommend some further provisions.

11.2 Conciliation

The conciliation process is outlined in Section 11.2. According to Section 11.2.2, IDA may provide conciliation "at its discretion". It "will not advocate any specific position or impose any solution on the parties". BT would inquire, therefore, as to the usefulness of this procedure and whether IDA should be given further powers to actively pursue and enforce a decision where conciliation fails.

In addition, any request for conciliation under the Code must be jointly taken to the IDA. BT submits that more often than not, where negotiations involve a dominant licensee, it would be extremely difficult to persuade the dominant licensee to refer the discussions to the IDA for conciliation. To speed up the process of requesting conciliation, therefore, either party should have the right to approach the IDA for conciliation.

11.3 Dispute Resolution Procedure

Section 11.3 deals with the dispute resolution process. BT notes that IDA is only required to resolve disputes in very limited circumstances (i.e. failure to reach an interconnection agreement with a dominant licensee and failure to reach an infrastructure sharing agreement). IDA also has discretion to intervene in disputes relating to implementation of the above agreements. Experience around the world has shown that unless appropriate regulatory safeguards are in place, it may be very difficult to conclude any type of agreement with an incumbent operator. This is because the two parties do not have an equal or near equal bargaining position and so it is extremely difficult to conclude a freely commercially negotiated agreement. A dominant operator that owns facilities to which other operators require access, is

in a position of superior bargaining strength as the other operators often have no alternative but to try to negotiate terms with the incumbent.

BT, therefore, would suggest that the dispute resolution procedure is further expanded to cover disputes arising from interpretation of the Code and its Guidelines. BT would also request that the IDA sets out a time limit by which time it will issue its decision. For example, according to Article 20 of the EU Framework Directive, NRAs must issue a binding decision "in the shortest possible time frame and in any case within four months except in exceptional circumstances".

Finally Section 11.3(d) gives the IDA discretion to depart from the Dispute Resolution Guidelines. For the sake of legal and business certainty, BT would inquire as to the circumstances in which the IDA would be likely to use this discretion.

11.4 Enforcement Action for Contravention of this Code

Section 11.4 of the Code outlines the procedures for enforcement action for breach of the Code. Again, BT notes that IDA has "discretion to determine whether, and in what manner it will conduct any enforcement action". BT would inquire as to the breadth of this discretion, particularly as regards the manner of the enforcement action. Businesses investing in the telecommunications industry in Singapore make investment decisions based on a number of factors. One of them is legal and business certainty and the knowledge that if a law is broken the perpetrator will be dealt with in the prescribed manner. Too much discretion afforded to any law enforcer will undermine this important business and legal factor.

11.4.1 Requests for Enforcement by a Private Party

Section 11.4.1 deals with requests for enforcement by a "Private Party". This term is not defined, although the section does refer to action taken by any licensee or end user. BT would find it helpful to have the term "Private Party" formally defined in the text. Moreover, IDA may wish to give the term a wide definition as any number or range of private parties could potentially be injured as a direct result of contravention of the Code. Surely anyone who suffers injury should have the right to request enforcement action, whether end user, licensee or not. Moreover, a very small operator or new market entrant without the means to meet the submission requirements laid down in Section 11.4.1.1 should have the opportunity to make a claim through a trade association or other user authority.

11.4.1.1 Submission of Written Request for Enforcement Action

The requirements for making a "Request for Enforcement" to the IDA are set out in Section 11.4.1.1 of the Code. The requirement in (v) that the requesting party "has made an effort in good faith to resolve the underlying dispute through direct negotiations with the Licensee", could, in practice, be very difficult to meet. This is especially the case where the requesting party is alleging an abuse of a dominant position. Moreover, in such a case, the requesting party may not have access to all the necessary data and other information necessary to substantiate the allegations fully. Incumbent and dominant licensees generally have access to most of the market/financial information required to make a complaint so the IDA may need to assist the requesting licensee to obtain access to it.

11.4.1.2 IDA's Response to Enforcement Request

Section 11.4.1.2 deals with IDA's response to an enforcement request – IDA has 15 days in which either to accept or decline the request for enforcement. In the case where IDA decides to decline the request, BT would urge the IDA to give the requesting party a reasoned opinion for its decision and whether the requesting party will have a right of appeal against the decision not to take action. In BT's opinion, the IDA should demonstrate that it has taken account of all the facts and make its reasoned decision public. These steps are important to demonstrate to the requesting party that due process has been observed. For example, in a complaint by UK ISP, Freeserve, Freeserve successfully appealed Oftel's original decision not to proceed with certain parts of its original complaint to the Competition Commission[13].

IDA may extend this 15 day initial review period for a further 30 days where there are complex or novel issues at stake. In a situation where the IDA simply requires some further information on which to make its initial decision to accept or decline the request, BT would inquire whether this situation would fall within the 30 day extension provision. If not, BT suggests that a provision be added to allow the IDA to seek further information where required to make its initial decision (e.g. within a 7 day period).

Based on the enforcement proceedings outlined in Section 11.4 of the Code, BT estimates that the timeframe for IDA to resolve 'normal' enforcement requests is approximately 6 months. 'Complex' and 'novel' issues would take over 7½ months. Requests for extension to revert with information are also subject to indefinite timeframes, which means it could take longer than 6 or 7½ months. This is unduly lengthy and could be substantially improved. BT considers that a period no longer than 3 or 4 months (together with a fast track procedure where necessary) for the resolution of disputes would be more in line with international best practice.

BT is concerned that the IDA may decline the request for enforcement where it "concludes that the exercise of its enforcement discretion would not be appropriate", in Section 11.4.1.2(c)(v). Again, this may give the IDA too much discretion – BT would inquire what "appropriate" means and how this sub-section will be used in practice. In the absence of further guidelines on this "let out" clause, and for the sake of business and legal certainty, BT suggests that Section 11.4.1.2(c)(v) be deleted.

11.4.1.3 Deferment of Consideration for Request for Enforcement

Likewise, Section 11.4.1.3 allows the IDA to "defer its consideration of a Request for Enforcement". There is no time limit or reason why the IDA might wish to make such a deferral. Again, IDA should either expand the rationale behind this clause and give examples of situations in which deferral will be sought, or delete it.

11.4.1.4 Notification of Enforcement Action

[13] Freeserve.com PLC –v- Director General of Telecommunications, 11 Nov 2002 (Competition Commission Appeal Tribunal)

According to Section 11.4.1.4, if IDA accepts the request for enforcement, IDA will issue a written notification to the responding licensee. A time limit should be imposed so that all complaints proceed quickly. The written notification indicates the provisions of the Code alleged to have been contravened, details of the facts and a copy of the request for enforcement. As previously explained, in BT's experience, complaints alleging an abuse of a dominant position usually have very little market and financial data as this key information usually lies in the hands of the incumbent.

BT would also suggest that the IDA takes a more active role in the investigation rather than leaving it to the parties to make allegations and respond. It would be more efficient if IDA, at this stage, included in the written notification detailed requests for information (including supporting documentation) from the responding licensee. This would certainly aid the investigative process, allowing the IDA to get to the "crux of the matter" more quickly. (Further suggested powers for the IDA are set out below). Waiting until the end of the information swapping process may well be too late and will certainly delay the application.

11.4.1.10 Issuance of IDA's Decision

IDA will issue its decision within 60 days of receiving all the necessary information, which period may be extended. For the sake of legal and business certainty, there should be a time limit on any extension period, otherwise enforcement actions could continue indefinitely. Section 11.4.2.4 appears to be a duplication of Section 11.4.1.10.

11.4.4 Enforcement Measures

Section 11.4.4 sets out enforcement measures. In BT's opinion the mere issuing of a warning for breaching any provision of the Code is an extremely weak and light-handed penalty, so as to have no real practical effect. In BT's experience, it is the threat of financial or other penalty, not warning, that leads to compliance.

11.4.4.4 Financial Penalties

As regards the financial penalties set out in Section 11.4.4.4, BT regards penalties of up to a S$1 million per contravention limit as low, compared to world standards and, therefore, incapable of providing an effective deterrent. For example, in the European Union and the UK, financial penalties for a breach of competition law can reach a maximum of 10% of the offending company's annual turnover. Indeed, the European Commission recently imposed on Deutsche Telekom a fine of €12.6 million for margin squeezing from 1998 to the present, and in July this year it fined Wanadoo Interactive, a subsidiary of France Telecom, €10.35 million for predatory pricing from March 2001 to October 2002.

Moreover, the EU's new enforcement legislation, Regulation 1/2003, lays down further financial penalties of up to 1% of turnover where businesses supply incorrect, incomplete or misleading information or refuse to submit to inspections of required books or other business records (Article 23). Under this new legislation, the Commission will also have the power to make periodic penalty payments in order to compel businesses to comply with a decision or put an

end to an infringement of the competition rules. These are all useful tools to prevent a breach of competition law in the first place.

Experience shows that the more severe the penalty, the greater the deterrent effect will be. In Australia, the maximum penalty for contravention of a provision of the Trade Practices Act 1974 used to be AU$250,000 for a corporation and AU$50,000 for an individual. Now these maximum penalties have been increased to AU$10 million and AU$500,000 respectively. Criminal liability has also recently been added to UK competition law for company officials under the Enterprise Act 2002 – infringement may lead to imprisonment in some cases.

BT submits that the financial penalties should be increased in line with world standards to achieve maximum deterrent effect.

11.5 Binding Effect of Initial Submissions

Section 11.5 deals with the binding nature of initial submissions and states that the IDA will reject any new allegations, new issues or information not previously disclosed in the initial request for enforcement. BT takes the view that this could be a particularly harsh provision if strictly applied. It will be important to look at the particular facts and circumstances of an individual case to ensure that there is no miscarriage of justice.

For example, as previously stated, smaller operators or new licensees often simply do not have access to the detailed information necessary to sustain a compliant. Often, it is as an investigation proceeds that new or further facts sustaining an allegation or providing evidence of further abuse, come to light. For example, a licensee might make an allegation of price squeeze, but the information obtained from the dominant licensee through the course of investigation could lead to a discovery of predatory pricing or some other pricing abuse. It would be counter-intuitive if a complainant were not allowed to proceed with one complaint for each allegation arising from the same facts. To make an order that a new request for information must be submitted would not be an efficient way to deal with such matters. BT would request that the IDA deals with new allegations in a balanced and proportionate manner, otherwise process will potentially be allowed to triumph over justice.

11.6 Requests for Information

Section 11.6 deals with the IDA's powers to request information, inspect documents and conduct interviews. Experience in other jurisdictions has shown that the powers of a regulatory or competition authority are key to the satisfactory enforcement of the law. Recently in the UK and EU, such powers have been extended so that authorities may properly investigate allegations of breach of competition or regulatory law. BT would suggest some additional powers of investigation for the IDA. For example, it would be useful to extend Section 11.6 – request for information - to any party as directed by the IDA (i.e. not just a corporate licensee, but to any physical person or a trade/user association or other relevant business not covered by the Code).

The IDA should issue time limits with its requests for information to ensure that all information and documentation is delivered in a timely manner. The IDA might also wish to consider

increasing its existing powers under the Telecoms Act and IDA Act to conduct inspections of licensees where reasonable suspicion exists of a breach of the Code with powers to enter premises, examine and take copies of books, reports and records and to ask any member of staff for explanations. For further information, the IDA may wish to refer to the new powers of investigation afforded to the European Commission under Regulation 1/2003 or to the Office of Fair Trading's Guidelines, Power of Investigation (under the Competition Act 1998).

11.9 Review of IDA's Decision

Procedure for review of the IDA's decisions is dealt with in Section 11.9 of the Code. Any party may make either request IDA to reconsider its decision or appeal to the Minister. Again, a party may not present any new facts or raise new arguments which may, for the reasons stated earlier, prevent the IDA or Minister from 'getting to the bottom of the matter' and reaching a correct judgement. For example, what if new evidence is later uncovered which supports the original claim and also leads to further allegations?

The review procedure is two-pronged – reconsideration and appeal or simply appeal, and the two processes may not run concurrently. If one party files a reconsideration request and one or more appeals to the Minister, the Minister may abstain and wait to hear an appeal from the IDA's decision on the reconsideration. This process is dangerous in that it allows the responding licensee a double opportunity to prolong the whole decision process. There is also no time limit by which IDA must complete its reconsideration so it could be some time before final appeal is heard and the outcome decided. Moreover there is no time limit by which the Minister must deliver its final decision, so the whole process could take a matter of years.

Given the difficulty of reviewing one's own decision, BT would suggest that the reconsideration review process is deleted from the Code so that the appeal process is solely to the Minister. This will allow for speedier and more efficient results and will prevent the responding licensee from 'stringing out' the appeal process.

ANNEX 1

EXCERPT FROM JONES DAY REPORT - REGULATORY SCORECARD (SEPT 2002)

Introduction

1. The purpose of this report is to assess whether the telecommunications regulatory frameworks in selected European countries are effectively applied and enforced to secure certain fundamental objectives. In particular, the report examines whether the regulatory regime in place in June 2002: (i) facilitates the establishment of public telecommunications networks and the provision of public telecommunications services, (ii) encourages investment in telecommunications infrastructure, and (iii) ensures a level playing field for all players to stimulate investment, innovation, and sustainable competitive development. Proper application of this regime should also enhance employment and international competitiveness in these countries and the EU as a whole. With the advent of the new EC framework legislation, the EU telecommunications industry and regulators stand at a critical crossroads. The present review of current effectiveness is therefore particularly timely.

2. This report covers leading economies in the EU: Belgium, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom. We recognise that this is a wide-ranging report, which will require revision as individual regimes evolve. We would therefore welcome comments from third party operators and national regulatory authorities and others that will allow us to enhance and update the report. Future expansion of the report may include additional Member States, as well as a wide range of non-EU countries.

3. We are particularly grateful for the information provided by BT Global Services in relation to the countries in which it operates and to Houthoff, Bird & Bird, Coudert Brothers, and Schurmann & Grönberg, who supplemented our own research and the research of other third parties (including ECTA, Cullen, and the European Commission).

4. The assessment is based on selected key criteria, including the manner in which the regulator exercises its powers, the availability of access products, the effectiveness of access regulations, and the application and implementation of telecommunications legislation. While these are only some of the many relevant criteria, they provide strong insights into what is necessary to attain the EU's telecommunications objectives. For each of these targeted areas, we have determined objective parameters, which are used to evaluate national legislation and authorities.

5. The report assesses the situation as of June 2002. For most of the relevant criteria, it also attempts to foresee likely changes in the regulatory environment by 2004. These forecasts are based on various sources, including, for example, indications from Ministries or Regulators of planned improvements, or that current failures in implementation reported by the Commission will be addressed. For the majority of the relevant criteria, it is our view that improvements will not occur simply as a matter of evolution, but will require a genuine impetus for reform. In particular, it will require careful implementation of the new EC regime, and steps must be taken to ensure its uniform application across the various EC Member States – something which has

been lacking until now, and which has had a marked impact on cross-border investment and the success of the EC regime up to the present day[14].

6. This report first explains the various areas subject to the assessment, the reasons why they were chosen, and their content (Section II). It then describes the methodology used for the assessment (Section III) and applies this methodology in each country reviewed (Section IV). Section IV also presents general conclusions of the in-country assessments and the scoring attributed to the various countries. The scores for each country are based on the replies and comments from local specialists, which are contained in the attached annexes.

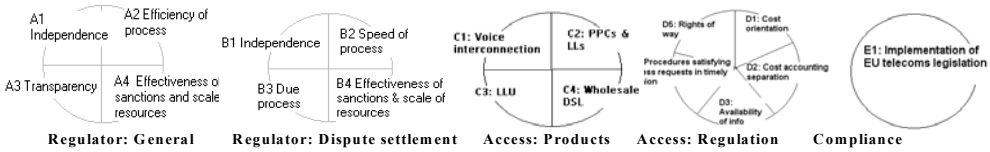
Part V draws a correlation between the relative regulatory effectiveness scores and the investment and employment levels in telecommunications in each of these countries. There is a clear correlation between the two that highlights the importance of efficient regulation in telecommunications markets. Failures clearly impact competitive forces and critically affect investments in telecommunications[15]. The scores applied to the different countries on the basis of the analysis highlighted below can be graphically depicted as follows:

[14] See Marcus, Scott J., Federal Communications Commission, OPP Working Paper Series, "*The Potential relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications", at p. 25*: *"The new European regulatory regime appears to be both comprehensive and theoretically elegant. Implementation issues might nonetheless significantly impact its practical effectiveness*"; Werner Roeger, "*The contribution of information and communication technologies to growth in Europe and the U.S.: A Macroeconomic Analysis*", European Commission DG Economic and Financial Affairs, January 2001; Olivier Boyland, Giuseppe Nicoletti, "*Regulation Market Structure and Performance in Telecommunications*", OECD, April 2000.

[15] See *inter alia* Communications Outlook Reports, http://www.oecd.org/.

Source: Beaufort International Limited

Report on the effectiveness of national regulatory frameworks and investment impact



Regulator: General | Regulator: Dispute settlement | Access: Products | Access: Regulation | Compliance

Negative for Investment/Innovation
Neutral/Scope for improvement
Positive

See explanation of scoring below

	Regulator: General 2002	Regulator: General 2004	Regulator: Dispute settlement 2002	Regulator: Dispute settlement 2004	Access: Products 2002	Access: Products 2004	Access: Regulation 2002	Access: Regulation 2004	Compliance 2002	2002	2004
Belgium										-16	-6
France										-12	-9
Germany										+2	+6
Ireland										-6	+4
Italy										-12	-7
Netherlands										-1	5
Spain										-11	-4
Sweden										-1	+3
UK										+15	+16

Correlation between regulatory effectiveness and investment and employment in the telecommunications sector

Correlation between Regulatory Effectiveness & Investment per Capita

This graph shows the relationship between the effectiveness of regulatory regimes as calculated in the Scorecard and investment per capita over the period 1997 – 1999. The graph shows a strong correlation between the two, with a correlation coefficient of 0.76. A correlation does not show the cause and effect, only the relationship. However, it can be assumed that greater regulatory effectiveness is more likely to attract investment than the other way around. This indicates a real benefit therefore of effective regulation: greater investment in the telecommunications infrastructure.