# REACH LTD.

## SUBMISSION IN RESPONSE TO IDA'S CONSULTATION DOCUMENT

## SECOND PUBLIC CONSULTATION ON THE FIRST TRIENNIAL REVIEW OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES

## 22 JUNE 2004


**Contact Details:**
Mr Dermot Keilthy
Director, Regulatory Affairs
REACH
20/F Telecom House
3 Gloucester Road
Wanchai
Hong Kong

Tel: +852 2888 2207
Fax: +852 2962 5012
Email: Dermot.Keilthy@reach.com

## TABLE OF CONTENTS

**REACH LTD.**

**SUBMISSION IN RESPONSE TO IDA'S CONSULTATION DOCUMENT**

**SECOND PUBLIC CONSULTATION ON THE FIRST TRIENNIAL REVIEW OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES**

## 1. SUMMARY

REACH provides comments on the following key issues as part of the second public consultation on the Code review:

- REACH commends IDA on having a further round of consultation on the Code, which indicates a move towards greater transparency in IDA decision making. We trust that IDA will remain open to substantive industry comments, and ensure that this round involves more than just minor 'tweaking' of Code provisions.

- At the same time as providing adequate opportunity for consultation, IDA must be mindful that the delay in revising the Code and RIO is hampering business for a number of operators. Now that the revised RIO will not be issued until 2005, the IDA should ensure that it addresses urgent issues alongside the Code and RIO reviews rather than wait until the full RIO review.

- IDA should also take the opportunity for a wider regime review, including issues such as licence fees and accounting separation. It should also consider the complexities that have arisen from its treatment of licence directions as confidential, and the fact that this leads to an appearance of regulatory inactivity/lack of transparency/lack of accountability.

- REACH submits telecommunications should be covered by the Competition Bill and that the IDA and Code should have a complementary function. At worst case, the Code and Competition Bill should be more consistent if they are to exist as separate regimes. We refer to the submissions made by our group of competitive carriers to MTI in relation to the Competition Bill as well as to IDA in relation to this Second Code Consultation.

- In terms of broad policy objectives, IDA should ensure that it adequately supports service based competition. The current draft Code does not do so. By turning away from SBOs / resale and remaining focused on facilities competition, IDA runs the risk of overlooking or restricting the benefits which SBOs and resellers bring. Not supporting such activities would be out of step with the increasingly sophisticated international market and could constitute a barrier to entry.

- REACH supports IDA's proposal to issue preliminary decisions to increase regulatory transparency but believes the Code should be strengthened to ensure that this process is used for all key issues and that final decisions include clear reasoning.

- REACH also supports the decision to develop guidelines on key Code provisions. However, these should be required by the Code and be binding on operators. Guidelines should also be issued as soon as possible for consultation so that industry can be sure that the revised Code will be effective.

- We submit that, while the Second Code Consultation indicates an intention to respond to industry issues in a timely fashion, IDA should include more checks in the Code to ensure that lengthy delays cannot occur, as they have in the past.

- REACH supports IDA's comments that competition in Singapore markets remains immature compared to other key benchmark jurisdictions, such that SingTel should be treated as dominant across the board.

- In relation to dominance assessments, we assume that the IDA will include details in guidelines but believe that some matters are so critical that they should be referred to in the Code. In particular, the Code should refer to the fact that a percentage market share test will be used to presume dominance.

- The Code should also contain stronger statements that the onus to prove non-dominance rests on the Dominant Licensee. IDA should also be required to inform interested parties what evidence a Dominant Licensee has provided, even if the actual details of that data are partially withheld on the basis of confidentiality.

- We remain concerned at IDA's proposal to withdraw from its consumer protection role.

- REACH has a number of remaining concerns with the tariff provisions of the revised Code. We still believe that more transparency should be provided as to SingTel's tariffs. There should also be a requirement to have wholesale tariffs to promote wholesale competition and to recognise avoided costs.

- We are pleased to see that IDA recognises some wholesale services should be tariffed on a cost basis.

- We remain concerned that wholesale and resale tariffs will not be reviewed by IDA against appropriate criteria. In fact, the further draft of the Code further reduces the chance for effective wholesale competition in Singapore. Wholesale and resale tariffs should be less than retail prices and should also be assessed with regard to factors such as cost and international benchmarks.

- The Code should provide for greater transparency of cost calculations.

- The IDA should be cautious in using an AVC test for Code provisions such as predatory pricing. Such a test has its limits in telecommunications markets, where sunk costs are high and variable costs low. It may need to adjust the test to reflect this.

- REACH is concerned that the Code has been clarified to allow IDA the same time to consider a revised RIO as for a new RIO. This is inconsistent with IDA's statements that it will act in a timely fashion.

- REACH submits that since the Second Code Consultation raises, but does not address, outstanding industry matters such as cable station access, the IDA should inform operators when such matters will be addressed.

- IDA must urgently consider allowing third party enforcement of the Code, in line with the Competition Bill. However, IDA should improve on the approach by allowing for third parties to obtain compensation directly rather than waiting to take civil action after a regulatory decision.

- The Code needs more teeth in terms of anti-competitive conduct. The proposed guidelines will assist, but third party enforcement rights and higher penalties are still needed. Also, the guidelines will also only work if they improve on the current Code provisions, particularly in relation to price squeezes and discrimination. We believe that such conduct must be happening now, given SingTel's pricing in the market, and therefore something must be done to ensure that the Code is more effective in preventing this in future.

- REACH continues to believe that the Code should allow some flexibility for the review and appeal processes to be alternative rather than consecutive in appropriate cases. The processes also need to be further clarified.

- IDA should consider Code provisions allowing information to be withheld from it on the basis of confidentiality and determine whether there may be benefit in guiding industry that SingTel NDAs cannot be used to keep relevant material from IDA indiscriminately.

- REACH has no issue with gazettal of IRS and mandated wholesale services. We believe that the detailed provisions for collocation space should retain a time limit for SingTel's reservation of space.

- We continue to urge IDA to be more proactive in providing informal assistance with industry issues rather than treating disputes with SingTel as commercial.

- REACH believes IDA still needs to address key issues in reviewing the Code and RIO such as inclusion of binding SLAs on SingTel provision of IRS. We also look forward to IDA including provisions for mandatory wholesale services, particularly LLCs.

## 2. STATEMENT OF INTEREST

Reach Ltd. ("*REACH*") provides this submission in response to the "*Second Public Consultation on the First Triennial Review of the Code of Practice for Competition in the Provision of Telecommunications Services*" ("*Second Code Consultation*"). Our comments should also be read together with our earlier submission ("*First REACH Submission*") on IDA's Consultation Document "*First Triennial Review of the Code of*

*Practice for Competition in the Provision of Telecommunications Services*" ("*First Code Consultation*"). Our comments are made on behalf of our subsidiary, Reach International Telecom (Singapore) Pte Ltd. Of relevance to our status under the Code of Practice for Competition in the Provision of Telecommunications Services ("*Code*"), this entity is the holder of a Facilities Based Operator Licence ("*FBO*") in Singapore and has signed up to the current Singapore Telecommunications Limited ("*SingTel*") Reference Interconnection Offer ("*RIO*").

REACH commends IDA on having a further round of consultation on the Code, which indicates a move towards greater transparency in IDA decision making. We trust that IDA will remain open to substantive industry comments, rather than take the approach that this round should only involve minor 'tweaking' of Code provisions.

## 3. GENERAL COMMENTS

### Timing Of Code and RIO Review

IDA indicated at the industry discussion session on 28 May 2004 ("*Code Session*") that, given the need for the Telecommunications Act to first be amended, the revised Code would not be released until late 2004. This means that the RIO will not be revised until 2005.

REACH is particularly concerned as to how the delay in releasing a new RIO will impact on current outstanding RIO disputes. We trust that IDA will not use the fact that there will be a comprehensive overhaul by next year as a reason to delay some of the urgent amendments required to the current RIO. IDA should continue to make *ad hoc* amendments as necessary to meet the commercial needs of operators. It is unreasonable to expect that operators should put significant plans on hold just so that a RIO review can be done neatly and all at once. Operators have already been waiting for the RIO review to address some of these issues since early 2003 and were expecting resolution by the end of 2003 (worst case) rather than having to wait until the revised RIO release date in 2005.

REACH raises as clear examples the inclusion of i2i as a submarine cable to be connected under Schedule 4 and the necessary changes to Schedule 8 collocation provisions to stop SingTel's obstructive behaviour in providing collocation for necessary connection equipment to certain cables. We refer to our RIO submission in this regard.

### Wider Regime Review

REACH reiterates our concern as to when there will be a wider telecommunications regime review. In particular, REACH believes that several aspects of the licensing regime are in need of reform to ensure that they remain in line with IDA's objectives for the Singapore telecommunications industry. For example, IDA has already reduced SBO licence fees dramatically and REACH believes that a similar review of FBO licence fees is overdue.

We also consider that the time is ripe for a review of other licensing provisions, including the requirement for non-dominant FBOs to comply with accounting separation requirements. Accounting separation should only be imposed on Dominant Licensees.

This proposal would best be implemented by amendment to existing standard FBO licences and inclusion of accounting separation as a Dominant Licensee obligation under section 4 of the Code. In this regard, the Second Code Consultation appears to misunderstand the point of the First REACH Submission in suggesting that since accounting separation is a licence obligation it need not be included in the Code. Licence obligations apply across the board whereas our proposal is that accounting separation be targeted more appropriately at dominant licensees alongside other targeted obligations under the Code.

**Need For Change In Treatment Of Licensee Directions**

A key change needed to the wider telecommunications regime is to treat IDA directions to licensees as public where they clearly have an impact on other operators or customers. Currently, licences require that IDA directions be treated as confidential. We have been informed that IDA feels it cannot disclose to industry when it is planning to take action and issue directions in relation to SingTel conduct as a result of these licence provisions. This is because licences are deemed to constitute almost a private relationship between IDA and the licensee.

REACH believes that this very legalistic and conceptual approach has no place in today's regulatory environment. It is impossible for IDA to achieve its objective of being a transparent regulator if it does not inform industry when it is taking action on matters that industry is concerned with. It also means that IDA may not be armed with all the best information before issuing directions as it may be completely unaware that there are a number of operators facing the same problem without an open dialogue.

**Consistency with Competition Bill**

REACH submits telecommunications should be covered by the Competition Bill and that the IDA and Code should have a complementary function. At worst case, the Code and Competition Bill should be more consistent if they are to exist as separate regimes. We refer to the submissions made by our group of competitive carriers to MTI in relation to the Competition Bill as well as to IDA in relation to this Second Code Consultation.

## 4. ISSUES RAISED IN SECOND CODE CONSULTATION PAPER

**Facilities Competition Requires Support For New FBOs**

A key theme throughout all our submissions is that reform is needed to the Code and RIO (in application as much, if not more, than the written procedures) if IDA is to support the Singapore government policy of promoting infrastructure competition.

REACH submits that promotion of infrastructure competition does not mean protecting SingTel but rather ensuring that SingTel does not frustrate the ability of new FBOs to build infrastructure or to offer services using their facilities that provide funding for further investment. This is the reason why Code and RIO procedures need to be streamlined and greater certainty provided to FBOs via transparency of regulation and removal of SingTel discretions.

As an example of conduct that SingTel has been able to get away with, an FBO may have built its own backhaul but, because of the conditions in the RIO, it is not allowed to use this backhaul to connect cable capacity it has leased. Instead, this "backhaul" connectivity has to be provided by SingTel and the FBO has to pay for local circuits from the cable station for connection to its POP. Clearly for an FBO to invest in and build its own infrastructure and not to be able to use it for its intended purpose is a powerful disincentive to invest in infrastructure development in Singapore.

REACH also believes that the Code and RIO should support new entrants by allowing them to supplement their infrastructure with service based competition where this makes better business sense. The Code needs to keep pace with the development of (and trends in) the global telecommunications market. For example, today's dynamic international wholesale market demonstrates that many international carriers are no longer investing in long-term IRU or ownership interests in submarine cable systems for their wholesale capacity or services. This is because of the downward trend in international wholesale prices – carriers do not wish to be restricted by long-term cost floors in such a highly volatile market. Accordingly, it is increasingly common practice for carriers nowadays to invest in large capacity relatively short-term leases instead.

Where an international operator is licensed to provide international facilities based services, it should not be restricted to supporting only its long-term IRU and ownership capacity investments, or similar investments of its customers, but should also be allowed to support shorter term leased capacity based services in line with prevailing market requirements. Therefore, the Code should enable competing FBOs in Singapore to both co-locate and obtain connection services to support leased capacities.

FBOs have already demonstrated their commitment to infrastructure development and bringing capacity into Singapore by meeting the requirements to be awarded an FBO licence - in particular through the commitments and undertakings under the performance bonds. Given the changing behaviour of the industry (moving from IRUs to IPLCs to avoid contracting long-term prices in a market where capacity prices continue to fall), if an FBO is complying with the requirements of its performance bond and has IRU capacity landing in Singapore on at least one cable system, the RIO should allow that FBO facilities access rights to directly connect to leased capacity it has on all other cable systems landing in Singapore. This would facilitate origination, termination and transiting of traffic and further Singapore Government's policy of promoting Singapore as a key regional telecommunications hub. If access for competitive FBOs to co-location for commercially viable capacity is denied by SingTel, then this goal will be frustrated.

There is evidence that development of Singapore's role as a competitive regional hub is being stifled by SingTel. The IDA's ITS Decision in November 2003 indicated that SingTel has approximately 60% of international telephone services retail minutes landing in Singapore. SingTel's financial results for the three months ended 31 December 2003 stated that SingTel accounted for 77% of all Singapore international telephony minutes, including transit. Therefore, if traffic landing in Singapore is excluded, this indicates that SingTel has in excess of 90% of all transit telephony minutes - this does not suggest a highly competitive hubbing environment.

REACH repeats and supplements these points from its submission on the First Code Consultation as we are concerned that these are not addressed, or even referred to, in the Second Code Consultation. We were further concerned by IDA's comments at the Code Session to the effect that it intended to maintain its current policy approach (which has been shown to overly favour facilities based competition, particularly SingTel investments). Also, despite IDA's statement that it will not further reduce support for service based competition, it has weakened its proposals for wholesale and resale pricing. REACH is concerned that this indicates a policy shift even further away from service based competition.

By turning away from SBOs / resale and remaining focused on facilities competition, IDA runs the risk of overlooking or restricting the benefits which SBOs and resellers bring. Not supporting such activities would be out of step with the increasingly sophisticated international market and could constitute a barrier to entry.

The international market is now characterised by layered chains of supply: the cable builders sell large blocks of capacity to specialist wholesale carriers who in turn sub-divide the capacity to sell to small carriers which sell the capacity on both a wholesale and retail basis. Value-added features may be added at each layer of supply, but often the capacity is simply resold from one layer to the next. The advantage of these chains of supply is that they allow aggregation of demand and therefore allow smaller operators to share in purchasing economies which they would not be able to access if they or their customers had to buy directly from the original capacity holder.

Resale encourages the emergence of specialist wholesale providers. Reducing support for resale could have the effect of eliminating the intermediate wholesale markets. The effect is to reduce the overall level of competition and to reduce the scale economies which are passed through to end users.

Resale helps reduce the barriers to entry. While international capacity costs have fallen significantly, the market is still characterised by high fixed costs required to invest in capacity. Resale allows the wholesale purchaser of capacity to share some of the risk by reselling part of the capacity to another wholesale provider. Discouraging resale, therefore, can raise barriers to entry and result in the market being characterised by a small number of large operators.

**Transparency Of IDA Policy And Decisions**

We strongly support the Second Code Consultation proposal that IDA seek public comments before any Code modifications.

REACH is also pleased to see that IDA intends to improve the transparency of its decision making, including by issuing preliminary decisions and being clearer in its reasoning for decisions. However, while the use of preliminary decisions is mentioned in the Second Code Consultation, we believe it needs to be codified in section 1.5.6 of the Code, rather than limited to specific provisions such as dominance exemptions. We also submit that the IDA should strengthen the Code provisions in relation to providing more detailed reasoning. While the Second Code Consultation says that IDA will improve this

area, the Code wording remains as per the current Code and so leaves the same scope for uncertainty as to IDA rationale for decisions.

**Use Of Guidelines**

REACH supports IDA's decision to issue guidelines on how it will apply various sections of the Code. However, this should be properly codified, not only by the section 1 reference to the *possibility* of guidelines but also in the relevant sections where IDA already knows guidelines are necessary (eg. dominance exemption and anti-competitive conduct). The Code should also make clear the status of the guidelines so that operators see them as effectively binding.

We also remain concerned about the adequacy of the Code pending release of the details in the guidelines. To ensure that there is industry buy-in to the revised Code, it is critical for IDA to move swiftly to release draft guidelines for industry comment. As stressed elsewhere in this submission, IDA must ensure that public comment is taken into account early in the process before IDA's views are cemented. It is also important that consultations take place soon so that the guidelines are able to be released together with the Code, or at least immediately after. There should be no further delays to proper implementation of the revised Code.

REACH believes that the IDA must already have substantially prepared 'internal' guidelines in order to carry out its functions under the current Code, for example in relation to dominance exemptions. These 'internal' guidelines should be released as soon as possible in draft form for comment.

Similarly, IDA should swiftly issue draft guidelines on unfair competition. The quality of these guidelines will be very important to the success of the revised Code.

**Timeliness Of Decisions**

REACH notes IDA's stated intention in the Second Code Consultation to make regulatory decisions more quickly. However, while defending its current processes as being in line with other jurisdictions, it should still recognise that a number of industry matters have taken unduly long to resolve, such as LLCs and cable station access. The Code should be revised to ensure that there are time limits on broader IDA functions.

**Dominance Definition**

We strongly support a number of statements in the Second Code Consultation where IDA recognises competition is still immature and SingTel dominates across Singapore telecommunications markets. We now have a better understanding of why IDA feels that a licensed entity dominance classification remains appropriate rather than use of standard competition analysis.

**Dominance Threshold**

REACH commends IDA for its proposal in the Second Code Consultation to expressly adopt a 40% threshold for a presumption of dominance. REACH believes this to be fundamental to the effective operation of the Code. As such, we submit that the

threshold should be referred to in the Code. Even if the IDA insists on leaving this to guidelines, the Code should at least refer to the fact that a presumption of dominance will be applied based on market share as set in guidelines. This will ensure that the guidelines are viewed by industry as effectively binding. The Code and guidelines should also expressly reject the "addressable market" concept in calculating market share (we refer IDA to REACH's previous submissions and correspondence with IDA on this point).

The Code should also contain clearer statements that the onus will be on the Dominant Licensee to prove non-dominance. The inability of competitors to provide sufficient data to establish dominance should not be sufficient reason for IDA to roll back regulation of SingTel, given the information asymmetries that prevail in telecommunications markets.

**Dominance Exemptions**

REACH again notes its support of IDA's proposal to issue guidelines in relation to Code exemption provisions and to provide more detail in its decisions. However, we believe that this should be codified in section 2. The current section 1 reference to the possibility of guidelines and intention to provide clear reasoning for decisions is inadequate.

We also submit that section 2.5.1 must be clarified by elaborating on the verifiable data SingTel must provide to support an exemption request. Further, there should be a requirement for IDA not only to consult on the request but also to identify what data SingTel has provided, even if IDA cannot reveal all the details of that data. In this way, IDA can demonstrate accountability and transparency in terms of making sure SingTel complies with the Code while at the same time safeguarding confidentiality. This also gives industry the chance to put a case to IDA as to whether data should really be confidential and also to provide counter data.

REACH is pleased to see that section 2.5.2 has been strengthened so that IDA must reject a request for exemption where necessary information has not been provided by SingTel. This increases the need for IDA to elaborate the data that must be provided and to publicise at least in summary form what has been provided in each case.

**Removal of Consumer Protections**

REACH remains concerned by the principal change that IDA has proposed to section 8, being the removal of prohibitions on false and misleading claims. These provisions under the current Code have proven their importance, with many of the successful actions and penalty awards to date relating to false and misleading claims. It is worrying to contemplate that with their removal, the Code may become a relatively dormant document in terms of enforcement of unfair competition.

Together with IDA's intention to pull back from consumer protection under section 3, REACH believes the end result will be that consumers are left with no effective recourse where SingTel engages in unfair sales tactics.

**Tariffing**

REACH again submits that SingTel should have to publish its prices, terms and conditions. Failing this, there should at least be an announcement (eg. gazette) that

SingTel has changed its prices so that interested parties can look up details. However, we are pleased to see that IDA has at least strengthened tariff publication requirements to include proper service descriptions and eligibility requirements.

REACH remains convinced that Dominant Licensees should be required to provide detailed information on how tariffs are derived so that industry can assist IDA in determining whether such tariffs are appropriate. IDA should recognise the need and benefit of engaging in industry consultation in this regard and make this standard practice.

More importantly, there should be obligations to have a wholesale tariff in the first place ie. it should not be voluntary for SingTel to offer a product it offers at retail with a reduced wholesale rate, given the lower costs (even if only in terms of avoided marketing costs etc) of serving the wholesale market. For the same reason, while resale services are required, the Code should go further and require wholesale pricing.

REACH commends IDA for recognising in the latest draft Code that there may be certain wholesale services that are so critical to competition, such as local leased circuits, that they should be specially designated under the RIO and then subject to cost based pricing. We trust that the IDA will implement this provision appropriately, and not favour retail minus pricing.

In terms of IDA's review of tariffs, REACH again submits that resale and wholesale pricing should be reviewed with regard to end user prices, cost, avoided costs, international benchmarks and the resale price that an efficient competitor would need to be able to viably compete. If IDA relies only on reference to end user prices in the case of resale and wholesale services, it will not be promoting effective competition or the international competitiveness of the Singapore telecommunications industry. REACH sees no reason to deviate from the IDA's review criteria for end user tariffs in terms of the importance placed on international benchmarking.

In this regard, REACH is particularly concerned that the Second Code Consultation proposes to further weaken the review criteria for voluntary wholesale services from retail minus and avoided costs to a vague test of "*just, fair and non-discriminatory*". The proposed Code further provides in section 4.4.3.1 that this test will be applied having regard to "*whether the prices, terms and conditions are no less favourable than the prices, terms and conditions on which the Dominant Licensee offers any comparable retail service to its End Users*."

REACH is concerned that there is no best practice (or query any) precedent for the "just, fair and non-discriminatory" test. While Singapore should seek to develop its own regime, surely it would be a sound approach to take advantage of the experience of other jurisdictions rather than strike out afresh with no precedent and no certainty for industry.

Further, while the test may seem to offer real grounds to challenge SingTel pricing, this is completely negated by the section 4.4.3.1 review criteria which only has regard to the equivalent retail price for the wholesale service. We note just a few problems with this provision:

- Quite clearly a price may be unjust, unfair or discriminatory even if it is the same as (or even better than) the retail price.

- A wholesale price that is no worse than a retail price ie. the same would amount to a price squeeze. The Second Code Consultation points out that the intention of the wholesale tariff provisions was to stop price squeezes. We strongly disagree with the statement that the latest revisions will achieve this. It is counter-intuitive to say that allowing a wholesale price to be the same as a retail price will allow competitors sufficient margin to compete downstream.

- There may be no equivalent retail service to apply the review criteria.

- Where there is a retail service it may be that the product falls more into the resale rather than wholesale category of the Code.

- If the only reference point is SingTel's retail prices there is no way that Singapore wholesale prices can be kept in line with international best practice. This is counter to Singapore's stated goal of promoting investment and enhancing Singapore's position as a leading telecommunications hub.

At the Code Session, IDA stated that while retail prices were key to its assessment of wholesale tariffs, it would definitely have regard to other relevant factors such as cost and international benchmarks. REACH submits that this must be codified, with the proposed section 4.4.3 amended to expressly refer to these factors.

**Cost Standards**

As we have previously submitted, there is a real need for transparency in the process of setting wholesale and retail prices, as well as implementation of such prices. This has been stressed as key to ensuring Singapore markets are competitive, including in important documents such as the US-Singapore FTA.

We believe that industry should have the opportunity, at least in terms of wholesale prices, to review the methodology used by SingTel in setting its prices and by IDA in approving such prices. The industry is in the best position to provide real and practical advice on the impact of such prices and whether they are in line with international best practice. In terms of wholesale prices, we should be able to input to IDA whether the methodology would result in a price squeeze or other such anti-competitive conduct.

We also stress again our RIO submission arguments that while we support the IDA's use of LRAIC pricing and current review of what that pricing is, IDA still needs to ensure that the prices set are an accurate reflection of this principle and are in line with global best practice. Again, we believe that IDA would benefit from industry input rather than relying only on external advisors or information provided by SingTel which would clearly be protecting its own interests.

REACH continues to believe there should be a requirement to provide wholesale and resale services at retail minus rates (or a non-discriminatory wholesale price that allows for downstream competition if there is no retail benchmark). The Code should provide for a list of services to be issued in this regard, comprising both retail services to be

provided for resale as well as any services specifically developed for the wholesale market. The list should be able to be amended easily, whether as a result of SingTel explicitly introducing a new service or where the existence of the service must be implied (as will often be the case with internal supply of wholesale products).

REACH also notes that IDA has determined to change its current marginal cost standard included in various parts of the Code to an average variable cost test. We believe that this is an improvement but that there remains a real risk that SingTel's predatory conduct will go unchecked. It is well-recognised that in industries where variable costs may be low as compared to fixed costs, such as in telecommunications, it may be almost impossible to prove a case of predatory pricing using an average variable cost test. IDA may need to consider whether, because the investment in telecommunications is largely sunk/long term, the period over which it considers variable costs be similarly long.

Further, REACH notes that in assessing the adequacy of end-user retail tariffs, IDA will consider whether they are above average variable cost. REACH submits that while average variable cost or LRIC may be benchmark tests for predatory effect in retail prices, they are not appropriate bases upon which to set, or approve, end-user retail prices. Ultimately, a Dominant Licensee's infrastructure investment decisions and associated overhead costs are geared to its final output into its end retail markets. Consequently, as not all investment and few overhead costs will be recovered (and should not be recovered) from the Dominant Licensee's wholesale and resale activities, these costs remain to be covered by its end-user retail tariffs. Therefore, IDA should adopt a fully distributed cost basis as the benchmark for approving general end-user retail tariffs – unless there is adequate justification for applying a different cost base. The application of a fully distributed cost basis as a reference point for general end-user retail tariffs, combined with the use of LRIC for wholesale and resale pricing, should also significantly reduce the opportunity for price squeezing by the Dominant Licensee.

While the Dominant Licensee may complain that this will lead to higher retail prices and deny lower prices to consumers, it will provide the opportunity for new, more efficient operators to enter the market with lower prices – with those operators bringing the benefit of lower prices to consumers. Additionally, if the Dominant Licensee's retail prices based on fully distributed costs are high by comparison to other Singapore licensees and other jurisdictions, this may indicate that the Dominant Licensee's operations should be made more efficient to reduce costs in order to offer lower prices – not through pricing at below cost. Retail prices set at average variable cost are not sustainable unless there is, probably unfair, cross-subsidisation from those Dominant Licensee activities which are less susceptible to competition to those activities which face greater competition.

**RIO Review Timeframe**

REACH again stresses its concern with the IDA lengthening key Code processes, including an increase from 75 days to 150 days for review of new RIOs. We further note that, although not highlighted in the Second Code Consultation, IDA has now clarified section 12 to also apply the 150 day period to revisions to the existing RIO. At the Code Session, IDA confirmed that it would use the amended 150 day period in section 6 (new RIOs) for SingTel's revised RIO. This introduces substantial delay as compared to the

previous 75 day period for new RIOs. It is also inconsistent to have the same review period for a revised RIO containing few changes as a completely new RIO.

We remain confused as to how the provisions requiring SingTel to submit a revised RIO shortly after the revised Code is issued will work, as IDA has not made clear how it will handle matters raised in the RIO Consultation. We trust that IDA will provide industry with transparency of this process and the opportunity to input before IDA decides its position on RIO matters.

**Cable Station Review**

The Second Code Consultation states that industry concerns in relation to cable station access will be addressed in a separate process. The IDA is well aware of our interest in this area yet REACH remains 'in the dark' as to what IDA intends to do, whether there will be a public consultation, and if so, when. REACH believes that regulatory transparency requires this sort of information to be provided and that a better outcome will be reached if interested parties are allowed to input on the process. At the same time, now that this matter has been outstanding for so long, we do not want the process unnecessarily delayed at this stage by an unwieldy consultation.

REACH strongly recommends that IDA hold an open dialogue with directly affected parties before it finalises its review of cable station access. IDA may find that this is helpful not only to industry but also to itself, in terms of ensuring a sound decision. We strongly urge the IDA not use the excuse of confidentiality of its directions and refer to our comments in this regard above in relation to the need for a wider regime review.

**Right Of Third Party Enforcement**

REACH strongly submits that IDA should work with the government to include telecommunications and provide rights of third party enforcement under the competition law proposed for 2005. The IDA should ensure that any general law is adequate to address telecommunications specific issues. As IDA will be aware, we are deeply concerned that telecommunications is currently excluded from the draft Competition Bill.

Nevertheless, REACH takes some comfort from the IDA comment in the Second Code Consultation that if third party rights to seek compensation are included in the Competition Act then the Code may be amended to take the same approach. REACH believes that this is essential for economy-wide consistency. It would be a complete anomaly if one of the most important industries, telecommunications, had the weakest competition regime. However, REACH believes there are still problems with the proposed Competition Bill approach of only allowing civil action for compensation after a regulator decision (we refer to industry submissions on this point to MTI).

**Anti-Competitive Conduct**

REACH supports the proposal to introduce guidelines in relation to anti-competitive conduct. We believe that anti-competitive conduct provisions in the Code would be rendered more effective by the IDA issuing guidelines about how it will assess such conduct and its approach to enforcement.

REACH has already provided some detailed comments on anti-competitive conduct, which we submit should be reflected in the guidelines if not in the Code itself. We further comment here that IDA should look closely at non-discrimination provisions in the Code such as section 8.2.2.1 to make sure that they are effectively addressed in the guidelines. Discrimination by a dominant operator such as SingTel at the wholesale level creates serious problems for wholesale competition with flow through impacts to retail markets and end users. It is essential that the Singapore regime address discrimination effectively. IDA has in part recognised this in the revised draft Code by providing that wholesale prices must not be discriminatory. However, it is not enough to just include the principle – there must be mechanisms to ensure compliance. We refer to our submissions on the First Code Consultation and on the RIO in relation to the need for SLAs, proper benchmarking etc. Including the basic principle does not seem to have been effective to date in curbing SingTel's anti-competitive practices.

We also believe that anti-competitive conduct regulation would be enhanced by third party enforcement rights, as outlined above. Anti-competitive conduct does not just result on societal losses but also direct damage to competitors and they should be allowed to protect their interests without having to rely on regulatory intervention, which may not be forthcoming given the lack of a history of competition law in Singapore.

Another way of giving these provisions teeth would be to impose higher penalties. By this, we do not just mean having substantial penalties written into the law or Code, but having IDA dish out penalties that have a deterrent effect and recognise that anti-competitive conduct in any form is a serious infringement of Singapore law. The Second Code Consultation does not, we believe, give this matter due consideration and IDA should look to the Competition Bill penalties as indicative of what may be appropriate under the Code.

**Review Process**

REACH welcomes the clarification and certainty which putting timeframes to the reconsideration procedures brings. However, we are disappointed that IDA's latest proposal is for the review and appeal process to be consecutive in all cases. We are aware of IDA's concern that this is needed to comply with FTAs but do not believe that the intention of the FTAs is to hinder dispute resolution. While in most dispute cases, the flow from a reconsideration to an appeals process is a logical one, there may be situations where the opinions of IDA and the prospective appellant are so diametrically opposed that there is no chance of resolution through reconsideration. In these circumstances, there should be provision for the reconsideration process to be bypassed since, being incapable of providing resolution, the reconsideration process only imposes an unnecessary and inappropriate delay in achieving resolution through the appeals process.

In terms of the minor clarifications made in the latest draft Code, REACH observes that notice must now be given of reconsideration requests. However, section 11.9.1(b) is still too vague in its wording eg. it does not specify to whom notice will be given, timeframe etc.

REACH also asks that section 11.9.5 be amended so that if the IDA considers taking the non-standard approach of staying a decision, for example on the grounds of irreversible damage to industry, it will first consult with interested parties as to whether they really will suffer damage or how this damage could be minimised eg. by a partial stay only. We refer to previous industry discussions with the IDA in relation to this point in the context of IDA's stay of the LLC decision.

We also submit that the Telecommunications Act must be amended to clarify the appeal process to the Minister. It is insufficient to simply provide that there is 14 days to appeal without then clarifying how the Minister will handle the appeal, including timeframes. The problem the current vagueness causes is well demonstrated by the delay in completing the LLC appeal.

**Confidential Information**

REACH has already provided comments in relation to the need for IDA to use its information gathering powers more effectively to get key data from SingTel, rather than relying on competitors. We also take this opportunity to raise a concern we have with section 11.7 of the Code which allows operators to withhold information from IDA on the basis of confidentiality. We are concerned that this may result in IDA not being armed with all the material it should have. While it is important for both dominant operators and competitors to have confidential information safeguarded, we believe that there is a need to ensure that confidentiality is not used as an excuse to withhold material that is not really commercially sensitive. For example, SingTel often makes commercial proposals and agreements subject to NDAs, which leave the other party in a difficult position where they want to show the agreement to IDA because it raises a regulatory issue. REACH submits that IDA should consider providing industry guidance that such material can be provided to IDA if needed for Code enforcement. IDA could also consider whether SingTel's requirement to sign NDAs may in some circumstances raise competitive concerns.

**Gazettal Of IRS And Mandated Wholesale Services**

REACH has no issue with details of IRS and wholesale services being gazetted.

We have some concern with the IDA's proposal to allow SingTel rights to reserve space for anticipated growth over an unspecified period (as opposed to previous 24 month limit). This type of provision is too open to abuse unless the IDA makes clear how it will assess what is a reasonable space reservation and other licensees have an opportunity to inspect SingTel space.

**Lack Of Change Re Conciliation Role**

REACH has real concerns with the underlying approach to dispute resolution in the Code and Dispute Resolution Guidelines. Too much reliance is placed on commercial negotiation with the IDA avoiding involvement. The need for IDA to intervene in interconnection disputes rather than deciding whether and when it will assist has been identified in the Singapore – US FTA, which requires that operators have recourse to the regulator for such disputes within a reasonable period of time. It is not a true recourse

option where IDA may, and often does, turn away complainants or requests them to continue to deal direct with SingTel. Once again, REACH strongly urges IDA to be more proactive in interconnection disputes involving implementation matters.

## 5. CONCERNS YET TO BE ADDRESSED IN CODE CONSULTATIONS

### SLAs for IRS

A number of the concerns that REACH has with the Code have already been identified by us in our submission to the RIO Consultation. In many instances where we have proposed changes to the RIO, we believe that these should be supported by new or amended Code provisions, rather than left to SingTel interpretation when redrafting the RIO. We cross refer you to our earlier RIO submission. However, there is one point that we feel must be made yet again, particularly given that it was not addressed or even referred to in the Second Code Consultation.

IDA could improve the RIO markedly by requiring binding SLAs covering all matters from ordering to provisioning and fault management. Real penalties should have significant commercial or financial impact on SingTel where its quality of service is inadequate. The basis for an effective QoS framework should be included in the Code. In relation to QoS, it is critical for IDA to understand the effect of SingTel's current delay tactics in an industry where time is of the essence and speed of delivery is often the deciding factor for customers selecting a supplier.

The RIO (and Code) would also be strengthened with the inclusion of mechanisms to ensure non-discrimination, as general prohibitions on such conduct are otherwise meaningless. Proposals include SLAs, non-price record keeping rules and IDA monitoring. The Code itself should set out a framework for these tools, which are then detailed in the RIO.

### Inclusion Of Designated Wholesale Services Under The Code

REACH looks forward to inclusion of LLCs as a mandated wholesale service under the Code and hopes that IDA will strongly and successfully defend its LLC decision in the current appeal.

## 6. CONCLUDING COMMENT

REACH trusts that the above provides some practical and helpful feedback on the Second Code Consultation. We remain ready to discuss Code issues with the IDA as and when required and look forward to the release of draft Code guidelines that will provide industry with a better indication of how the regime will be implemented going forward. We are confident that IDA shares Singapore's stated goal of promoting investment and enhancing Singapore's position as a leading telecommunications hub and we look forward to assisting IDA in developing the international best practices that will contribute to that goal.