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

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JOINT SUBMISSION OF TELECOMMUNICATION CARRIERS IN THE ASIA PACIFIC

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TABLE OF CONTENTS

STATEMENT OF INTEREST

The carriers involved in preparing this joint submission ("Submission") in response to the second draft Code of Practice for Competition in the Provision of Telecommunication Services dated 11 May 2004 ("Code") are AT&T Worldwide Telecommunications Services Singapore Pte Ltd, BT Singapore Pte Ltd, Cable & Wireless Global Pte Ltd, Macquarie Corporate Telecommunications Pte Ltd, MCI WorldCom Asia Pte Ltd, Reach International Telecom (Singapore) Pte Ltd and T-Systems Singapore Pte Ltd. Some of the carriers may also be separately preparing their own more detailed submissions.

A competitive communications industry is vital to the success of Singapore, as a regional economic hub. As providers of communications services to business and residential users in Singapore, we strongly believe that it is important for Singapore to have a pro-enterprise environment with a robust regulatory and competition law framework that promotes competition. Research has shown that an economy with a robust competition regime attracts more investment than an economy which is known to be unregulated or which has weak or ineffective competition regulation.

COMMENTS

This part of the Submission provides more detailed comments on each of our key points.

Key Point 1: We Support The Following Changes to the Second Code Review.

Transparency (Section 1)

We are pleased that IDA has decided to increase transparency in its decision making processes by allowing for more public consultation on any proposed modification to the Code (Section 1.6), or any grant of exemption from the Code provisions (Sections 1.7.1 and 6.3.2(b)). We are also pleased that IDA will release decisions on material policy or regulatory issues for public comment before they are finalised. IDA has given some examples of what decisions might be classified as "material" and therefore open to public comment. This is a very positive step forward as it promotes regulatory certainty and will encourage investment. We welcome the increased transparency provisions and urge IDA to retain these in the final Code.

Notwithstanding, we submit that there is scope to further enhance the transparency provisions. Specifically, we request that those tariffs filed by a dominant licensee with IDA, pursuant to Section 4.4.1 of the Code, should be subject to public comment prior to IDA's approval. This is discussed in Key Point 10 below and to summarise, we believe that IDA would benefit from public comment, as it is a regulator and not involved in the actual building of network, so may not have the requisite commercial and technical expertise.

Suspension and Termination of End-User Agreements (Section 3.2.4)

We are pleased that IDA has amended the initial draft of Section 3.2.4, relating to procedures for a licensee suspending and terminating End User Service Agreements, to reflect the realities of commercial and business decision making processes with respect to suspension and termination of service. We thus welcome the revised Section 3.2.4 provisions which simplify the procedures for suspension and termination of End User Service Agreements and which we believe should be retained.

Key Point 2: The Competition Act Should Take Precedence Over The Code.

As a general comment, it should be noted that the latest draft of the Code has not changed significantly in terms of its competition law provisions as compared with the old draft. This is surprising because in the interim period, the Ministry of Trade & Industry ("MTI") issued a draft Competition Bill ("Bill"), which we believe is a much stronger piece of legislation, more closely aligned to world standards on competition law. We submit that there are two options to address our concerns:

(a) *Generic Competition Law with specific regulation for the telecommunications industry.*

Our preferred option is to create a comprehensive generic competition law for all sectors, with specific guidelines and sector-specific regulation for the telecommunications industry. Such an approach is consistent with the practices in other jurisdictions, such as Australia and the UK and has proven to be feasible and effective. For example, in Australia the Trade Practices Act 1974 has competition provisions, which apply across industry sectors and specific sections[1] which are focused on the telecommunications industry. We strongly believe that this is the more appropriate approach to be taken by IDA and urge IDA to consider adopting such an approach.

(b) *Extension of Competition Code so that it is aligned with the draft Bill.*

Alternatively, the second option is to amend and extend the Competition Code so that it is much more aligned with the draft Bill. While IDA's intention appears to be to take this approach, it has not aligned the Competition Code properly and fully with the Bill. Contrary to section 15.1 of the Consultation Document, which states that "*IDA will coordinate with MTI to ensure that the provisions under the Bill and the Code are aligned.…*", there does not appear to be any alignment between the Bill and the Code given that the two pieces of legislation contain different rules and different tests.[2]

Section 15.1 of the Consultation Document then proceeds to state that any non-alignment with the Bill is due to differences in the "*policy objectives to be achieved under the Code (which addresses a broader range of sectoral policy goals) and the Competition Bill (which focuses exclusively on preventing anti-competitive conduct).*" While we agree that the Code does address a broad range of policy goals, we believe that in respect of the Code's specific competition provisions, these provisions should be addressing exactly the same goals as the Bill, namely the prevention of anti-competitive conduct. We therefore fail to understand why IDA proposes to implement competition provisions in the Code which are incompatible with those in the Bill.

We strongly believe that creating a two tier system of competition regulation will lead to an imbalance within the competition regime, promotes regulatory uncertainty and gives rise to serious issues of interpretation, application and enforcement. Such uncertainty is likely to have a negative impact on investor confidence especially as the new regime does not conform to international best practices. Such a system is confusing for businesses, creates

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[1] Parts XIB and XIC Trade Practices Act 1974.

[2] One example of non-alignment is in respect of Section 9 of the Code (Agreements Involving Licensees That Unreasonably Restrict Competition). As discussed in Key Point 12, Section 9 focuses on the relationship of the parties to an agreement and has different rules for horizontal agreements (i.e. agreements between competing licensees) and non-horizontal agreements (i.e. where the parties are not direct competitors). The usual approach (as followed by the Competition Bill) in assessing anti-competitive agreements is to focus on the effect on competition rather than focusing only on the relationship of the parties.

uncertainty, hampers investment decisions in the market and ultimately, negatively affects market growth and development.[3]

We urge IDA to introduce a comprehensive generic competition law for all sectors (including the telecommunications industry), with specific guidelines and sector-specific regulation for the telecommunications industry. Alternatively, we urge IDA to amend and extend the Code so that it is in complete alignment with the Bill.

<u>Key Point 3</u>: IDA's Emphasis On Facilities Based Competition Should Not Be At The Expense Of Service Based Competition.

We note IDA's comment that it will continue its policy of encouraging facilities-based competition ("FBC"). While we agree that FBC is important, we submit that this should not be at the expense of service-based competition ("SBC"). SBC remains important, not only in its own right, but also as a platform for FBC:

(a) In our experience, SBC is a means of market entry for facilities based operators ("FBO") , allowing them to familiarize themselves and establish a customer base before making the significant investment necessary for effective FBC;

(b) Service-based operators ("SBO") help create niche wholesale markets for FBOs;

(c) SBOs help spread the risk for new FBOs by purchasing significant volumes of capacity, allowing FBOs to unload bulk capacity without having to first establish a retail market presence; and

(d) SBOs are a major customer group for FBOs, competitive with the incumbent. If SBOs are harmed as a result of the withdrawal of regulatory protections, competitive FBOs will likewise be harmed as their customer base is threatened.

In addition, we disagree with a dominant licensee's often used argument that the facilitation of SBC will discourage new entrants from investing in infrastructure of their own. The argument is typically offered in a simple syllogism: if interconnection and access inputs are priced reasonably (in relation to the underlying cost of provision), new entrants will have no incentive to build their own competing infrastructure. We disagree with this argument because unreasonably high interconnection and access pricing and other limits on service based competition does not necessarily lead to infrastructure investment. The economics are straight-forward. Where a dominant carrier is allowed to raise the cost of its rival service based operators, charging them access rates well in excess of the underlying costs of provision, the ability of service based operators to provide a competitive service down stream to end users is foreclosed. The market stagnates, with new service based entrants having little or no incentive or ability to expand their operations. Conversely, if a dominant operator's charges reflect the underlying cost of provision (inclusive of a

[3] Please see Appendix A, where we have included our submission on the Bill, for further details.

reasonable return) then other operators are able to expand and increase their infrastructure investment. There is, in other words, a clear positive correlation between reasonable rates for access inputs and the encouragement of service based competition and increased investment in infrastructure.[4] We strongly believe that IDA has presented itself with a false choice and need not pit SBC against FBC. Rather, a robust service based competitive dynamic will drive increased infrastructure competition and a truly long-term commitment on the part of carriers. There can be a balance between the two extremes. The present document does not seek wholesale equivalents of all retail services but rather reasonable wholesale equivalents of bottleneck elements of the dominant carrier's services or network.

Singapore's experience since full liberalization in April 2000 is a case study on this issue. In the last four years, new licensees have invested very little in local access infrastructure. Competitive DSL providers are virtually non-existent. Further, it is a safe assumption that the combined total of local leased circuit connections built by all facilities-based operators licensed after 2000 covers less than 5% of the commercial buildings in the Central Business District.[5]

We respectfully suggest that infrastructure competition in Singapore has been slow to develop in a large part due to unusually high access pricing (e.g. local leased circuits) and refusal to supply (e.g., non-existence of usable wholesale DSL product and refusal to supply cross connections in the landing station for the I2I cable). As mentioned above, the "investment ladder" for new entrants (whether "SBOs" or "FBOs") is often to first enter a market relying on third party infrastructure, developing a customer base before migrating those customers onto their own network once certain economies of scale have been developed. The availability of key access products from monopoly providers, on mandated terms, is crucial to stimulating investment in competing infrastructures. The key access products include: (i) fixed voice interconnection, (ii) wholesale local leased lines; (iii) local loop unbundling, and (iv) wholesale DSL services. In Singapore today, it is the lack of items (ii) and (iv) that is impacting the ability of both SBOs and FBOs to move up the ladder of investment. We urge IDA to recognize these issues as it sets its policy goals for the development of the industry in Singapore.

<u>Key Point 4</u>: Guidelines Should Be Issued For Public Consultation As Soon As Possible And IDA Should Agree To Adhere To Guidelines As Closely As Possible.

Section 1.5.6 of the Code states that IDA will issue guidelines "*where appropriate*". Section 8.8 of the Consultation Document states that IDA will only "*consider*" issuing guidelines in the key areas – namely, assessment framework for dominant licensees seeking exemptions, reclassification, and assessment criteria for anti-competitive behaviour and agreements that unreasonably restrict competition.

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[4] See ECTA (European Competitive Telecommunications Association) Study at <u>www.ectaportal.com</u>

[5] IDA's consultation on local leased circuits conducted in mid-2003 demonstrates that SingTel is dominant in the provision of local leased circuits both within and outside the Central Business District. Please let us know if further information is required.

Firstly, it is crucial that guidelines in the key areas are issued for public consultation as soon as possible and should come into force at the same time as the Code comes into force, especially if the government intends to allow a two-tier system of competition regulation to exist. This is vital to avoid uncertainty and allow investors in Singapore to conduct their business with certainty.

Secondly, we are concerned that IDA does not always propose to adhere to its issued guidelines. For example, the draft guidelines governing the dispute resolution process, state that… "*IDA may, in its discretion, determine not to apply these Guidelines to resolve any dispute. In such a case, IDA will specify other procedures and standards to resolve the dispute.*" As you would be aware, guidelines are a very widely used tool to assist businesses to interpret and apply legislation. They are extremely important, particularly as they tend to cover key or difficult areas and provide valuable guidance and certainty to investors. Whilst we acknowledge that guidelines generally tend to be without legal force, we would urge IDA to agree to adhere to them as closely as possible and only deviate from them in exceptional circumstances. This is important because the purpose of guidelines is to illustrate IDA's approach when considering such key matters as dominance, anti-competitive agreements and abuse of a dominant position. If IDA does not adhere to them as closely as possible, there will be a great deal of uncertainty for licensees.

<u>Key Point 5</u>: The Framework For Classification Of Dominant Licensee Needs To Be More Detailed.

IDA has rejected a market by market definition in favour of a licensed entity approach. We urge IDA to consider adopting a market by market approach as soon as possible because such an approach gives a true and accurate reflection of competition in the market and the position of operators within it. The definition of market need not only be on a service by service basis but could, for example, be limited to a service in either the business or residential markets.

In Section 9.5 of the Consultation Document, IDA stated that the EU market by market approach was a more difficult and lengthy process than it expected. However it should be noted that the difficulties encountered were because the process in the EU covers 15 countries, each with differing market characteristics and with differing political environments. By contrast, it would be much simpler to perform a market analysis of the smaller telecoms market in Singapore. Even if IDA does not choose to move to a market approach for licensee classifications, it would still be worth conducting market reviews and building up a picture of competition in each market to aid effective regulatory intervention and to make a smooth transition towards using this approach.

Whilst we found IDA's brief analysis of the Singapore telecommunications market in Annex 1 of the Consultation Document to be a useful starting point, we are concerned that it has been presented without methodology and background material and that it has not been subject to public consultation. We would encourage IDA to continue the exercise it

has commenced in a public consultation involving market definition and competition analysis.

Section 9.9 of the Consultation Document provides that "*IDA will consider issuing a set of advisory guidelines regarding the assessment criteria for exemptions and reclassification of Dominant and Non-dominant Licensees*". It is crucial that IDA issues these guidelines as soon as possible and that they come into force at the same time as the Code. In addition, IDA should agree to follow its own guidelines so as to ensure consistency and certainty in its approach.

Key Point 6: The Framework Proposed In the Consultation Document For Regulating Access To the Dominant Licensee's Facilities and Services Should Be Modified in Several Areas.

The initial proposed Code and Consultation Document put forth a framework for regulating access to the Dominant Licensee's facilities and services. The framework includes: Resale Of End User Services; Voluntary Wholesale Service, Mandatory Wholesale Services and Interconnection Related Services (IRS).

Our position on each of these proposed methods of regulation is as follows.

Resale of an End User Service: The Consultation Document proposes that the Dominant Licensee makes services that it provides to its retail customers available to non-dominant Licensees at the same prices, terms and conditions. The IDA maintains the view that the Dominant Licensee need not be required to provide the non-dominant Licensees a discount below the retail price.

As described in more detail below in Key Point 7, we continue to support the resale requirement but again express the strong belief that such a resale regime is not viable in practice if the pricing provided to operators is the same at which the Dominant Licensee sells its services to end users. The resale regime described in the Consultation Document already exists under the existing Code and we are aware of no operators that utilize it to serve end users.

Voluntary Wholesale Service: The IDA's initial proposed Code provided that the Dominant Licensee's "voluntary wholesale services" would be offered to non-dominant Licensees at a retail-minus discount. The instant Consultation Document changes the treatment of these services, requiring merely that "voluntary wholesale services" be priced at "just, reasonable and non-discriminatory" levels, as reviewed by the IDA in tariff filings.

As described in more detail below in Key Point 8, we continue to believe that in markets where the Dominant Licensee remains recognized as dominant there should be no distinction between voluntary and mandatory wholesale. And in such markets, the Dominant Licensee's wholesale services should be mandated at pricing determined by a cost-based or retail-minus methodology.

Mandatory Wholesale Services: As with "Interconnection Related Services" these are a specified set of services that the Dominant Licensee is obligated to include in its RIO. For example, the IDA has designated Local Leased Circuits as a Mandatory Wholesale Service for inclusion in SingTel's RIO. In the initial proposed Code, the IDA suggested that "unless otherwise specified" by the IDA, the prices for these services would based on a retail-minus methodology. In the revised proposed Code, the IDA further refines its approach toward Mandatory Wholesale Services, concluding that "in order to facilitate effective competition, Dominant Licensees must be required to offer a service on a wholesale basis. In such cases, Dominant Licensees would be required to price these mandated wholesale services using the methodology specified by IDA, which will either be at cost-oriented or retail-minus levels. IDA will allow for public consultation before finalizing its decision and will provide the rationale behind adopting the appropriate pricing methodology."[6]

We support the IDA's decision to consider either a cost-based or retail-minus pricing methodology for Mandatory Wholesale Services. We ask, however, that the IDA more clearly define "Mandatory Wholesale Services" to include all services that the Dominant Licensee offers to itself or its affiliates in markets where it remains recognized as dominant. We respectfully suggest that under this definition, the IDA was correct in designating Local Leased Circuits as a Mandatory Wholesale Service. Further, we ask that the IDA consider a similar designation for xDSL, requiring the Dominant Licensee to develop a wholesale product where appropriate and where the provider is dominant. This approach for xDSL would be consistent with the policy of the European Union, which considers both Local Leased Circuits and wholesale xDSL as areas where the incumbent remains dominant and thus mandated wholesale service terms are required where there is insufficient competition at the whole level. We would be pleased to provide the IDA more information in this regard as needed.

Interconnection Related Services: The initial proposed Code specifies that prices for these interconnection and access related services "must be cost-based." The Consultation Document does not appear to alter this approach.

We support the IDA's conclusion in this regard. We ask, however, that the IDA review the now outdated long-run average incremental cost models completed in 2000-2001 and included in the RIO.

Key Point 7: The Pricing Of Resale and Wholesale Services Based On A Simple Retail Tariff Is Inappropriate.

In setting prices, there is a need to achieve a balance between promoting the interests of end-users and investors. The tariff review criteria in Section 4.4.3.1 for resale and voluntary wholesale services simply requires that the prices for resale and voluntary wholesale services be set "*on the same … prices, terms and conditions*" and at "*prices,*

[6] *See* paragraph 11.5 of the Consultation Document.

terms and conditions that are no less favourable" than the prices, terms and conditions a dominant licensee offers comparable retail services to its end-users. In principle, we strongly object to pricing of resale and voluntary wholesale services on a retail basis. If competition is to develop, there needs to be a sufficient difference between wholesale/resale price from the dominant operator and the discounted retail price of the dominant operator for an efficient operator to compete in the retail market when purchasing the wholesale/resale services.

The resale of services is an important activity, creating competition and innovation in the dominant licensees' service set. Resale of services increases the marketability, distribution and reach of services to the benefit of consumers. Resale activity also leads to greater choice and depth of service offerings for all end-users. Resale of services not only benefits end-users, it also benefits the dominant licensee, allowing it to tap into new market segments and quickly expand service reach. Accordingly, we agree with IDA's position that dominant licensees should not be allowed to restrict the resale of services.

As explained above, we strongly object to the pricing of dominant licensees' resale services at the same retail prices at which it sells its services to end users. Resellers would typically incur marketing, distribution and administrative expenses in reselling the service. As such, pricing resale services the same as retail prices gives a dominant licensee an unfair competitive advantage, which may lead to price discrimination and price squeeze.

We therefore strongly believe that resale services should be offered at a lower price level better than retail, i.e. retail-minus basis (including any effective discounts). Without such ex ante pricing rules in place, we believe that resellers will be deterred from entering the market, leading to fewer service offerings and less innovation for both business and residential end-users. The end result is no or little competition and higher price costs across the economy.

<u>Key Point 8</u>: A Dominant Licensee Should Be Regulated In The Supply Of All Services Where It Is Deemed Dominant.

There should be no distinction between voluntary and mandatory wholesale services – the mere concept predicates the ability for dominant licensees to exercise choice as to whether to offer services and therefore have discretion to discriminate. As a matter of principle, a dominant licensee should be regulated in the supply of all services where it is deemed dominant. Therefore, any licensee that is classified dominant under Section 2.2 of the Code should be required to offer services where it is deemed dominant, to competitive carriers on a mandatory wholesale basis. For example, the supply of wholesale DSL and local leased circuits should be offered on a mandatory wholesale basis.

<u>Key Point 9</u>: The Provision Of Voluntary Wholesale Services At "Just, Reasonable And Non-Discriminatory" Prices, Terms And Conditions Is Inappropriate.

Section 4.3 of the Code provides that if the dominant licensee chooses to offer a service on a wholesale basis, the dominant licensee must offer the service at prices, terms and conditions that are "*just, reasonable and non-discriminatory*". As discussed in key point six, above, we believe that in markets where the Dominant Licensee remains recognized as dominant, there should be no distinction between voluntary and mandatory wholesale and in such markets, the Dominant Licensee's wholesale services should be mandated at pricing determined by a cost-based or retail-minus methodology. Should the IDA decide to maintain a category of "voluntary" wholesale services in markets where the Dominant Licensee is no longer deemed dominant, we submit that the words, "*just, reasonable and non-discriminatory*" are vague and effectively meaningless as a basis for regulating the price of these services. Without further elaboration on how these terms will be applied, the terms will remain vague allowing the Dominant Licensee room to price anti-competitively.

Further, language in Section 4.4.3.1(c) on tariff review criteria suggests that the basis on which IDA would approve tariffs on voluntary wholesale services filed by a dominant licensee is benchmarked based on retail prices offered to end-users. In principle, we strongly object to voluntary wholesale services being tariffed on the same basis as its retail equivalent. As discussed in key point six, pricing voluntary wholesale services on the basis of its retail equivalent gives a dominant licensee an unfair competitive advantage, which may lead to price discrimination and price squeeze.

In Section 11 of the Consultation Document, it appears that IDA adopted such vague wording because it believes that anti-competitive conduct will be minimized by the effect of Section 8.2.1.2 of the Code. We disagree for two main reasons:

(a) Section 8.2.1.2 merely provides a description of price squeeze. There are no tests to conclude that such an abuse has taken place; and

(b) Competition provisions such as Section 8.2.1.2 would be applied ex post, i.e. after the abuse has already taken place, with the threat of an enforcement action for breach to act as a deterrent. It is well established however, that early on in the liberalisation process, ex ante regulation is required to prevent such abuses, rather than relying solely on the enforcement of competition law. For example, Oftel added strenuous pricing provisions to British Telecom's licence in the UK on liberalization, to supplement general competition law. The problem with relying on ex post competition law is that it is applied once the damage is done, which may be too late.

Accordingly, we submit that specific rules on the pricing methodologies to be applied pursuant to Section 4.4.3 of the proposed Code ("IDA Tariff Review Process") are required to prevent pricing abuses.

<u>Key Point 10</u>: Long Run Incremental Cost ("LRIC") Should Be Adopted In The Assessment of Tariffs.

In determining the adequacy of the proposed filed tariffs for end-user retail and voluntary wholesale services by the Dominant Licensee, Section 4.4.3.1(a) now provides for the use of the average variable cost ("AVC") methodology in its assessment, as opposed to marginal cost ("MC") in the first Code Review. We disagree with the IDA's view expressed in the Consultation Document that "there is broad consensus among economists and regulatory authorities that average variable cost is an effective proxy for marginal cost." Given the cost structure of the telecommunications industry – i.e. one which is capital intensive due to infrastructure build requirements, AVC is generally not a suitable costing methodology for tariffing purposes.

We also believe that it is necessary, especially in the case of end-user retail tariffs, to clarify the purpose for which a particular costing methodology is to be employed when determining the appropriateness of that methodology for tariffing, e.g. whether the purpose is to set a fair and sustainable general tariff, or to test for any anti-competitive predatory effect of a tariff. Before turning to end-user retail tariffs specifically, we examine why AVC is not appropriate for application as a means of establishing tariff cost floors within the telecommunications industry more generally.

In setting a price, a balance should be achieved between the interests of end-users and the interests of investors. As the cost structure of the telecommunications industry is characterised as one that is capital intensive, requiring significant levels of investment with long payback periods, the review of costs and prices would also need to take a longer term view. While there is no single definition of AVC, it is typically seen as taking a short term view of whether a cost is variable or fixed. Whereas, Long Run Incremental Cost ("LRIC") which has been developed as an industry standard as a suitable measure for infrastructure related costs and investments, such as telecommunications – particularly in pricing access to, and wholesale usage of, that infrastructure. LRIC will include the cost of capital and consider the underlying assets of a forward looking valuation rather than its historical cost. When choosing an appropriate wholesale/resale costing methodology, there needs to be guidance on the following detail: -

- Definition of timeframe in which costs are defined as fixed or variable (e.g. with a shorter timeframe, costs tend to be more fixed).
- Definition of the unit, i.e. AVC of all calls, a particular call, a single call? The smaller the unit defined, the lower the AVC.
- At the network level, there is a difference between the variable cost of a particular network component and the variable cost of a service.
- Valuation of the current assessment - should be based on current and not historic cost.
- Inclusion of the cost of capital in the cost base and the applicable rate.

Where wholesale services are sold on a non-discriminatory and transparent basis to the retail arm of the dominant licensee as well as to other operators at a rate that provides a sufficient margin between the wholesale and retail price (net after discounts), AVC might be considered an appropriate measure for retail prices (although a "margin" below AVC based retail prices would imply wholesale prices are below AVC, and could indicate predation by the dominant licensee in the wholesale market). However, this is not the case in the proposed Section 4.4.3.1 tariff review provisions. IDA proposes that the test for the adequacy of end-user retail prices is whether they are above AVC. Therefore, simply requiring the prices for resale and voluntary wholesale services to be set "on the same (…) prices, terms and conditions.." and at "prices, terms and conditions that are no less favourable" than the prices, terms and conditions a dominant licensee offers comparable retail services to its end-users does not promote competition as it makes no allowance for the retailing costs of the wholesaler/reseller. If competition is to develop, there needs to be a sufficient difference between wholesale/resale price from the dominant operator and the discounted retail price of the dominant operator for an efficient operator to compete in the retail market when purchasing the wholesale/resale services.

As well as the need for sufficient difference between wholesale/resale prices and discounted retail prices to allow a margin for new market entrants, it is inappropriate to apply "variable" costing methodologies (whether AVC or LRIC) as the basis for a Dominant Licensee's ongoing retail prices. The reason for this is that, to be viable in the long run the Dominant Licensee must at some point recover all of its overhead and long-run costs. These costs are generally not, for good reason, fully recovered under the "variable" cost methodologies applied for wholesale/resale pricing. As the end-user retail market is the final market into which the Dominant Licensee sells its products and services, it is necessary for unrecovered overhead and long-run costs to be recovered at this stage. Therefore, many regulators use a fully distributed cost ("FDC") methodology for setting/approving the basic end-user retail tariffs of their respective dominant licensees. This ensures that there is full cost recovery, driven by the overall cost causality principle that retail sales are the primary reason dominant licensees are in business and, therefore, that these retail sales are the essential drivers of infrastructure and related investment, and overhead costs. We too believe that FDC is the most appropriate basis for the Dominant Licensee's end-user retail prices.

While discounting from an FDC based end-user retail tariff may be justified depending upon circumstances, there must be assurance that the level of discount is appropriate and available on a non-discriminatory basis, and that it does not simply represent a shifting of overall cost recovery from one area of the Dominant Licensee's operations which faces a high level of competition to an area that faces less competition (and could be construed as unfair cross-subsidisation), In some very limited cases there may even be justification for AVC based prices for very short-term promotional end-user retail offerings – but these should be exceptional, and require IDA review for anti-competitive effects before being approved.

Where it is necessary and appropriate for the Dominant Licensee to provide wholesale/resale services, these Dominant Licensee wholesale/resale activities are

generally ancillary to its main focus of provision of end-user retail services. Therefore, as associated wholesale/resale investment and other costs incurred by the Dominant Licensee are normally incremental to the provision of its end-user services, it is normally appropriate that wholesale/resale prices be LRIC based.

Key Point 11: Filed Tariffs Should Be Subject to Public Comment and Publication Should Be Web-Based.

We would request that IDA subject those tariffs filed by a dominant licensee pursuant to Section 4.4.1 of the Code to public comment prior to approval. This would not only increase transparency by would also greatly benefit IDA to receive input from other telecommunication carriers having substantial operating presence around the world on the competitiveness, adequacy and appropriateness of the filed tariffs.

Section 4.4 of the Code requires dominant licensees to make copies of the approved tariffs available upon request by interested parties, within a reasonable time. We submit that the proposed procedure imposes unnecessary administrative and increases regulatory costs and is therefore unwarranted. We believe that the tariff publication requirement could be streamlined by requiring web-based publication of such tariffs by dominant licensees.

As regards IDA's rationale for declining web-based publication of tariffs by dominant licensees on the premise that it would stifle the dominant licensees' incentive to innovate, we would submit that IDA's fear is unfounded. We can appreciate IDA's concerns if the information relates to a dominant licensee's cost structure. However, we are simply requesting that the procedures for obtaining a dominant licensee's tariffs be streamlined. The increased transparency through publication promotes non-discrimination and minimizes the incidence of pricing abuses. (See Key Point 13 for further details)

We therefore urge IDA to require web-based publication of tariffs by dominant licensees.

Key Point 12: IDA Should Accept Comments to Section 10 (Changes in Ownership and Consolidation involving Designated Telecommunication Licensees).

Although IDA has stated that it will not consider any further comments on this Section, we believe this to be highly irregular as it does not allow the public to compare the Code with the draft Competition Bill, which also contains a merger control process and which had not been issued by the MTI at the time of the first consultation to the Code Review. Given that the Competition Bill sets out an entirely new framework for dealing with mergers, we believe it is necessary for the public to be given the opportunity to compare these regimes and comment accordingly.

While we agree with IDA's move to a "substantial lessening of competition" test in Section 10 of the Code, in line with the approach in the Competition Bill[7], we would like to point out that the Code has much more detailed provisions in terms of merger control resulting in a more cumbersome and burdensome system of merger control than that proposed by the Competition Bill. We would inquire whether IDA and MTI will work together to align the two sets of procedures dealing with mergers and consolidations. It goes without saying that a two tier system will result in considerable inconsistencies. Given this significant development and the resulting uncertainties, we would respectfully submit that it would be unfair and inappropriate for IDA not to accept further comment on these provisions.

Key Point 13: Unfair Methods Of Competition – Tests Should Be Up To Date - Detailed Guidelines Should Be Issued Detailing IDA's Approach - More Methods Should Be Included In The Code.

Pricing Abuses

Predatory Pricing

Section 15.4 refers to predatory pricing and the test for establishing predation. Originally, IDA proposed a test based on marginal cost (which would have made proving predation extremely difficult). In the revised Code, IDA proposes that the test for predation be based on "*average variable cost*" ("AVC"). The test whereby predation is assumed where prices are set below AVC is standard in anti-trust jurisprudence (see AKZO Chemie BV v Commission 1993). However, authorities have since moved to a different test for the telecommunications industry in many jurisdictions because cost structures in network industries tend to be different from most other industries. We would contend that a test based on average variable cost is too straight forward and is inappropriate for application to the telecoms industry. We urge IDA to consider using the test of "long run incremental cost" ("LRIC").[8]

This is the view taken by the European Commission and is followed by regulators throughout Europe. The EC Access Notice states:

> "*a price which equates to the variable cost of a service may be substantially lower than the price the operator needs in order to cover the cost of providing the service…the costs considered should include the total costs which are incremental to the provision of the service…[Therefore,] the Commission will often need to consider the average incremental costs of providing a service, and may need to examine average incremental costs over a longer period than one year*."

[7] See Sections 54-60 of the draft Competition Bill.
[8] See Key Point 9.

This approach is followed by the UK's Office of Fair Trading and Ofcom (see "Competition Act 1998 – The application in the telecommunications sector"). In these guidelines, the conclusion is reached that:

> *"When examining pricing issues in the telecommunications sector, LRIC is generally therefore a more satisfactory cost base than marginal or average cost"*.

We therefore urge IDA to follow the developed jurisprudence of more mature telecoms markets and use LRIC as the standard for predatory pricing. Otherwise, IDA's test may yield inaccurate results as the true costs of the dominant licensee may not be uncovered and taken into account.

Price Squeeze

We urge IDA to implement guidelines, which IDA agrees to follow, as soon as possible.

In the guidelines, we urge IDA to provide a detailed analysis of how it will assess price squeeze, notably how it will allocate costs and how it will approach other pricing abuses such as cross-subsidisation (which may take many forms) price discrimination and discounting. This will be especially important if IDA decides to rely solely on competition law provisions to prevent pricing abuses, rather than introducing ex ante pricing provisions.

By way of example some additional pricing abuses are:-

(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 excessive high prices to certain customers) with the effect of excluding competitors from the market in question.

(b) Discounting

The provision of discounts by a dominant licensee can substantially reduce the effective price of services offered to end-users, giving it a significant competitive advantage. 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.

Other Abuses

The forms of abuse of market power listed in the Code are non-exhaustive and focus primarily on pricing abuses. Given the many tests and the wealth of precedent available in other jurisdictions, such as the UK, Australia and the EU, we believe that it would not be difficult for IDA to include additional abuses in the Code and provide a fuller explanation of how they will be dealt with in the guidelines.

By way of example, some additional non-pricing abuses are:-

(a) Refusal to Supply and Behavior 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, behavior 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.

Behavior 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 (see Key Point 11).

(b) Bundling

Bundling is another important example of abuse where it has an exclusionary effect on competition.

Other unfair methods of competition should be included

We urge IDA to include more methods of unfair competition in the Code and ensure that it issues guidelines to the interpretation and application of such methods.

Key Point 14: Guidelines Should Be Issued For Assessing Agreements That Unreasonably Restrict Competition.

Again, we urge IDA to prepare guidelines which IDA agrees to follow, for assessing agreements that unreasonably restrict competition and to implement such guidelines at the same time as the Code comes into force. Guidelines are needed because Section 9 of the Code neither follows established competition law principles relating to anti-competitive agreements, nor the equivalent provisions in the Bill and therefore there is no established jurisprudence for licensees to follow.

We found Section 9 to be peculiar and rather confusing in its approach and therefore believe that it will be difficult for licensees to apply in practice. In particular, Section 9 focuses on the relationship of the parties of the agreement and has different rules for horizontal agreements (i.e. agreements between competing licensees) and non-horizontal agreements (i.e. where the parties are not direct competitors). The usual approach in assessing anti-competitive agreements is to focus on assessing the effect on competition rather than focusing only on the relationship of the parties.

We submit that if an agreement unreasonably restricts competition and has no objective justification, then it should be deemed anti-competitive regardless of the status of the parties to such agreement. We urge that IDA takes the same approach as that in the Bill, otherwise licensees will face confusion and uncertainty. If IDA chooses not to adopt standard legal principles for anti-competitive agreements, then we urge IDA to issue guidelines on the interpretation and application of the revised Section 9 as soon as possible.

Key Point 15: Effective and Timely Enforcement Required.

Enforcement provisions are the key to the effective implementation of competition and regulatory rules and to attaining the ensuing benefits to customers. Without effective and timely enforcement, competition and regulatory provisions will be rendered redundant in practice.

Conciliation

We note IDA's comments on conciliation. Given that IDA will only be available to "*resolve the most significant types of disputes*" which will be "*potentially time consuming*", we submit that it is appropriate that an ultimate time limit is placed on any conciliation procedure entered into by licensees**.**

Dispute Resolution

The dispute resolution process is also limited to significant disputes. We strongly urge IDA to expand the applicability of the dispute resolution process to include all commercial disputes between licensees (except those that are "*de minimis*"). The reason for this is that from our experience it can be very difficult to conclude a freely negotiated commercial agreement where one party is in a vastly superior bargaining position, such as in the case of a dominant licensee. We believe that it would be helpful to have a neutral third party involved in resolving such commercial disputes. In addition, we urge IDA to set out time limits in which its decision will be issued.

Enforcement Procedures

Despite IDA's assurances, we continue to have concerns regarding IDA's exercise of discretion. For example, we would appreciate more detailed guidance on how/when IDA will use its discretion to conduct enforcement action.

We also have concerns regarding IDA's discretion to reject a request for enforcement (Section 11.4.1.2(c)). Not only should written reasons be given for deciding not to proceed with a request, but the party requesting enforcement should be given the opportunity to appeal that decision. Moreover, IDA still has considerable discretion to defer the consideration of a request for enforcement (Section 11.4.1.3 of the Code), although we are pleased to note that IDA has indicated that it will limit the exercise of such discretion to "*certain exceptional cases*".

We inquire whether IDA will define the phrase "Private Party" in Section 11.4.1 of the Code. In particular, would a trade association whose member(s) suffer injury as a result of a breach of the Code be allowed to make a request for enforcement on behalf of its member(s) or would each member be required to make an individual application? We would also urge IDA to introduce a private right of action into the Code, in line with the Bill.

Finally, we note that enforcement proceedings could easily take longer than four months for standard complaints and even longer for more complex cases. We urge IDA to commit to resolving standard complaints within four months where possible. This is increasingly becoming a standard timeframe and international best practice (adopted by the European Commission and OFTA, the latter proposing to complete 80% of investigations within 4 months from initiation). To further speed up the enforcement process, we urge IDA to add time limits to responding to requests for further information in Section 11.6 of the revised Code, otherwise the enforcement process could be drawn out interminably.

Enforcement Measures

We are disappointed that IDA has decided not to increase the maximum financial penalty of $1 million per contravention to a more standard level of 10% of turnover. Many jurisdictions worldwide use this standard and it has in fact been proposed as the maximum level of financial penalty under the Bill. This level acts as a real incentive to operate within

the law. Of course, as IDA states, other avenues for enforcement are available but experience shows that it is the threat of severe financial penalty (and resulting adverse media attention and shareholder reaction) that ensures compliance. We would urge IDA to follow international best practice and avoid inconsistency with the Bill.

Powers of Enforcement

Experience has shown that the powers of a regulatory and competition authority are key to the satisfactory enforcement of the law. As IDA acts as both regulator and competition authority, we suggest that IDA's powers of investigation be amended to bring them into line with those proposed for the new Competition Commission. For example, Section 61 of the Bill gives the Commission wide powers for ordering document production and Sections 64 and 65 give the Commission the power to enter premises and seize and remove documents or equipment, search any person and take copies from any document produced, with or without a warrant. We urge IDA to include such terms in the Code.

Review Procedures

We are pleased to note that the reconsideration process has been simplified and that there is now a time limit by which IDA must deliver its reconsideration decision.

We are concerned, however, that the proposed Code and Consultation Document are silent on the issue of Judicial Review.

Article 9.11 Section 3 of the Telecoms Chapter of the U.S. – Singapore Free Trade Agreement is entitled "Judicial Review" and requires Singapore to "ensure that any enterprise aggrieved by a telecommunications regulatory body has the opportunity to obtain determination or decision by an independent judicial authority."

For the sake of clarity, we ask that the IDA confirm that Licensees may seek judicial review of the IDA's decisions, and if so when and how such judicial review should be sought.