A RESPONSE TO THE IDA'S INVITATION FOR PUBLIC COMMENT ON THE PROPOSED REVIEW OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES (2004)

Prepared by:

As/Prof **Burton Ong**
Faculty of Law,
National University of Singapore
Address: c/o Faculty of Law,
National University of
Singapore, 13 Law Link,
S117590
Date: 5th December 2003
Telephone: 68746463
E-mail: lawongb@nus.edu.sg

Summary of Major Points:

This memorandum invites the IDA to consider the following issues, and make the necessary changes, in reviewing the Competition Code:

- The importance of expressing, more precisely and comprehensively, the regulatory philosophy behind the IDA's goal of promoting "effective and sustainable competition" in the market for telecommunication services.

- The need to articulate a clear policy on the management of competition issues that are likely to arise in a duopolistic or oligopolistic market setting. In particular, the viability of expanding the concept of "Significant Market Power" to allow for regulatory intervention if such sub-competitive market conditions should arise in the future.

- The desirability of distinguishing between the law of unfair competition and the anti-competitive behaviour that the Code seeks to address. While both forms of conduct are closely related and are legitimate matters for the IDA to be concerned with, a clearer demarcation between the two categories of prohibited conduct would strengthen the basic regulatory foundations of the Code.

Statement of Interest:

The author has an academic interest in competition law issues and has taken the opportunity presented by the IDA's public consultation efforts to contribute to the refinement of the Competition Code.

1. INTRODUCTION

This memorandum was prepared in response to the Info-Communications Development Authority's ("IDA") invitation to comment on the proposed 2004 revisions to the Code of Practice for Competition in the Provision of Telecommunication Services (the "Code").

The comments below reflect the personal opinion of the author and focus on three sections of the Code. References are made to the section numbers used in the proposed 2004 version of the Code prepared by the IDA that was uploaded on the IDA's website for public comment.

The purpose of this memorandum is to address some of the broader policy considerations which the IDA may wish to consider more closely when refining the current version of the Competition Code. The changes recommended in this memorandum are primarily directed at clarifying and strengthening the basic regulatory philosophy towards industry participants.

2. PROPOSED SECTION ONE

Section **1.5.2** attempts to clarify the scope of IDA's responsibility to promote "effective and sustainable" competition. The presence of this provision in the Competition Code underscores the instrumental role that the IDA has to play in facilitating the competitive process in a market which would probably not be as open to competition in the absence of regulatory intervention. In the interests of better articulating the IDA's role as a competition regulator, it is submitted that this provision should be further refined in the following ways:

(i) Sub-paragraph (c) can be sub-divided into two sub-paragraphs that read: "eliminating collective behaviour by industry participants that is anti-competitive" and "eliminating unilateral behaviour by an industry participant that is an anti-competitive abuse of its Market Power". This will more precisely distinguish the two broad categories of anti-competitive conduct that industry participants may engage in.

(ii) A further sub-paragraph should be included along the following lines: "ensuring that consumers are able to effectively substitute the products and services of one industry participant for those of another". Given that product and service substitutability between industry participants is an essential cornerstone of the competitive process, the IDA should articulate its responsibility to ensure that as many artificial barriers faced by consumers in switching between competing product and service providers are eliminated.

3. PROPOSED SECTION TWO

The scheme of licensee classification that distinguishes between "Dominant" and "Non-Dominant" licensees, as envisaged in sections **2.1** to **2.3,** relies heavily on the concept of "Significant Market Power" as the identifying characteristic of the "Dominant" licensee. Section **2.2.1(b)** uses "Significant Market Power" as an alternative test for dominance apart from the criteria set out in section **2.2.1(a)**.

"Significant Market Power" is defined in section **1.9(p)** to mean the "ability to *unilaterally* restrict output, raise prices, reduce quality or otherwise act, to a significant extent, *independently of competitive market forces*" (emphasis added).

Given the present structure of the telecommunications market, such a system of classification might be an effective means of singling out the industry participant that should be identified as the "Dominant Licensee" and saddled with additional responsibilities (identified in sections **3** to **9** of the Code) to facilitate the competitive process.

Looking ahead, however, it is submitted that the structure of the market may change into a state which renders the concept of "Significant Market Power", as it is currently defined in the proposed 2004 Code, unworkable. If the rivals of a present-day "Dominant Licensee" are able to capture part of the "Dominant Licensee's" market share for themselves in the future, the resultant landscape of the telecommunications market may change from one dominated by a single "Dominant Licensee" into a market comprising two or three significant players with similar market shares. Given the currently limited number of industry participants at present in the markets for mobile telephony services and internet access services, it is submitted that the emergence of duopolistic or oligopolistic market structures in the near future are not an unlikely result of the competitive process in these markets.

In duopolistic and oligopolistic markets, economic theory predicts that industry participants will engage in parallel market behaviour that is potentially sub-competitive, a phenomenon vividly illustrated by the petroleum pricing behaviour of firms in the present-day retail petroleum market, without necessarily entering into in an explicit collusive arrangement between them. This may result in sub-competitive market conditions that would fall outside the scope of the IDA's regulatory reach: section **9.2** makes it clear that "IDA will not find a tacit agreement where Licensees have done nothing more than make similar output and pricing decisions, which could reflect an efficient response to changing market conditions", such that no action can be taken unless the industry participants in question have employed "signalling devices" to facilitate their "co-ordinated behaviour".

A clearer position needs to be taken here on the regulator's attitude towards such sub-competitive market behaviour under these market conditions should they emerge in the future. Is such parallel conduct by industry participants to be tolerated as an inevitable incident of the market structure, or should additional prophylactic regulatory mechanisms

be put in place in the Competition Code to address the competition problems that arise in such situations before they actually materialise?

If the IDA takes the view that it is likely for the relevant markets to evolve in such a way as to take on duopolistic or oligopolistic market characteristics, while recognising that such market structures are associated with sub-competitive firm behaviour that may adversely affect consumers in the same way as if there had been an explicit anti-competitive horizontal agreement between firms, then it may be prudent for the IDA to consider taking pre-emptive steps by incorporating further provisions in the Competition Code that address such contingencies before they actually occur.

Furthermore, the concept of "Significant Market Power", as it is currently defined and understood in the proposed 2004 Competition Code, would not fit well within markets with duopolistic or oligopolistic characteristics. None of the firms in such markets would qualify as "Dominant Licensees" given that they lack "the ability to *unilaterally* restrict output, raise prices, reduce quality or otherwise act, to a significant extent, *independently of competitive market forces*" (emphasis added). In such situations, market power is shared *collectively* between the duopolists or oligopolists and they would lack the ability to act in the unilateral sense that we would expect of a "Dominant Licensee" under the current system of classification. Where a duopoly or oligopoly exists, there are *no* "competitive market forces" to drive the behaviour of industry participants. In such situations, if the current definition of "Significant Market Power" is retained, the task of identifying licensees as "Dominant" becomes practically impossible.

One way of addressing these concerns would be to reword the definition of "Significant Market Power" in section **1.9(p)** to read "the ability to, unilaterally or collectively, restrict output, raise prices, reduce quality or otherwise act, to a significant extent, independently of competitive market forces and, ultimately, independently of consumers". If this definition of "Significant Market Power" is adopted, then all the members of a duopoly or oligopoly are more likely to be classified as "Dominant Licensees" and subjected to the same additional responsibilities under the Competition Code to facilitate competition.

4. PROPOSED SECTION EIGHT

The title of section **8** in the proposed 2004 Competition Code is "UNFAIR METHODS OF COMPETITION". It is submitted that this is a misleading and inaccurate description of the nature of the provisions in sections **8.2** and **8.3**, which ought to be distinguished from the provisions in section **8.4**. The title creates the wrong impression that section **8** is a provision concerned primarily with the law of unfair competition, conjuring notions of misappropriation, passing-off and various other economic torts.

Unfair Competition Law principles should be distinguished from Competition Law principles. The former is concerned with setting and enforcing standards of ethical

behaviour among rival traders, whereas the latter is primarily concerned with facilitating and enhancing the competitive process by correcting, *inter alia*, behaviour which prevents competition from taking place in the market.

It is submitted that section **8** be renamed "UNILATERAL ANTI-COMPETITIVE CONDUCT" to better reflect the substance of the provisions in sections **8.2** and **8.3** which codify examples of abuses of dominance by a Dominant Licensee which include predation, cross-subsidies and discrimination. This would be consistent with the fact that the provisions in section **8** prohibit conduct that is attributable to a single industry participant, as opposed to section **9** which involves collusive behaviour between two or more industry participants.

Section **8.4** properly deals with Unfair Methods of Competition as it is concerned with prohibiting behaviour that would also give rise to an economic tort. Sections **8.4.2.1** to **8.4.2.3** deal with situations that may give the wronged party an action under the torts of conspiracy, deceit, misrepresentation or interference with contractual relations. There is also an overlap with the law of confidential information.

It is submitted that section **8.4** should include a further clarification that the IDA's ability to punish the Licensee for violations under this section of the Code is independent of any civil liability the Licensee should incur from an action brought by the victim of the wrongdoing.

5. CONCLUSION

It is hoped that the recommendations made above will be useful to the overall reform of the IDA-administered Competition Code. The author welcomes comments and requests for further clarification on the matters that have been raised above.
