

**APPLICATION FOR  
THE EXTENSION OF THE DIRECTION ISSUED TO CABLE &  
WIRELESS HKT TELEPHONE LIMITED ON 4 AUGUST 1999  
PURSUANT TO GENERAL CONDITION 44 OF ITS FIXED  
TELECOMMUNICATIONS NETWORK SERVICES LICENCE  
IN RESPONSE TO  
"APPLICATION FOR DECLARATION OF NON-DOMINANCE  
IN THE INTERNATIONAL CALL SERVICES MARKET FOR  
NON-CHINA ROUTES"  
BY CABLE & WIRELESS HKT LIMITED<sup>1</sup>**

**Statement of the Telecommunications Authority, Hong Kong**

**28 September 2000**

## **INTRODUCTION**

### **Background**

1. In April 1999, the Telecommunications Authority (TA) received a request from Cable & Wireless HKT Telephone Limited (CWHKTC) for reconsideration of his findings and conclusions on CWHKTC's previous applications for a declaration of non-dominance in the international call services market for non-China routes. Having considered the information available to him and the views and comments received from the industry on the application, the TA issued a statement entitled "Application for a Declaration of Non-Dominance in the International Call Services Market for Non-China Routes by Cable & Wireless HKT Telephone Limited" on 4 August 1999 (the August 1999 Statement). The statement is available on the web site of Office of the Telecommunications Authority (OFTA) at [www.ofta.gov.hk](http://www.ofta.gov.hk).

2. CWHKTC's April 1999 application was acceded to in part but subject to conditions. The TA was satisfied that CWHKTC was no longer dominant in the market for "international call services" where the destinations were within the Category A destinations. However, the TA was of the view that CWHKTC was still dominant in the market for "international call services" to destinations that were within Category B destinations. The application did not include China routes and this was considered separately as part of a distinct application by CWHKTC. Irrespective of the fact that, for the group of Category A routes, CWHKTC was no longer

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<sup>1</sup> As at the date of publication of this statement, the companies belonging to the Cable & Wireless HKT group had not changed their official names of the companies. The official names of the companies are used throughout this statement.

dominant, the TA was satisfied that CWHKTC still had significant market power and could influence the market in particular in combination with its sister company Cable & Wireless HKT International Limited (CWHKTI). This, combined with concerns about CWHKTC's ability to ensure its compliance with its licence obligations, its vertical integration with CWHKTI etc., had caused the TA to make the lifting of the dominance restrictions subject to conditions. This was to ensure that proper compliance systems and robust pricing arrangements are put in place so that competition can be protected. They included the following requirements:

a) Pricing

- i) To establish systems and controls so as to ensure its compliance with its pricing obligations but also so as to monitor its behaviour on an ongoing basis;
- ii) To ensure that necessary information regarding the provision of the services declared to be non-dominant (i.e. breakdown of costs, business case, etc) should be kept on file in full details so that CWHKTC could respond within 48 hours to requests for information by the TA in investigating complaints about pricing;
- iii) CWHKTC could not impose a minimum period of contract between itself, or any other affiliated company, and the customer for offering any tariff or package of tariffs or discount to a customer;

b) Information

- i) CWHKTC and CWHKTI should establish systems and controls so as to ensure that any information concerning
  - a) the wholesale and retail traffic of CWHKTC's competitors; and
  - b) the usage patterns and/or usage information of customers connected to CWHKTC's fixed network but who use CWHKTC's competitors for overseas calls

was not made available nor used by it in any way by CWHKTC so as to obtain, in the opinion of the TA, an unfair advantage.

3. The TA had at the time decided that the lifting of the restrictions should be dependent on the new safeguards being implemented first. The TA had therefore issued on 4 August 1999 a direction (the August 1999 Direction) to the group of companies comprising CWHKTI, CWHKTC and Cable & Wireless HKT CAS Limited which jointly and severally hold the Fixed Telecommunications Network Services (FTNS) licence (CWHKT FTNS). The Direction contained provisions that one working day after CWHKT FTNS had notified the TA of how it had complied with the requirements of the Direction and had published a report of it,

General Condition (GC) 20(4) (prohibition of offering unauthorised discounts to its published tariffs), GC21 (requirement for prior approval from the TA for tariff revisions) and GC22 (requirement for prior approval from the TA for tariff for new services) of its FTNS licence would no longer apply in relation to the market that had been declared non-dominant. Further, once a destination at the wholesale level had been declared as a Category A destination, it would automatically be included in the group of destinations that CWHKTC was considered non-dominant. This would remain effective until 30 September 2000 if it was not revoked by the TA before that.

4. On 10 August 1999, CWHKT FTNS notified the TA of the fact that it had taken all necessary steps to comply. A copy of CWHKT FTNS's report was published and is also available at OFTA's web site.

5. On 1 September 2000, Cable & Wireless HKT Limited (CWHKT) made an application on behalf of CWHKT FTNS, in particular, CWHKTC, for an indefinite and unconditional extension of the above Direction. In the application, CWHKT FTNS provided the following justifications:

- a) CWHKT FTNS is of the view that the nature of competition in the international call services markets on Category A routes continues to justify the TA's conclusion in the August 1999 statement that CWHKT FTNS is not dominant on these routes. This, CWHKT FTNS believes, also shows, that CWHKT FTNS has no significant market power on these routes.
- b) CWHKT FTNS considers that it has demonstrated to the satisfaction of the TA that CWHKT FTNS has implemented the necessary steps, systems and controls to secure compliance with all licensing obligations, in particular, those related to pricing and the use of network and customer information. CWHKT FTNS has also in operation an ongoing and continuous regulatory compliance programme in respect of CWHKT FTNS's regulatory obligations generally.

6. In response to that, the TA published on 7 September 2000 a consultation paper together with the actual application of CWHKT, after the excision of such information as the TA considered commercially confidential.

7. As stated in the consultation document, the TA would examine this application on the same basis which was detailed in his August 1999 Statement concerning CWHKTC's April 1999 application. However, he would give due regard to any new evidence or arguments that might be raised by the respondents to the consultation. In the consultation, the TA invited comments on the application in general as well as on:

- (a) whether there are any changes in the state and competitive nature of the

market, the market share of CWHKTC and/or the market power possessed by CWHKTC since the Direction was issued that would affect CWHKTC's non-dominant status in the relevant market and if there are changes, how and why they have/would have such effect;

- (b) whether the Direction, if extended, should be extended indefinitely or only for a limited period; and
- (c) whether the Direction, if extended, should be extended unconditionally or subject to the same conditions or part of the conditions.

### **The Submissions**

8. The TA received six submissions in total. Five of them were received within the set deadline and one, one day after the set deadline. The six submissions are from the following (in alphabetical order):

- (a) Cable & Wireless HKT Limited (CWHKT)
- (b) CTI Telecom (H.K.) Limited (CTI)
- (c) Hutchison Global Crossing Limited (HGC)
- (d) New T&T Hong Kong Limited (New T&T)
- (e) New World Telephone Limited (NWT)
- (f) SmarTone Mobile Communications Limited (SmarTone)

9. All the six submissions received responded to the specific issues raised by the TA. Of the submissions, only CWHKT suggested that the TA should accede to the application in full. New T&T suggested that the TA should not accede to the application. All other submissions considered that the Direction should not be extended indefinitely and unconditionally and some suggested that the Direction should only be extended for the next 12 months and be subject to all the existing conditions.

10. Except CWHKT, all other submissions were of the view that the TA's concerns expressed in his August 1999 Statement still exist. They submitted that CWHKTC and its affiliates still have significant power and there was no evidence to demonstrate the contrary. Some of them raised concerns about the effectiveness of CWHKT FTNS's compliance system. One of them also suggested that the actual impact of the recent acquisition of CWHKT by Pacific Century CyberWorks Limited (PCCW) on the competition should be observed before an indefinite extension is considered.

## **ANALYSIS**

### **General**

11. The TA in considering the application by CWHKT for the extension of the Direction has followed the approach set out in his August 1999 Statement. He has to confirm in the first place whether the relevant market defined in his August 1999 Statement is still valid and then examine:

- a) whether the state and/or competitive nature of the market have been changed since the August 1999 Direction was issued;
- b) if the state and/or competitive nature of the market have been changed, whether CWHKTC is still not dominant in respect of the market;
- c) if CWHKTC is still not dominant, should the August 1999 Direction be extended indefinitely or just extended for a specified period;
- d) if the August 1999 Direction is extended, should all the conditions be lifted or should only part of them be lifted; and
- e) if only part of the conditions should be lifted, which conditions should these be.

### **Legal basis**

12. The previous applications of CWHKTC for non-dominance were filed and processed pursuant to GC44 of CWHKTC's FTNS Licence which is reflected in all FTNS licences. This provides that if the TA forms the opinion that the licensee is not in a dominant position with respect to any market for telecommunications services, he may exempt it from certain licence obligations. These obligations include the implementation of specified accounting practices, obtaining the prior approval of the TA for the tariffs of new services or the revisions of existing tariffs, and a prohibition on unauthorized discounts from the TA approved tariffs. GC44 also provides that the TA can lift any such obligations either completely or in part and for such period and on such conditions as he may determine. The TA Statement and Direction of August 1999 were issued on this basis and by the same token, CWHKT's current application for extension of the August 1999 Direction is processed.

### **Relevant Market**

13. In his August 1999 Statement, the TA stated that he was satisfied that the relevant market in which CWHKTC was no longer dominant was the market for "international call services" from Hong Kong, including both voice and data services,

to the destinations within Category A destinations. He was also satisfied that the geographic market should be the whole of Hong Kong.

14. The TA noted that all the respondents, except New T&T, to the consultation of the current application were silent to the definition of the relevant market. New T&T stated that it did not agree with the TA's conclusion in his August 1999 Statement that the relevant market was that for "international call services". New T&T stated that it maintained that the relevant market was the end user access and connectivity to international call services in Hong Kong. It submitted that the TA must look at the control on the access market and there was no real distinction between "international call services" and "domestic call services". In fact, New T&T made the same comments in response to the consultation of CWHKTC's April 1999 application. The TA stated in his August 1999 Statement that he had considered its comments as well as other submissions at that time and for the reasons, as set out in the previous reports, he was not satisfied that it was appropriate to define the relevant market more widely than "international call services" (paragraph 20 of the August 1999 statement).

15. New T&T also stated in its current submission that it was illogical to conclude that there is such thing as "international call services market for Category A routes" and "international call services market for category B routes". It further stated that logically the TA should assess CWHKTC's market position for each and every route. However, New T&T did not provide further arguments to support its statements. The TA, in respect of his decision in subdividing the international call market into markets, namely the market to those destination that have been liberalised at the wholesale level (i.e. Category A routes) and the markets that have not (i.e. Category B routes) excluding China, had explained in detail in its main report to the August 1999 Statement about the issues such as cross elasticity of demand and supply; product characteristics; price difference; judgement by participants; and distinct sellers/buyers which he had taken into account in making such decision (paragraphs 25-37 of the August 1999 Statement). In the absence of any new grounds, the TA considers that such subdividing of markets is still appropriate for considering the current application.

16. Having considered all representations made and having looked into whether there have been any changes in the substitutability and cross elasticity in both the demand and supply of services in relation to defining the relevant market under the current application, the TA is satisfied that the previously used definition of the market is still valid.

### **Assessment of Dominance**

17. In assessing whether any change in CWHKTC's position in Category A routes, the TA has looked at whether there are any changes in the state and

competitive nature of the market, the market share of CWHKTC and/or the market power possessed by CWHKTC since the August 1999 Direction was issued.

### Market State and Nature

18. In its application, CWHKT FTNS stated that it "*believed that the current state of the market continues to confirm the accuracy of the TA's original findings*". It also stated that "*the market is even more competitive one year after the TA's original declaration and show every sign of remaining so for the indefinite future*".

19. In its submission to the consultation, CWHKT FTNS stated that "*there have been many changes in the market, but these changes only serve to strengthen and reconfirm that CWHKT FTNS is non-dominant for category A routes*". CWHKT FTNS set out the following changes which it considered have made Category A routes more competitive:

- *the commencement of External Facilities Telecommunications Network Services (EFTNS) competition on 1 January 2000;*
- *the number of External Telecommunications Services (ETS) licensees increased from 127 when the Direction was issued in August 1999 to 169 in August 2000;*
- *amongst the EFTNS and ETS licensees are most of the world's leading telecommunications operators who already have worldwide networks and arrangements in place and, consequently, have global connectivity readily available to them;*
- *CWHKT FTNS's licensed competitors have sufficient capacity on the Category A routes, either by direct or indirect routing, to carry virtually all of Hong Kong's external traffic;*
- *Refill rates available in the market place offer lower cost alternatives than the use of CWHKT FTNS's external gateway services;*
- *Category A routes are competitive, either because of International Simple Resale (ISR) or because the distant end market is a liberalised multi-carrier environment, or both.*

CWHKT FTNS further supported its statement on the increasing competitiveness of Category A routes by referring to a news article of 20 September 2000 which quoted CTI's statement that "*the FTNS operators have discounted their prices over 150 times in the past 12 months and that although competition has been intensive, CTI's traffic has increased by 67% and they hold a significant proportion of market share*".

20. The other respondents to the consultation did not put forward any information and/or arguments on any changes in the state and competitive nature of the relevant market that would affect CWHKT FTNS's non-dominant status in it. Having considered the submission received and the information available to him, the TA is of the view that though there have been some changes in the market in terms of the further liberalization of the market and the increase in number of market players since the issue of the Direction, these changes have not adversely affected but may

have increased the competition of the market. He is therefore satisfied that changes in the market have not adversely affected the non-dominant status of CWHKT FTNS.

### Market Share

21. CWHKT FTNS supplied in its application information on its current status of market shares to demonstrate its market share has declined further since the declaration of non-dominance was issued.

22. However, the TA, based on the figures of the traffic reported regularly by each licensee, calculated the actual market share of each of them in the Category A market. Having examined the market shares of each licensee, the TA noted that the market share of CWHKT FTNS in Category A routes had been consistently below 50% since the August 1999 Direction. CWHKT FTNS's average market share for the period from January 2000 to June 2000 is similar to that of August 1999. In examining the market concentration, the TA noted that there had been fluctuations in market shares of other licensees at different times and also that the market shares of the new licensees have increased since the August 1999 Direction was issued.

23. Having examined the market shares of CWHKT FTNS and the other licensees, the TA is satisfied that there has not been any significant change in the market share of CWHKT FTNS in the Category A routes since the August 1999 Direction was issued.

### Other Factors

24. In respect of barrier to entry and the power of CWHKT FTNS in making decisions as to pricing or other strategic matters, the TA is satisfied that there have not been any changes that have affected CWHKT FTNS's non-dominant status in the market.

### Vertical Integration

25. In his August 1999 Statement, the TA stated that "*Vertical integration in itself does not imply that an undertaking is dominant. However, where an undertaking is dominant or has market power in one market and is vertically integrated into upstream or downstream markets around that market, then it may have the ability to affect adversely competition in the upstream or downstream markets. Consequently, the potential for vertical integration to lead to an abuse of a dominant position is a significant aspect of the analysis of market power in telecommunications*". He therefore examined concerns expressed about the degree of vertical integration of CWHKTC and CWHKTI balanced by the existing safeguards for interconnecting operators. He was satisfied that CWHKTC still had significant

market power and could influence the market in particular in combination with its sister company CWHKTI. He also had some concerns about the information available to CWHKTI in respect of the traffic of CWHKTC's competitors could be used by CWHKTC in an unfair manner; and the ability of CWHKTC of ensuring its compliance with its licence obligations. Therefore, in order to ensure that the vertical relationship between CWHKTC and CWHKTI does not have a detrimental effect on competition, the TA made the lifting of the dominance restrictions subject to conditions which were detailed in the August 1999 Direction.

26. The TA had also imposed a time limit to the August 1999 Direction. This was to act as a "probationary" period over which CWHKT FTNS had to demonstrate its compliance with its licence obligations as well as the conditions that the TA has imposed through the August 1999 Direction. The TA has to therefore consider whether, in the event that he decides to extend the August 1999 Direction, whether or not a new specified period should be imposed. One option is to set a new fixed period by the end of which the TA would again review the position. The other option is to extend the August 1999 Direction until this is withdrawn or revoked by the TA because of a change of circumstances that would merit such action.

27. In its current application, CWHKT FTNS confirmed that the steps required by the August 1999 Direction to be taken to ensure compliance with regulation obligations in general and those regarding pricing on Category A routes and the use of network information are in place and remain effective.

28. In its submission to the consultation, New T&T stated that "*it was not aware of the occasions (if any) in which the TA had monitored the compliance by CWHKT FTNS of the systems on pricing and information and their effectiveness and accordingly was not in a position to conclude if they provide useful or effective checks and balances sought by the TA*". It was of the view that the TA's concerns expressed in the August 1999 Statement still existed. It stated that "*CWHKT FTNS still enjoys entrenched and deep-seated dominance in the access market (both local fixed lines and international facilities) which has overwhelming influence in the international calling services market despite the end of CWHKTI's monopoly in the international facilities, the issuing of further wireless FTNS licences and external FTNS licences*". It also stated that "*CWHKT FTNS, with its dominance in the access market:*

- *has the propensity to abuse its dominance by denying, delaying and degrading any interconnection and facilities sharing requests by its competitors;*
- *enjoys and benefits in the access to traffic flow information having close to some 95% of the local fixed lines;*
- *has ready access to huge customer base for marketing and auto-registration of services;*
- *enjoys a better cost structure than its competitors in the offering of international call services as it does not have to pay any local access charge (LAC) or interconnection charge to any operator for calls originated from its network to access its international calling services; and*

- *has benefits that are not available to its competitors such as controls both ends of the international traffic, supplies to the retail sectors as well as the wholesale markets, well established sales channels and established corresponding relationship with international carriers as well as established international facilities."*

29. Other respondents to the consultation shared similar views to that of New T&T that there have been no evidence from CWHKTC to demonstrate that it does not possess significant market power as its statement "*has no significant market power on these [the Category A] routes*"; that CWHKT FTNS holds an advantage position as the LAC payable by CWHKTC's competitors represents a real payment of the other operators while it is just an internal transfer cost for CWHKT FTNS; and that the market power of the combined entity of CWHKTC and CWHKTI has not diminished since the declaration of non-dominance.

30. The TA is mindful that since that date when CWHKT FTNS notified the TA of the implementation of the safeguards required under the August 1999 Direction, there have been no enforcement actions against CWHKTC in respect of a pricing issue. However, the TA is aware that there have not been any changes in the situation in relation to the vertical relationship of CWHKTC and CWHKTI since the issue of the August 1999 Direction. The TA is satisfied that the concerns raised in some of the submissions were reasonable and that at the present stage, the conditions imposed by the August 1999 Direction are still necessary to ensure competition in the market is protected. In addition, the TA is satisfied that none of the conditions imposed placed an undue burden on CWHKT FTNS or its affiliates. In any event, the conditions reflect best practices that the company should have been following in any event or are required to ensure customers are not locked in.

### **Life of Direction**

31. The TA has considered whether he should impose a new expiry date or extend the Direction indefinitely. In view of the fact that over the past 12 months, there have been no enforcement action against CWHKT FTNS and the market was not adversely affected by the last declaration of non-dominance combined with the fact that the TA will maintain in place the conditions imposed in the August 1999 Direction, the TA is satisfied that it is safe and appropriate not to impose an automatic expiry date.

32. In view of the fact that CWHKT FTNS is still subject to the competition provisions of its licence combined with the conditions in the Direction and the enhanced Telecommunications Ordinance provisions, the TA is satisfied that at any stage, he is in a position to deal with any anti-competitive conduct effectively and efficiently. In any event, major changes in the relevant market and/or failures to comply with the obligations in other circumstances could lead the TA to review the

Direction issued today. Further, he will, in any event, revisit the market specifically (since he maintains regular monitoring of it) to reconsider this Direction in 18 months.

## CONCLUSION

33. Having considered all the submissions and the information available to him, the TA is satisfied that:

- (a) the previously used definition of the relevant market for the purpose of this application is still valid;
- (b) the competition of the market has not decreased since the issue of the August 1999 Direction and that the non-dominant status of CWHKT FTNS in the market was not affected;
- (c) there has not been much change in the market share of CWHKT FTNS since the issue of the August 1999 Direction;
- (d) there have not been substantial changes in respect of barrier to entry and the power of CWHKT FTNS in making decisions as to pricing or other strategic matters that have affected the non-dominant status of CWHKT FTNS in the market; and
- (e) there are no changes in respect of the vertical relationships between CWHKTC and CWHKTI and therefore, conditions imposed by the August 1999 Direction are necessary to protect competition in the market.

34. In view of the above, the TA is satisfied that CWHKT FTNS remains non-dominant in the market of international call services to Category A destinations.

35. The TA has therefore issued today a Direction to CWHKT FTNS to that effect subject to the same conditions imposed by the August 1999 Direction. No expiry date is set for the extension of CWHKT FTNS's non-dominant status in the market of international call services to Category A destinations. The new Direction shall take effect immediately and will continue to be in force until such date as it may be revoked, in full or in part, in writing by the TA. The TA will review in 18 months from today the situation including but not limited to the changes of the market situation, the market share of CWHKT FTNS in the market, the market power of CWHKT FTNS and how CWHKT FTNS behave in relation to the conditions imposed in the new Direction. However, if at any stage prior to that date, there are substantial changes in the market, the TA will consider these and take into account any views with legitimate justifications from any parties to review the new Direction.

36. As stated in the August 1999 statement, the licence obligations of CWHKTC concerning abuse of dominance remain in place. If the TA is to find in the future that CWHKTC is dominant in the international call services to Category A routes and that it has abused its position, he can take necessary action either under the licence conditions of the company or the Telecommunications Ordinance. A prior declaration of dominance is not a pre-requisite. The declaration is required where the TA wishes to impose additional conditions such as the requirement to obtain prior approval for price changes. Even where prior approval is not required, the licensee who is dominant in any market must comply with the requirement not to abuse its position. It is therefore a matter for each licensee to monitor, and where necessary, adjust its behaviour depending on its market power.

**Office of the Telecommunications Authority**  
28 September 2000