

Consumer Council
Submission to LegCo Bills Committee on Telecommunications (Amendment) Bill
2002

Introduction

1. The Council welcomes the opportunity to comment on the paper setting out the key matters that should be addressed in the "guidelines on the competition analysis of mergers and acquisitions in telecommunications markets" that will be used by the Telecommunications Authority (TA) in performing the functions conferred upon him to regulate mergers and acquisitions of carrier licensees under the Telecommunications (Amendment) Bill 2002 (the Bill) when enacted.

2. The analytical framework described in the paper in general encompasses issues, and outlines procedures that are found in comparable guidelines produced by competition authorities in other jurisdictions that have competition laws, governing not only telecommunications markets but economic activity in general. As such the Council has no general concerns with the proposed analytical framework.

3. Nevertheless, there are two issues the Council would like to raise for the Government's consideration.

Efficiencies

4. From overseas experience, it is noted that only a small percentage of mergers notified to a competition authority are challenged and most of them occur in concentrated markets. Virtually any significant horizontal merger involves some loss of direct competition and would thus be anti-competitive; in the absence of any efficiencies that leads to the creation of a stronger competitor. This means that the question of efficiencies needs to be closely examined whenever there is a horizontal merger.

5. The paper on the proposed guidelines notes at paragraph 69 that the economies of scale argument is likely to be considered as efficiency enhancing, and notes at paragraph 72 that:

"It must demonstrated that the efficiencies will be achieved by the merger and would be unlikely to have been achieved without the merger....."

6. This raises a question as to how efficiencies can be demonstrated to such an extent that the TA will be satisfied that a merger which raises a prima facie concern that a substantial lessening of competition will occur, absent any efficiencies, should be allowed to proceed. The Government's paper does not give an indication as to the standards the TA will require in order to be satisfied in this regard. Moreover, the Council queries the extent to which the TA will be able to satisfy himself:

- a) that efficiencies have actually been achieved, until after a merger has taken place and economies of scale have been utilized by the merged entity; and importantly
- b) whether any efficiencies achieved have resulted in improvements for consumer welfare by enhancing competition in the relevant market.

Consumer welfare indicators

7. With regard to what are appropriate indications of consumer welfare, and an efficient market, the Council made a submission in June 2002 to the LegCo Panel on Information Technology and Broadcasting regarding the interconnection arrangements in promoting competition and the role of the TA. In that submission, the Council noted that there was a need for market information to be made available in order to gain a better understanding of the nature, extent and impact of competition in the Hong Kong telecommunications sector.

8. The Council made reference to the practice in the UK, where the telecommunications regulator, OFTEL, lists as effective competition indicators a range of factors, including:

(A) Consumer outcomes.

- Consumers enjoying “best or near best deal” in comparison with consumers in similar economies
- A wide range of services available to consumers
- Consumers satisfied with quality of service they receive
- Sets of prices, which broadly reflect underlying costs (i.e. absence of persistent excessive profits)

(B) Consumer behaviour.

- Consumers able to access information to help make effective choices.
- Consumer confident/knowledgeable in using information and in taking advantage of market opportunities.
- Absence of barriers for consumers to switch suppliers.

(C) Supplier behaviour.

- Active competition in price and quality and innovation
- Absence of anti-competitive behaviour
- Absence of collusion
- Meeting consumer needs
- Efficient provision of services
- Recent entry of new competitors

(D) Market structure.

- Limited entry barriers for potential competitors.
- Absence of inefficient suppliers.
- Limited ability of operators with market power in related markets to lever this market power into the particular market segment.
- Changes in market structure over time, especially a tendency to reduce concentration.

9. Furthermore, in its submission to the Government's Consultation Paper that preceded the Bill in June 2001, the Council suggested the TA should clarify in the proposed Mergers and Acquisition Guidelines that any claimed efficiencies from a proposed merger must be specified and verified, in the sense that they are not vague or speculative, but credibly will indeed happen if a transaction that raises a competition concern proceeds.

10. The Council suggests that the above indicators should form the basis upon which the TA will consider factors against which efficiency arguments will be tested, particularly competition indicators in A and B.

Ensuring that efficiencies are achieved

11. In its response to the above June 2001 Consultation Paper, the Council also submitted that conditions should be placed on any mergers or acquisitions, where they are accepted on the grounds that efficiencies are expected to arise, and that if they do not occur, remedial action should follow. The Council stated that whether this involves divestiture, or another means of addressing the loss in consumer welfare, should be specified at the time acceptance is given by the TA of the efficiency arguments given by relevant parties.

12. The Bill does not include any power for the TA to make conditions along the lines suggested in the Council's response to the Consultation paper. However, the proposed Section 7P sub section (6)(b)(ii) of the Bill provides that the TA may give consent to a merger if he is of the opinion that the proposed merger would have, or be likely to have the effect of substantially lessening competition, subject to the direction that the carrier licensee concerned takes action that the TA considers necessary to eliminate any anti-competitive effect. Section 7P sub section (9) notes that the action the TA may direct a carrier licensee to take is of a general nature, and not limited to matters such as control, voting rights and beneficial ownership.

13. In the absence of any other legislative powers for the TA to impose conditions, the Council suggests that the TA indicate in the Guidelines that he will use the power to make directions under Section 7P sub section (6)(b)(ii) of the Bill to ensure that claimed efficiencies are actually met by a merged entity.

Consumer Council
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