

Consumer Council
LegCo Bills Committee on Telecommunications (Amendment) Bill 2002
Regulation of Mergers and Acquisitions
in the Telecommunications Market

Introduction

1. The Council welcomes this opportunity to summarize its views for the Bills Committee on this important piece of legislation. In summary, the Council has in the past made several submissions to the Committee regarding the Bill, on the following matters:

Interim injunctive power

2. During the time lag between the Telecommunications Authority's (TA) decision that there is a prima facie concern and the final decision on whether the merger or acquisition should go ahead, the party or parties that have a controlling interest of the carrier licensee will be in a position to make crucial decisions affecting the competitive position of the carrier licensee, such as altering the corporate structure and disposing of assets. Once these changes have been made, it is likely that reversal of the structural changes that have been made will be difficult if not impossible to achieve.

3. The Council suggested that where the TA has a prima facie concern that a proposed transaction will lead to a position of control and subsequent substantial lessening of competition, he should have interim injunctive powers, so as to prevent a transaction from going ahead in the first place, until the final ruling on the merger or acquisition has been made.

Substantial lessening of competition test

4. The Council queried why a different test is being applied to the new mergers and acquisitions provisions of the Ordinance, in Section 7P, compared to that which currently applies to anti-competitive conduct, in Section 7K. Introducing a differently worded test in the current amendments, to that which applies in relation to Section 7K, appears to indicate that different factors should be taken into account when determining what is meant by 'anticompetitive'.

5. To avoid regulatory confusion and different standards being applied to essentially the same conduct, the Council recommended that the same test should be used for anti-competitive conduct in both Sections 7K and 7P. In view of the fact that the test under the proposed Section 7P is similar to that used in a number of other jurisdictions around the world, it should be the preferred uniform test.

Efficiencies

6. The Council argued that some indication should be given 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 of substantial lessening of competition, should be allowed to proceed. The Council suggested that the extent to which the TA will be able to satisfy himself as to efficiencies should be based on:

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

7. In the absence of legislative powers for the TA to impose conditions to ensure the efficiencies are met, the Council suggested that the TA should indicate in the proposed "*Guidelines on the Competition Analysis of Mergers and Acquisitions in Telecommunications Markets*" that he will use the power to make directions under proposed Section 7P sub section (6)(b)(ii) of the Bill to ensure that claimed efficiencies are actually met by a merged entity.

The Role Telecommunications (Competition Provisions) Appeal Board (the Competition Board)

8. In answer to a question from a LegCo Member for the Council's views as to whether mergers or acquisitions should be referred directly to the Competition Board rather than on appeal following a TA decision, the Council noted that there seems little significant difference (in terms of the work undertaken by the TA and the Office of Telecommunications Authority, and the chain of decisions) between:

- a) a decision made by the TA that a merger or acquisition substantially lessens competition and an aggrieved person subsequently referring the decision to the Competition Board for a final decision, or
- b) a decision made by the TA that a merger or acquisition *prima facie* substantially lessens competition, and he refers the matter to the Competition Board for a final decision.

9. The Council did note that one difference might be that the regulatory process in referring a matter directly to the Competition Board might be marginally shorter, due to shorter legislative procedural steps. If this was in fact the case, the important need for expediency would be achieved.

10. However, the Council indicated its concern that the debate on the role of the Competition Board could be used to delay the passage of the telecommunications mergers and acquisitions provisions. The Council's stance is that the most important issue is the passage of safeguards to prevent mergers or acquisitions that will be detrimental to consumer welfare from going ahead. The manner in which those safeguards are enforced, whilst being important, are secondary to the urgent need for the safeguards to actually be in place.

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