CB(1)1618/02-03(02)

The Telecommunications (Amendment) Bill 2002:

"Administration's Proposed Committee Stage Amendments and Other Improvements"

1. Introduction

PCCW welcomes this opportunity to present its views on the Administration's Proposed Committee Stage Amendments and Other Improvements ("**CSAs**"). Despite some positive features of the CSAs, PCCW wishes to again emphasise that the Telecommunications (Amendment) Bill 2002 ("**Bill**") is unnecessary and will have a significant adverse affect on the Hong Kong telecommunications sector for the following key reasons:

- the imposition of M&A regulation only on the telecommunications sector is unjustified as there have been no problems identified which would require such discriminatory regulation;

- the Bill is likely to deter much needed investment in the telecom sector;

- an established regime already exists which is effective in protecting user interests and competition in the telecom sector;

- the Bill inadequately addresses critical issues such as the standard of review, timeframes, burdens of proof, safe-harbours, triggering market shares, the need to

focus on transfers of control rather than share transfers and other matters raised by the parties on this panel;

- The double de novo review structure of the Bill would discourage M&A transactions as the review process ignores the fragile and highly time sensitive nature of mergers and acquisitions; and

- the Bill and the proposed OFTA Guidelines when read together would very likely prohibit all mergers except the most innocuous ones.

Assuming, however, that the Bill is inevitable (although we do not understand why an inadequate bill is inevitable) and despite the generally positive nature of the CSAs, PCCW reiterates the need for further significant changes to the Bill. Our full submission responds to the proposed CSAs and sets out the key changes which are still necessary. In this presentation I will only address one issue, that being the need for a single M&A review and the importance of that review being done by the Competition Board.

2. The Need for Primary M&A Review by the Competition Board

While PCCW supports improved checks and balances, time is of the essence in M&A transactions and therefore oversight by only 1 reviewing entity is appropriate. There is a need for an expert competition agency, namely the Competition Board to be that first and only arbiter of any M&A transaction. This proposal has found a level of support in the industry and the non-carrier participants attending the 27 February Bills Committee meeting.

PCCW believes that having two de novo reviews will be either take too long or be too rushed and condensed to be worthwhile. Instead of two short and unsatisfactory proceedings (i.e. one before OFTA and one before the Competition Board) where

time lines are very short, evidence may not be fully developed and decisions may be problematic, PCCW would suggest a single but more comprehensive proceeding before the Competition Board in which OFTA and all other interested parties would participate. This approach utilises OFTA's staff, maximises the time available for a comprehensive review by the Competition Board and best recognises that, in M&A, time is of the essence.

PCCW's proposal of a single review by the Competition Board is based on five considerations:

1. Global best practice indicates that specialised competition agencies and the courts, not sector specific regulators, should be the "judges" in these matters. The Competition Board is a specialised entity and in a recent hearing demonstrated significantly greater competition law expertise than OFTA.

2. Global trends in M&A regulation indicate a strong preference for a board making a decision rather than a non-judicial single person.

3. Consistent with the principles of checks and balances, and recognising different areas of expertise, it is preferable to separate the decision making power for general communications policy implementation from M&A review.

4. Because time is of the essence, it is preferable to have one comprehensive review rather than two hurried and perhaps incomplete reviews.

5. OFTA can still have a significant role in the M&A process by having a pre-clearance role and by actively participating in proceedings before the Competition Board.

Based on our direct experiences with OFTA our view is that OFTA does not have the necessary level of competition law expertise to be given primary jurisdiction over M&A issues. At the same time, the Competition Board has demonstrated its ability in this area.

In March 2003, PCCW took a case related to a tariff rejection by OFTA to appeal before the Competition Board. PCCW was highly impressed with the Competition Board's grasp of the relevant competition issues. By comparison, during the hearing, OFTA abandoned or substantially modified each of the arguments it had made in support of its written rejection of the tariff.

The Competition Board has not yet given its judgement on the case, but it has shown a significant level of expertise and understanding of the issues raised. While one case may not be a referendum on OFTA's competition law expertise, it does provide compelling evidence. To ignore such evidence would put a critical local industry sector at risk. Accordingly, the only realistic course of action would be to either task the Competition Board with M&A review jurisdiction or to have no legislation at all – either option would be preferable to tasking OFTA with M&A review jurisdiction as the Bill proposes.

This proposal has received significant support from the industry and other parties who have made submissions to LegCo. In particular, PCCW notes that the Consumer Council in its March filing to the Committee agrees with the industry that a clear need exists in the M&A review process for "simplicity and expediency". It stated:

"[simplicity and expediency] is a constant theme that occurs in the formation of competition policy in other competition law jurisdictions… [T]he streamlining of the decision making process implied in the suggested role for the Board, which is in any event the final decision making body, would on its face meet the need for simplicity and expediency."

While the Consumer Council still envisions a two step process, it also agrees with the industry that:

"excessive delays occasioned by regulatory processes may well stifle efficient mergers and acquisitions."

PCCW also notes that its recommendation is in line with recent international developments in Australia. A recent review of the competition provisions of the Trade Practices Act has recommended changes to the Australian merger authorisation process in recognition of the fragility and time-sensitivity of M&A transactions. Currently, applications for authorisations of mergers must be made to the regulator (the ACCC), with ACCC decisions being appealable to the Australian Competition Tribunal. The Dawson Committee concluded that a slow and uncertain double review process was commercially non-viable, particularly for M&A involving publicly listed companies. It has therefore been proposed to by-pass the ACCC's involvement in the authorisation process and to have authorisation applications be made direct to the Tribunal, creating a single process, similar to what PCCW proposes here.

In conclusion, PCCW still supports a single review of M&A proposals by the Competition Board. As to the numerous other issues raised in the CSAs, PCCW generally supports the concerns and views expressed in the submissions of the other panel participants.