

11 June 2003

BY HAND

Bills Committee on
Telecommunications (Amendment) Bill 2002
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sirs,

Telecommunications (Amendment) Bill 2002 – Response to the Administration’s Note on Thresholds Adopted by Competition Authorities in Examining Mergers and Acquisitions in Overseas Jurisdictions

We refer to the Administration’s note on thresholds adopted by competition authorities in examining mergers and acquisitions.

We would like to clarify an apparent confusion over the 15%/30% issue.

The Administration’s note seems to indicate that 15% is the threshold adopted in the Bill for examining mergers and acquisitions.

We should point out that by virtue of the proposed Section 7P (1) (b) and (c), the TA is actually empowered to examine any change in the shareholding of a carrier licence to determine if there is an effect of substantially lessening competition in the market, even when the 15% threshold is not crossed AND in addition to a “change of control” in a licencee. 15% is only a threshold for defining “change of control”.

We disagree with such a wide scope of the Bill and the 15% low threshold for defining control. We have therefore requested that Section 7P (1) (b) and (c) be deleted and that the definition of change of control be modified to include the amendments as explained in the last Bills Committee meeting on 9th June 2003.

Merger and acquisition regulation is fundamentally about whether a change in control in a company will substantially lessen competition in a particular market. It is not about reviewing or regulating any or all shareholding changes. The current Bill would expressly allow the TA to initiate an M&A investigation upon the transfer of a single share in a licensee. This is clearly excessive, unduly intrusive and cannot be defended. Such a wide scope of the Bill will inevitably catch many innocuous transactions and will create heavy compliance burdens on investors and licencees, discouraging investment and ultimately harmful to consumers.

Such a wide scope of the Bill also renders any discussion on the definition of "change of control" meaningless. It is certainly of no assistance to the business community which require certainty in their dealings to note that of the vast range of transactions potentially caught by the Bill, it is only those which happen to be regarded by the TA as "substantially lessening competition" that will actually be rejected. The fact that the TA has the power of investigating all transactions is disturbing enough and creates too much uncertainty.

Giving the TA power over innocuous share transfer transactions which do not involve a "change of control" is without objective justification and will have a chilling effect on investment in Hong Kong. It is also inconsistent with Hong Kong's reputation as a free economy and the Government's stated objectives of promoting investment by introducing this Bill. The Bill in its current form will only make it even more difficult for companies to search for investors and capital.

Consistent with international best practice, the TA should only be empowered to review mergers and acquisitions which give rise to true "changes in control" over a licensee, i.e. those changes which result in a change in "effective control". This concept of effective control is used in most jurisdictions to screen out those transactions that are unlikely to raise competition issues.


The 15% low threshold in defining "control" is all the more inappropriate when Section 7P (12) (d) has already provided an effective control test. Section 7P (12) (d) deems a "change of control" to have occurred if a person is given the power to "ensure that the affairs of the licensee are conducted in accordance with the wishes of that person". This test already allows the determination of whether a change of control has occurred to be independent from the level of shareholding which may or may not deliver control over a company. This effective control test also allows consideration to be given to the ownership distribution of the remaining shares, the distribution of voting rights including any special voting rights, control over the composition of the board of directors, etc. in determining whether a change of control has occurred.

We have also additionally offered that "change of control" can include any person becoming the largest single shareholder of a carrier licensee and any carrier licensee acquiring more than 15% of another carrier licensee in the same market. Such definition of "change of control" will give the TA more than ample power over all transactions that may potentially have an effect of substantially lessening competition in the market.

We have drawn the attention of the Bills Committee to the concept of control under the Hong Kong Code on Takeover and Merger and the Listing Rules. These regulations provide that "change of control" occurs only where there is an acquisition of a legal or beneficial interest or ability to control 30% or more of the voting shares of a company. Obligations that hinge on the control of a company, for example, obligations to make a general offer to other shareholders of interests in competing business do not apply unless the concerned party crosses the 30% threshold. Even in respect of listed companies, 30% is the threshold to define "change of control" to justify regulatory intervention in the name of protection of the public investing in listed companies. Why is a lower threshold applied for telecommunications companies, listed and unlisted? We have therefore asked that 15% be replaced by 30% (except in the case of a carrier licensee acquiring shares in another carrier licensee in the same market).

We have attached to this letter the Administration's table on other countries and added a third column with operators' comments on the Administration's statement of thresholds in other countries. As the table confirms, there are no other instances where a change of control is deemed to occur at 15%.

Yours faithfully
For and on behalf of
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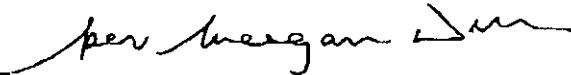
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**Thresholds Adopted by Competition Authorities
in Examining Mergers and Acquisitions
in Overseas Jurisdictions**

Jurisdiction	<u>Government's Statements</u> Thresholds for Examining Mergers and Acquisitions by Competition Authorities	<u>Operators' comments</u>
Hong Kong	<ul style="list-style-type: none"> - More than 15% (Proposed in Telecommunications (Amendment) Bill 2002) 	<p>No. This is not true. The Bill gives TA the power to examine <u>any</u> change in shareholding of carrier licensees, in addition to change of control. 15% is just the threshold for deeming a "change of control" to have occurred. We find 15% too low as in almost all instances, it does not entail control.</p>
United Kingdom	<ul style="list-style-type: none"> - No threshold provided for in Enterprise Act 2002 in what constitutes "ceasing to be distinct enterprises" (section 26) - In the guidelines, the Office of Fair Trading (OFT) may examine shareholding of 15% or more in order to see whether the holder might be able materially to influence the company's policy. "Occasionally, a holding of less than 15% could attract scrutiny where other factors indicating the ability to exercise influence over policy are present." (para. 2.9, "Mergers: Substantive Assessment Guidance" issued by OFT in May 2003) 	<p>As noted by the CITB, OFT's guidelines refer to "other factors indicating the ability to exercise influence over policy" being present when considering low shareholdings. Without such other factors being present to allow significant influence over the company, mere shareholdings in a company at low levels will not justify regulatory intervention. No such requirement is present in the Administration's proposed Bill. There is also no provision in either the UK legislation or guidelines that deems a change of control to have occurred at a particular percentage as exists in the Administration's Bill.</p>

Canada	<ul style="list-style-type: none"> - In the Competition Act (section 91), the definition of "merger" covers the acquisition of "significant interest" in a corporation. - In the Merger Enforcement Guidelines published by the Competition Bureau, it is stated in Part 1 that "[i]n the Bureau's experience, direct or indirect ownership of less than 10 percent of the voting shares of a corporation has generally been found not to constitute ownership of a "significant interest" in the corporation" 	<p>In the Competition Act (section 91), the definition of "merger" is defined to cover acquisition or establishment of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person." "Control" is defined in section 2(4) of the Act to mean a direct or indirect holding of more than 50% of the votes that may be cast to elect directors of the corporation and which are sufficient to elect a majority of such directors. The Act itself does not define "significant interest".</p> <p>In determining whether there is an establishment of "significant interest", the Competition Bureau stated in the Merger Enforcement Guideline that it would follow similar principle i.e. whether or not the person concerned has enough voting shares to obtain a sufficient level of representation on the board of directors to materially influence that board or to block special or ordinary resolutions of the corporation. It is therefore the Bureau's experience that direct or indirect ownership of less than 10% voting sharing will not constitute a "significant interest". For 10% to 50% scenarios, the Bureau will consider on a "case by case" basis under the above guiding principle. The Canadian legislation and their Competition Bureau puts strong emphasis on control of majority of board seats and voting shares for the finding of both control and significant interest. There is again no statutory presumption in Canada that a significant interest is established at any particular percentage of shareholding, as in the Administration's proposed bill.</p>
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Australia	<ul style="list-style-type: none"> - The Trade Practices Act 1974 (section 50) prohibits any acquisition of shares which would have the effect of substantially lessening competition. - In the guidelines published by the competition authority (ACCC), it is stated that “[T]here is no threshold shareholding for the purpose of s.50” (para. 3.19, Merger Guidelines issued by ACCC in June 1999) 	<p>There is no presumption in either the Australian legislation or guidelines that a change of control occurs at a particular percentage as exists in the Administration's Bill.</p>
Singapore	<ul style="list-style-type: none"> - No minimum threshold in existing Competition Code (any change in ownership, shareholding or management of the licensee is subject to approval) (para. 9.2.2 of Telecom “Competition Code”) - In May 2003, the telecom regulator (IDA) proposes to amend the Competition Code to provide for the following thresholds: <ul style="list-style-type: none"> - less than 5% - no notification or approval required - 5% to less than 12% - notification to IDA required - 12% or more - IDA prior approval required 	<ul style="list-style-type: none"> - The proposals recognize the defects for not providing safe harbours. - The Singapore proposals catch much fewer transactions than the Hong Kong proposal by <ol style="list-style-type: none"> 1. stating clearly that any transaction below 12% threshold will not be examined by the Government, 2. providing a presumption that between 12% and 30%, there is no effective control. - The proposals are for consultation only. They may be changed follow consultation.