**Consumer Council**

**Submission to LegCo Bills Committee on**
**Telecommunications (Amendment) Bill 2002**
**Regulation of Mergers and Acquisitions in the Telecommunications Sector**

1. The Council welcomes the invitation for comments from the LegCo Bills Committee examining amendments to the Telecommunications Ordinance, regarding the procedure in which mergers and acquisitions are to be examined by the Telecommunications Authority (TA).

2. The Council gives its general support to measures aimed at improving the regulatory environment in which the TA can address anti-competitive mergers and acquisitions, given the benefits that vigorous competition can bring to consumers. Nevertheless, the Council would like to raise three issues for further consideration:

(a) the question of general competition law;

(b) the ability for the TA to prevent consummation of a merger or acquisition during the period when the regulatory decision making process is underway; and

(c) the relevant test for examining mergers and acquisitions.

**General competition law**

3. The Legislative Council brief accompanying the Bill states that some industry submissions that were made to the Government on the consultation paper in this matter, suggested that if there is to be merger and acquisition regulation, it should be universal and not industry specific.

4. The Council has long seen the merit of a general competition law in Hong Kong that has universal application, and still considers that such a law would bring benefits to consumers and business alike. Moreover, there is increasing convergence in the communications industry, for example, between telecommunications, broadcasting and Internet. This fact makes a general competition law all the more necessary, in order to avoid the existence of loopholes, confusion in regulatory responsibility, and importantly, duplication of regulatory resources.

5. Nevertheless, the Council recognises that a network industry such as telecommunications does have distinctive features that require some industry specific competition rules. For example, statutory obligations requiring network carriers to provide access to competitors in order to preserve an 'any to any' communications service. However, this position is not inconsistent with the call for a general competition law, as industry specific rules can be included within the overall framework of a general law, to cater for any distinctive sector specific features.

**Ex post regulation**

6. The brief accompanying the Bill notes that it is proposed that a regulatory review should be conducted by the TA after a merger or acquisition has been completed rather than requiring parties to seek prior approval. The Council can accept that mandating parties to seek prior approval before merging or acquiring shareholdings would be difficult to implement, and could be a burden on the industry.

7. However, the Council suggests that where 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:

(a) prevent a merger or acquisition from proceeding; or

(b) prevent structural changes to a licensee's ability to compete in a market;

(c) until such time as he has finalised his decision and made directions, and any appeal rights have been exhausted.

8. The reason is that once a merger or acquisition has been completed, or a controlling shareholding has been achieved, there will be a time lag between:

(a) the point where the TA forms an opinion under 7P(1) at which point he is required to give the carrier a reasonable opportunity to make representations; and

(b) the point at which a direction is issued to take action to address the degree of control exercised over the licensee.

9. During this time lag 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.

10. The Council suggests that it would be preferable if the TA were in a position where he could prevent a transaction from going ahead in the first place, through having interim injunctive powers. The ability to seek an interim injunction from the court, preventing a merger or acquisition from going ahead, is available to competition authorities in the jurisdictions mentioned in the brief, that have what is termed by the government, an 'ex post' approach to mergers regulation[1].

**Substantial lessening of competition test**

11. Clause 7P of the Bill introduces to the *Telecommunications Ordinance* (the Ordinance) a new test under which the TA will be required to determine whether there is a potential problem with regard to competition in a telecommunications market. Section 7K of the Ordinance currently prohibits a licensee from engaging in conduct that in the opinion of the TA has the purpose or effect of preventing or

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[1] See for example, Section 80 of the Australian Trade Practices Act 1974. This provides for the Australian Competition and Consumer Commission to seek an injunction from the court in such terms as the court determines appropriate, where the court is satisfied that a person is proposing to engage in conduct that would constitute a contravention of the prohibition against anti-competitive mergers. In the United Kingdom there are similar powers. When a merger is referred to the Competition Commission there are powers under section 74 of the Fair Trading Act. These can be used to stop parties from taking any action which might prejudice the reference or make it difficult for the Secretary of State to take action on the Competition Commission's findings in the event of an adverse report.

substantially restricting competition in a telecommunications market. This prohibition is generally seen to be targeted at agreements between competitors to co-operate on matters such as market sharing and prices. In effect such agreements are anti-competitive joint ventures, and different only from mergers or acquisitions in the structural nature of the agreement.

12. In fact, the TA's decision of 23 December 1998 in which he considered the consequences of the acquisition of the Internet related business of Hong Kong Star Internet Limited to Hong Kong Telecom IMS Limited is a case in point. In that decision, the TA indicated he would have regard to the carrier license condition which prohibited a licensee from entering into any agreement which would in any way prevent or restrict competition. This test was the forerunner to Section 7K that was introduced in the year 2000 amendments to the Ordinance.

13. Accordingly, the Council queries why a different test is being applied to the new mergers and acquisitions provisions of the Ordinance, compared to that which applies to anti-competitive conduct in general, which as noted above could also apply to mergers and acquisitions. Introducing a different test in the current amendments to that which applies in relation to 7K, appears to indicate that different factors will be taken into account for essentially the same conduct, depending upon which section of the Ordinance the TA decides to take action.

14. This introduces a degree of uncertainty that could undermine the rationale behind the amendments, which as stated by the Government (in paragraph 4 of the LegCo Brief) is to address a lack of clarity in the present regulatory regime.

15. The Council recommends that the same test should be used for anti-competitive conduct in both Sections 7K and 7P.

Consumer Council
October 2002