

The Legislative Council
Bills Committee on Telecommunications (Amendment) Bill 2002

**Further Information on Regulation of Mergers and Acquisitions in
Telecommunications Industry by the Telecommunications Authority**

Introduction

At the meeting of the Bills Committee for Telecommunications (Amendment) Bill 2002 held on 6 November 2002, Members invited the Administration to elaborate on whether it is appropriate to empower the Telecommunications Authority (TA) to enforce the merger and acquisition (M & A) regulation under the Bill, having regard to overseas practices. In Hong Kong's case, the TA has always been the appointment of a public officer, instead of a board. We set out the overseas practices according to our research, and our response below.

Overseas Practices

2. At Members' request, we have gathered information on how overseas countries enforce the M&A regulation at the Annex. There is no universal rule on the composition of overseas authorities for regulation of M&A. Very often a number of agencies are involved in the whole process. There are different appeal mechanisms, and the scope of appeal may vary. For example,

- Canada has a single-person Commissioner of Competition responsible for receiving notifications of transactions, and administering and enforcing the M&A regulation. If the Commissioner of Competition determines that a transaction has anti-competitive effect, he may apply to a multi-member Competition Tribunal for an appropriate order. The decision of the tribunal is subject to review by the Federal Court of Appeal. While a similar mechanism is adopted in UK, the decisions of its Competition Commission are subject to review by the Competition Appeal Tribunal on the lawfulness and fairness of the decisions only.
- In the USA, the authority for reviewing M&A is divided between two authorities, namely the Department of Justice (headed by the Attorney) which has the authority to determine whether a proposed merger should be referred to the court for an appropriate order, and

the Federal Communications Commission (FCC) (a multi-member commission) which has the authority to approve any assignment or transfer of telecommunication licence and authorizations. The decisions made by FCC are subject to appeal in the courts.

- In Singapore, the Info-communications Development Authority (IDA) regulates M&A in the telecommunications industry. IDA comprises one Chairman and a number of members. Decisions of the IDA are subject to appeal to the Minister.

3. We believe that each country develops their own mechanisms, which evolve over time. The regulatory mechanism involves a whole range of regulatory issues, such as whether the system is ex-post or ex-ante, the varying composition of authorities in charge, whether the competition regime is sector-specific or applies across the board, the appeal channel as well as the different scope of appeal. The key issue is, however, to ensure sufficient checks and balances of the entire process.

Response on Our Proposal

4. Under the Telecommunication (Amendment) Ordinance 2000 enacted by the Legislative Council, the TA, supported by the Office of the Telecommunications Authority (OFTA), is empowered to administer the fair competition provisions of the Ordinance (i.e. sections 7K – 7N of the Telecommunications Ordinance). Moreover, the TA also administers the existing licence conditions on M & A regulation (e.g. transfer of licence, transfer of shares in certain licences). Over the years, OFTA has developed experience and expertise in enforcing the sector-specific competition law for the telecommunications industry.

5. The proposed Bill on regulation of M & A activities aims to address the present grey area where the M & A takes place at holding company level. Like the fair competition provisions, it aims to promote competition in the telecommunications market. Indeed, the expertise involved in the enforcement of the fair competition provisions and the M & A regulation is essentially the same. In the enforcement of the fair competition provisions, the TA is required to analyze competition in the market to assess if an operator has market power or is in a dominant position in the market or if a conduct would prevent or substantially restrict competition in the market. Likewise, in the enforcement of M & A regulation, the TA is required to analyze competition in the market to assess whether the M & A would substantially restrict competition in the market. The factors for competition analysis for assessment of dominance

and the effect of M & A are similar. In terms of implications on consumers and licensees, both the fair competition provisions and M & A regulation are equally crucial.

6. In the overseas jurisdiction, the enforcement of fair competition provisions and M & A regulation is invariably undertaken by the same competition authorities. We therefore consider it appropriate for TA to administer the M & A regulation under the proposed Bill, alongside with the existing fair competition provisions. Similarly, we propose to build on our existing mechanism of appeal by subjecting TA's decisions on M&A regulation to review on merits by the Telecommunications (Competition Provisions) Appeal Board.

7. We have built in sufficient checks and balances in our proposal. They are summarised as follows -

- (a) The TA is supported by OFTA, which is equipped with expertise in all relevant fields including accounting, legal, economic and telecommunications. In particular, a Competition Affairs Branch has been established to better support the TA in enforcing the fair competition provisions, and the M & A regulation upon enactment of the Bill.
- (b) The TA is subject to the procedural safeguards applicable to other investigation and decision making under the Ordinance. The TA must afford a reasonable opportunity for the relevant person to make representations. He must set out his decisions with reasons in writing under section 6A(3)(b) of the Ordinance. Such reasons will form the basis for appeal or judicial review.
- (c) Like decisions on the fair competition provisions, TA's decisions on M & A regulations under the Bill are subject to appeal to the Telecommunications (Competition Provisions) Appeal Board (in addition to judicial review). The Appeal Board is allowed to review the merits of the appeal case and is empowered to uphold, vary or quash the TA's decision. Under the Ordinance, the Chairman and Deputy Chairmen must be eligible for appointment as a judge of the High Court. In the hearing of an appeal, the Appeal Board shall consist of the Chairman or a Deputy Chairman who shall preside at the hearing, and 2 panel members from a pool of members having extensive expertise and experience in

legal, economic and consumer services.

Conclusion

8. We consider that our proposal for TA to administer the M & A regulation under the Bill is appropriate, as it is already doing so for the fair competition provisions and the existing licence conditions on M & A regulation. The key is to have sufficient checks and balances to ensure fair enforcement of the provisions. We consider that our proposed safeguards, which are the same with those for the fair competition provisions, are adequate.

9. We note Members' view on the composition of the TA. We believe that it should be an organisational issue to be considered in a broader context and in the longer term, taking into account the developments of the telecommunications industry.

**Commerce, Industry and Technology Bureau
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**Information of How Overseas Countries Regulate
Merger and Acquisition Activities
in Telecommunications Market**

Country	Regulatory Authority and Appeal Channels
Australia (ex post regulatory regime)	Australian Competition and Consumer Commission (ACCC) , consisting of 6 to 10 full time members, plus a significant number of associate (part-time) members, investigates and enforces the M&A regulation. If it wishes to stop a merger, order for divestiture and make other orders, it must bring civil proceedings in the Federal Court .
Canada (ex ante regulatory regime)	The Commissioner of Competition is appointed by the Governor in Council under S.7(1) of the Competition Act. He is responsible for the administration and enforcement of the Competition Act and other consumer protection legislation. He will receive prior notifications from parties to a merger which exceed the statutory thresholds. If he determines that the transaction has anti-competitive effect, he may apply to the Competition Tribunal consisting of not more than 12 members for an appropriate order. Decisions and orders of the Competition Tribunal are subject to appeal to the Federal Court of Appeal .
European Commission (ex ante regulatory regime)	The European Commission (EC) consists of 20 members (including a President and six Vice-Presidents) who are appointed by common accord of the Governments of the Member States. Each Commissioner has responsibility for a particular area of Commission activity. One Commissioner has responsibility for competition but formal decisions of the Commission in competition cases are nevertheless decisions of the Commission. Decisions of EC are subject to review initially by the Court of First Instance and subsequently, on points of law, to the European Court of Justice .
Singapore (ex ante regulatory regime)	Info-communications Development Authority (IDA) comprising one Chairman and not less than 2 and not more than 16 other members, investigates and enforces the M&A regulation for the telecommunications industry. The Chief Executive Officer appointed by the Minister is responsible for the administration and management of the functions and affair of IDA. Decisions of the IDA are subject to appeal to the Minister .

Country	Regulatory Authority and Appeal Channels
<p>United Kingdom (ex post regulatory regime)</p>	<p>The Enterprise Act 2002 establishes the Office of Fair Trading (OFT) on a statutory basis as a corporate body. It will consist of a Chairman and no fewer than 4 other members appointed by the Secretary of State who will together form a board. The OFT is responsible for making a decision whether to refer a merger to the Competition Commission (CC) consisting of fifty part time members plus a full time chairman for full investigation. Decisions of the CC are subject to review by the Competition Appeal Tribunal (CAT) on the lawfulness and fairness of the decision only.</p>
<p>United States (ex ante regulatory regime)</p>	<p>Authority for the review of telecommunications sector transactions is divided between the Department of Justice, which has the authority to decide whether a proposed merger should be referred to courts for an appropriate order, and the Federal Communications Commission (FCC) headed by five commissioners, which has the authority to approve (subject to conditions) any assignment or transfer of control of a telecommunication licence. Decisions made by FCC are subject to appeal to courts.</p>