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Legislative Council

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**Paper for the House Committee meeting
on 27 June 2003**

**Further report of the Bills Committee on
Telecommunications (Amendment) Bill 2002**

Purpose

This paper reports on further deliberations of the Bills Committee on Telecommunications (Amendment) Bill 2002 (the Bill) since it last reported to the House Committee on 6 June 2003.

Background

2. At the meeting of the House Committee on 6 June 2003, the Administration issued a note to all Members urging them to support the resumption of the Second Reading debate on the Bill on 18 June 2003 as recommended in the report submitted by the Bills Committee (LC Paper CB(1) 1858/02-03). A letter signed by several major telecommunications operators was also tabled at the meeting urging for deferral of the resumption of Second Reading debate to allow time for Members to consider certain amendments proposed to the Bill which were under preparation.

3. Hon SIN Chung-kai, Chairman of the Bills Committee, informed the House Committee that the telecommunications operators had all along objected to a number of regulatory proposals in the Bill. He further reported that the eight major operators finally reached a unified view and presented a joint submission to the Bills Committee at its last meeting on 23 May 2003. Since the Administration had not accepted the operators' proposals, Hon SIN Chung-kai indicated that he would propose a number of CSAs to the Bill. Given the complexity of the CSAs and the fact that the Bills Committee and the Administration had not yet had the opportunity to consider the proposed CSAs, he sought Members' support to request the Administration to defer the resumption of Second Reading debate to allow time for the Bills Committee to examine the proposed CSAs.

4. After discussion, the House Committee agreed that the Administration should defer resumption of the Second Reading debate on the Bill. The Bills Committee was also requested to make a further report to the House Committee. In the course of the Bills Committee's deliberation, the Administration has taken up a number of amendments proposed by Hon SIN Chung-kai.

5. The Bills Committee has held four meetings to consider the CSAs proposed by Hon SIN Chung-kai, as well as and the further CSAs proposed by the Administration to the Bill. The Chairman of the Bills Committee made two verbal reports to the House Committee on 13 and 20 June 2003.

Deliberations of the Bills Committee

Committee Stage Amendments proposed by Hon SIN Chung-kai

6. The main provisions of the proposed CSAs are as follows:
- (a) to confer powers on the Telecommunications Authority (TA) to grant approval for mergers and acquisitions (M&As);
 - (b) to empower the Telecommunications (Competition Provisions) Appeal Board (the Appeal Board) to investigate into and decide on completed or proposed M&As which have, or are likely to have, an effect of substantially lessening competition in a telecommunications market;
 - (c) to prescribe the procedures and powers of the Appeal Board in considering M&A cases; as well as the procedures and powers of the Court of Appeal in dealing with appeals against the opinion, direction or decision of the Appeal Board;
 - (d) to shorten and prescribe the time limits for various regulatory actions taken by TA and/or Appeal Board;
 - (e) to specify the maximum amount of the costs or expenses recoverable by TA and/or the Appeal Board in processing an application for prior consent to a proposed M&A;
 - (f) to revise the thresholds adopted in defining a change in the control exercised over a carrier licensee, and to remove the provisions empowering TA to look into any change in the beneficial ownership or voting control of any of the voting shares in a carrier licensee; and

- (g) to include the factor of benefit to the public interest in the list of factors that TA and the Appeal Board must take into consideration when considering an M&A.

7. One of the key CSAs proposed by Hon SIN Chung-kai is to empower the Appeal Board, instead of TA, as the main reviewing authority for M&A cases in the telecommunications market. The Administration has reiterated its stance that the proposed drastic change to the existing institutional framework will alter and distort the nature of the Appeal Board fundamentally to that of an investigation committee of first instance with executive functions. TA will in turn be relegated to a consenting agent. Moreover, the modus operandi and the relationship between TA and the Appeal Board under the Telecommunications Ordinance (Cap. 106) (TO) will be confused. The Administration has also pointed out that for practical reasons, the Appeal board, as it is currently constituted and resourced, will not be capable of performing the role of an investigation committee on M&As. Hon SIN Chung-kai's proposal has the support of some members of the Bills Committee while Hon Howard YOUNG, on behalf of Members of the Liberal Party, would support the Administration's original proposal to empower TA as the primary reviewing authority of M&As.

8. Regarding most of the statutory time limits proposed in the CSAs, such as the requirement that the Appeal Board should complete investigation in 10 weeks, the Administration considers that many of the time limits are unworkable. According to the Administration, none of the overseas appellant courts or competition authorities is required to work within the proposed time-frames. Moreover, many relevant time limits are stipulated in administrative guidelines, rather than in legislation. The Administration is concerned that the proposed time limits will compromise the work of TA and the Appeal Board and will open a floodgate for judicial reviews.

9. Some members of the Bills Committee have indicated support in principle for most of the CSAs proposed by Hon SIN Chung-kai as they can better address the concerns of the industry. In this connection, the Bills Committee also notes the position of the Consumer Council that while some of the proposed CSAs may have merits and better serve the interests of the industry, the Bill is by and large workable. On balance, the Council takes the view that the demand for expeditious passage of the important consumer and public interest safeguards provided in the Bill should outweigh further prolonged discussion on proposed amendments.

10. As regards the other proposals in the CSAs proposed by Hon SIN Chung-kai, the Administration has taken on board most of them, subject to certain modifications, and will introduce a number of additional CSAs to this effect. In this connection, Hon SIN Chung-kai has indicated that as most of his proposed amendments will be taken up by the Administration, he will not

move his proposed CSAs to the Bill.

Additional CSAs proposed by the Administration

11. The Bills Committee notes that the additional CSAs have been proposed by the Administration after considerable discussion with the major telecommunications operators. A table summarizing the major issues covered by the Administration's original proposal, Hon SIN Chung-kai's proposed CSAs and the Administration's additional CSAs is at **Appendix I**.

Change in control over a carrier licensee

12. Under proposed sections 7P(1) and 7P(5) of the Bill, the changes in ownership and control subject to TA's review will include any change in

- (a) the control exercised over a carrier licensee;
- (b) the beneficial ownership of any of the voting shares in a carrier licensee; or
- (c) the voting control of any of the voting shares in a carrier licensee.

13. The Bills Committee is aware that proposed sections 7P(1)(b) and (c) and 7P(5)(b) and (c) of the Bill have caused grave concern to the industry because under the proposed provisions, any change in beneficial ownership or voting control of the voting shares of a carrier licensee may trigger regulatory review by TA. The industry considers the scope of the proposed sections too wide and have urged that they be deleted altogether so that TA will only be empowered to review those M&As which will result in a change in effective control of the carrier licensee concerned.

14. The Administration, on the other hand, has pointed out that the proposed sections are necessary to enable TA to look into an M&A where a person who already has more than 15% shareholding increases his shareholding such that his influence over the affairs of the licensee will be substantially increased. The Administration has reservation on simply deleting the proposed provisions as this may compromise the policy objectives of the Bill.

15. On what constitutes a change in the control exercised over a licensee, the Administration does not agree with Hon SIN Chung-kai's proposed CSAs to raise the threshold for a change in control from more than 15% to more than 30% of the voting shares in the licensee. In this connection, the Bills Committee notes the view of the industry that the threshold of 30% is consistent with the thresholds adopted in the Securities and Futures Commission (SFC)'s Code on Takeover and Share Repurchase and the Hong Kong Stock Exchange's threshold for notifying cross-ownership of competing

businesses. Given the shareholding structure of most telecommunications operators in Hong Kong, some members have maintained their objection to the 15% threshold as this will catch a lot of competition-neutral mergers such as the introduction of strategic partners or investors; and will not be conducive to encouraging overseas investments in the local telecommunications industry. In response, the Administration considers it inappropriate to draw a comparison with the SFC's Code as the latter serves a different purpose of protecting the interest of minority shareholders of listed companies. It has also advised that 15% is already the highest threshold having regard to thresholds adopted in overseas jurisdictions.

16. After careful consideration of the concerns of members and the industry, the Administration has proposed to delete proposed sections 7P(1)(b) and (c) and 7P(5)(b) and (c), as well as to amend proposed section 7P(12) of the Bill to provide for the following:

- (a) instead of empowering TA to examine any change in beneficial ownership or voting control of the voting shares of a carrier licensee, only three specific thresholds of more than 15%, more than 30% and more than 50% are specified. The three levels of thresholds represent the acquiring of "material influence", "effective control" and "majority control" respectively over the carrier licensee. TA will be empowered to review only those changes that would result in the person's beneficial ownership or voting control in the voting shares of the carrier licensee crossing any of the three thresholds, subject to the test on whether the change may substantially lessen competition.
- (b) in examining whether the beneficial ownership or voting control of a person is exceeding the thresholds, TA should take into account the aggregate beneficial ownership or voting control of the person and its associated persons.

17. On concerns about the regulatory hurdle for new entrants to the telecommunications market, the Bills Committee notes that under the Administration's latest proposed CSAs, the 15% threshold (i.e. the first level of regulatory threshold) will not apply to new entrants. To benefit from this, the person must not have or concurrently acquire beneficial ownership or voting control of more than 5% of the voting shares in any one of the other carrier licensees.

Time limits for regulatory action

18. The Bills Committee has noted the industry's concern about the need for early decisions by TA on M&As which are often time-critical. In this regard, the Administration has agreed to further reduce the back-stop date from

one month to two weeks beyond which TA cannot commence any investigation into a completed M&A. It will introduce the necessary CSAs to this effect.

19. Although the Administration has not agreed to stipulate all the time limits for regulatory action by TA into the legislation, the Bills Committee notes that it has critically reviewed the various time-frames for processing M&As and has undertaken to include further reduced time limits into the M&A Guidelines which will be subject to consultation after enactment of the Bill. For example, regarding the processing of applications for TA's prior consent, the Administration will specify in the M&A Guidelines that TA is obliged to complete processing simple applications that do not involve detailed investigation and complex applications involving detailed investigation within one month and three months respectively.

Recovery of costs incurred by TA in processing applications for prior consent

20. In response to some members' concern about the rationale for charging fees on licensees, the Administration has explained that as a matter of principle, the carrier licensee or the acquirer should be required to pay for the costs incurred by TA in rendering its service to process an application for prior consent to a proposed M&A. Moreover, the Office of the Telecommunications Authority operates as a Trading Fund and is required to be funded by the income derived from the services it provides. The Administration has also highlighted that while fees are charged on a cost-recovery basis in connection with an application for prior consent, TA will not charge a fee for providing informal advice and when investigating into a completed M&A on his own initiative. The latter activities are regarded as TA's ongoing enforcement functions the costs of which have been factored into the licence fees.

21. The Bills Committee has noted the industry's grave reservation on the appropriateness for TA to charge fees and their strong request that a cap be set on the costs and expenses recoverable by TA so as to provide for greater certainty. Having examined the concerns, the Administration has advised that it can accept a cap at \$200,000 per application. Having regard to TA's operational experience in the levy of fees for interconnection cases, the Administration envisages that the costs for processing M&A cases would be around HK\$50,000 and HK\$110,000 per case for minor cases and major cases respectively. The maximum amount of \$200,000 is therefore considered adequate.

22. In considering the merits or otherwise of imposing a cap on the fees charged, some members are concerned that where the costs for processing a special application exceed the maximum amount of \$200,000, TA will have to subsidize the service provided. In response, the Administration has advised that it will keep in view the costs incurred in processing applications for TA's prior consent to proposed M&As. Where the trend is indicative that \$200,000 may not be sufficient to cover the costs and expenses incurred, the

Administration will seek to amend the maximum amount by order published in the Gazette. Members note that pursuant to the newly proposed section 7P(11C), the aforesaid order is subsidiary legislation subject to negative vetting by the Legislative Council.

23. On some members' enquiry as to whether carrier licensees would be inclined to pay a fee for seeking TA's prior consent to a proposed M&A, the Administration has recapped that under the *ex post* regulatory regime proposed under the Bill, the parties concerned are not obliged to seek TA's prior consent before proceeding with an M&A, as opposed to an *ex ante* regime where the prior consent of the regulator is required. However, the Bill also provides for an alternative option whereby a carrier licensee may seek TA's prior consent on a voluntary basis before proceeding with a transaction. This will enable the licensee to obtain certainty rather than risk being sanctioned subsequently if the M&A is found to have an anti-competitive effect.

Public benefit

24. The Bills Committee reckons that one of the key proposals of the industry as contained in Hon SIN Chung-kai's proposed CSAs is to allow those M&As which have the effect of substantially lessening competition in a telecommunications market to proceed if they can bring about public benefit which outweighs any such anti-competitive effect. Having examined the issue, the Administration has proposed additional CSAs to require TA to consider the public benefit of an M&A after he has found that the M&A has, or is likely to have, the effect of substantially lessening competition in a telecommunications market. If TA is satisfied that the benefit to the public will outweigh any detriment to the public arising from the lessened competition, TA may not issue a direction to intervene in the completed M&A; or may decide to give consent to a proposed M&A without issuing a direction. Members note that TA's decisions with regard to public benefit have to be published.

25. In this connection, the Bills Committee notes that the Consumer Council has indicated support in principle for the additional CSAs proposed by the Administration, provided that the legislative regime retains a power to make conditions on a licensee to ensure that the claimed consumer benefits do arise from an M&A which has, or is likely to have, the effect of substantially lessening competition.

26. Some members have taken on board the concern raised by the Consumer Council and sought the Administration's clarification on ways to ensure that the claimed consumer benefits arising from an M&A which has, or is likely to have, an anti-competitive effect will be realized. In response, the Administration refers to the relevant provisions in the Telecommunications Regulations relating to amendment of licences. It further advises that where TA considers it appropriate to bind the carrier licensee on the necessary

measures to realize the claimed public benefit which will outweigh the anti-competitive effect of an M&A, then, TA may, with the consent of the licensee, amend the conditions under the latter's licence with a view to bringing about the claimed public benefit.

Persons who may appeal to the Appeal Board

27. Under the Bill and the Administration's initial CSAs, all carrier licensees and the acquirer of the relevant carrier licensee concerned may appeal to the Appeal Board against TA's decisions, opinions and directions. Subsequently, quite a number of telecommunications operators have proposed that the scope of persons who may appeal to the Appeal Board should be limited to only the transacting parties of the M&A in question. The Bills Committee understands that their major concern is the possibility of the lodging of frivolous or malicious appeals by competitors which may impede or delay an M&A transaction.

28. The Bills Committee notes the Administration's view that since the scope of the proposed provisions is only confined to carrier licensees, it would have no objection to the proposal of further narrowing the scope of persons who may appeal to only the transacting parties to an M&A if this can provide greater certainty to the carrier licensees without compromising the objectives of the Bill. In this regard, some members have questioned whether all carrier licensees have agreed to forego their right of appeal under these circumstances, and whether other carrier licensees and interested parties will be deprived of the opportunity to voice their views/objection and seek redress. As a related issue, members are also concerned whether TA will also take into account the views expressed by members of the public when assessing the effect of completed or proposed M&As on competition.

29. The Administration has advised that as it is aware, a number of licensees have indicated support for the proposal. In his capacity as the representative of the Information Technology constituency in the Legislative Council, Hon SIN Chung-kai has informed the Bills Committee that by and large, the telecommunications industry considers the proposal acceptable although many operators do not agree with the introduction of the Bill per se.

30. On legal remedy, the Bills Committee notes that TA's decisions, opinions and directions are subject to judicial review. Pursuant to the CSAs proposed by the Administration to proposed sections 7P(2) and 7P(7), TA is required to give all carrier licensees and any interested person a reasonable opportunity to make representations; and to consider such representations before forming any opinion, making any decision or issuing any direction in respect of completed or proposed M&As. As regards consultation by TA and how he exercises his powers, the Administration has advised that existing section 6A of TO requires, inter alia, that when forming an opinion or making a decision under TO, TA is required to do so on reasonable grounds and having

regard to relevant considerations. Moreover, under existing section 6C of TO, before TA performs any function or exercises any power under TO, he may consult persons who may be directly affected or members of the public.

31. Hon Albert CHAN is concerned that restricting the scope of persons who may lodge an appeal to the Appeal Board may not be conducive to safeguarding public interest. He therefore finds it difficult to accept the proposal. Given that there are proposed provisions requiring TA to consider representations, if any, from other carrier licensees which are not parties to the M&A and that there are existing provisions in TO relating to consultation requirements, Hon Howard YOUNG and Hon MA Fung-kwok do not see any serious problem in the proposed arrangement which may help enhance certainty of M&A transactions. The Bills Committee as a whole has not raised objection to the CSAs proposed by the Administration to this effect.

Overall views of members

32. The Bills Committee notes that the additional CSAs proposed by the Administration have incorporated a number of proposals contained in the CSAs proposed by Hon SIN Chung-kai. In general, members of the Bills Committee have not raised objection to the additional CSAs proposed by the Administration to improve its original proposals although some members maintain their objection to the Bill per se while some members support the Bill but prefer a general competition law instead of sector-specific legislation.

Committee Stage Amendments

33. The full set of CSAs to be moved by the Administration is at **Appendix II**. The Bills Committee will not move any CSAs in its name.

Recommendation

34. The Bills Committee supports the Administration's proposal to resume the Second Reading debate on the Bill on 9 July 2003.

Advice sought

35. Members are invited to note the recommendation of the Bills Committee in paragraph 34 above.

Telecommunications (Amendment) Bill 2002

Major issues covered by the Administration's original proposals, the proposed CSAs by Hon SIN Chung-kai and the additional CSAs proposed by the Administration

Major Issue	Administration's original Proposal	Proposed CSAs by Hon SIN Chung-kai	Additional CSAs proposed by the Administration
1. The M&A Guidelines	(a) TA will formulate a set of guidelines on the matters he must consider in reviewing M&As after enactment of the Bill and before processing any M&A cases. Before issuing these guidelines, TA must conduct such consultation with the industry as required under TO.	(a) The M&A Guidelines and any subsequent amendments shall be subject to the review and written approval of the Appeal Board before issuance. (b) The TA and the Appeal Board shall take into account matters specified in the M&A Guidelines when reviewing M&As. (c) TA shall, upon issuing M&A Guidelines or any amendments to such guidelines, publish a notice in the Gazette to the effect that such guidelines or amendments have been issued. (d) The Secretary for Commerce, Industry and Technology shall not publish the Commencement Notice in the Gazette until the M&A Guidelines have been issued.	(a) Same as original proposal.
2. Authority in reviewing M&As	(a) Heading of the proposed section 7P: Power of Authority to regulate changes in control exercised over carrier licensees, etc. (b) TA is the primary authority for reviewing	(a) Heading of the proposed section 7P: Power to regulate changes in control exercised over carrier licensees, etc. (b) TA should only be empowered to make investigation and grant approvals to M&As. If TA believes that an M&A has, or is likely to have, the effect of substantially lessening competition in a telecommunications market, TA should refer the case	(a) Heading of the proposed section 7P: Authority may regulate changes in relation to carrier licensees (b) Same as original proposal.

	M&As.	<p>to the Appeal Board for investigation and determination.</p> <p>(c) Proposed section 32OA prescribes the procedures and powers of Appeal Board under section 7P of TO.</p> <p>(d) Parties to the M&A, i.e. the carrier licensee concerned and the acquirers may appeal to the Court of Appeal against the Appeal Board's opinion, direction or decision. The lodging of such an appeal shall suspend the operation of any direction issued under the proposed section 7P. The Court of Appeal may allow or dismiss the appeal; and may make such directions and order as to costs as it thinks fit.</p> <p>(e) Where the TA or the Appeal Board serves any notice in writing under the proposed section 7P, such notice shall include a statement of the reasons for any opinion, decision or direction contained in that notice.</p>	
3. Time limits in reviewing M&As	<p>(a) An investigation may only be commenced within 1 month after the change occurs or within 1 month after TA knows, or ought reasonably to have known of, the change, as the case may be.</p> <p>(b) To specify in the M&A Guidelines (not in law) that for proposed M&As, the time limit for TA to conduct a detailed analysis is 3 months.</p>	<p>(a) An investigation may only be commenced within 2 weeks after the change occurs or within 2 weeks after TA knows, or ought reasonably to have known of, the change, as the case may be. An investigation for completed M&As shall be completed within 4 weeks of its commencement.</p> <p>(b) For proposed M&As, TA shall form an opinion or make a referral to the Appeal Board within 4 weeks of receiving an application. Within 2 days after the 4-week period, TA shall inform the licensee concerned his opinion or make a referral to the Appeal Board subject to the consent of the applicant.</p> <p>(c) For completed M&As, TA shall inform the licensee concerned his opinion or his decision to make a referral to the Appeal Board within 2 days after the investigation is completed.</p> <p>(d) An investigation by the Appeal Board shall be</p>	<p>(a) An investigation may only be commenced within 2 weeks after the TA knows, or ought reasonably to have known (whichever is the earlier) that the change has occurred.</p> <p>(b) To specify in the M&A Guidelines (not in law) that for proposed M&As, TA is obliged to finish processing of simple applications that do not involve detailed investigations within 1 month, and complex applications that involve detailed investigations within 3 months.</p>

		<p>completed within 10 weeks of a referral from the TA. Within 2 days after the 10-week period, the Appeal Board shall inform the licensee concerned of the Board's decision.</p> <p>(e) A carrier licensee or an interested person in respect of whom an opinion, direction or decision of the Appeal Board was formed, issued or made may appeal to the Court of Appeal within 2 weeks of the notice of the opinion, direction or decision.</p>	
4. Recovery of costs incurred	The TA can recover from the carrier licensee, or the interested person, who makes the application for prior consent to a proposed M&A the costs or expenses incurred in processing the application based on a cost-recovery principle.	To specify the maximum amount of any costs or expenses recoverable by TA and/or the Appeal Board in processing an application for prior consent to a proposed M&A, i.e. HK\$100,000 in a new Schedule 3.	To specify the maximum amount of any costs or expenses recoverable by TA in processing an application for prior consent to a proposed M&A, i.e. HK\$200,000 in a new Schedule 3. The Secretary for Commerce, Industry and Technology may by order published in the Gazette amend Schedule 3.
5. Triggers for reviewing M&As	Where there is a change in (a) the control exercised over a carrier licensee; (b) the beneficial ownership of any voting share in a carrier licensee; or (c) the voting control of any of the voting shares in a carrier licensee.	Where there is a change in the control exercised over a carrier licensee.	Where there is a change in relation to a carrier licensee.
6. Definition of change of control	There is a change in the control exercised over a carrier licensee if	There is a change in the control exercised over a carrier licensee if	There is a change in relation to a carrier licensee if (a) *a person, either alone or with any

	<p>(a) a person becomes the beneficial owner of more than 15% of the voting shares in the licensee;</p> <p>(b) a person becomes a voting controller of more than 15% of the voting shares in the licensee; or</p> <p>(c) a person otherwise acquires the power, by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person.</p>	<p>(a) a person becomes the beneficial owner of more than 30% of the voting shares in the licensee;</p> <p>(b) a person becomes a voting controller of more than 30% of the voting shares in the licensee;</p> <p>(c) a person otherwise acquires the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person;</p> <p>(d) a person becomes the beneficial owner of such percentage of voting shares in the licensee which entitles him to hold the greatest voting control over the licensee;</p> <p>(e) a person becomes a voting controller of such percentage of voting shares in the licensee which entitles him to hold the greatest voting control over the licensee;</p> <p>(f) another licensee in the same telecommunications market as the licensee becomes the beneficial owner of more than 15% of the voting shares in the licensee; or</p> <p>(g) another licensee in the same telecommunications market as the licensee becomes a voting controller of more than 15% of the voting shares in the licensee.</p>	<p>associated person, becomes the beneficial owner or voting controller of more than 15% of the voting shares in the licensee;</p> <p>(b) a person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 30% of the voting shares in the licensee; or</p> <p>(c) a person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 50% of the voting shares in the licensee or acquires the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation or otherwise, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person.</p> <p>*Paragraph (a) above does not apply if the person concerned, when becoming the beneficial owner or voting controller of more than 15%, but not more than 30%, of the voting shares in the carrier licensee concerned -</p> <p>i. either alone or with any associated person, is not, or does not concurrently become, the beneficial owner or voting controller of more than 5% of the voting shares in any other carrier licensee; and</p> <p>ii. either alone or with any associated person, does not have the power (including by holding of voting shares), or does not concurrently acquire the power (including by the acquisition of voting shares), by</p>
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			<p>virtue of any powers conferred by the memorandum or articles of association or other instrument regulating any other carrier licensee or any other corporation or otherwise, to ensure that the affairs of such other carrier licensee are conducted in accordance with the wishes of that person.</p>
7. Definition of "Associated person"			<p>"Associated person" in relation to a person, has the meaning assigned to it in the definition of "associated person" in section 2 of TO, but –</p> <p>(a) the references to "the licensee" in that definition shall be construed as references to the person; and</p> <p>(b) where the person is a corporation, the references to "associated corporation" in that definition shall be construed as references to a corporation over which the person has control, a corporation which has control over the person or a corporation which is under the same control as is the person; "</p>
8. Public benefit	Nil	<p>TA or the Appeal Board may raise no objection or consent to an M&A where TA or the Appeal Board is satisfied in all the circumstances that the change or proposed change would result, or likely to result, in a benefit to the public interest and that that benefit would outweigh the detriment to the public constituted by any substantial lessening of competition that would result, or likely to result from the change or the proposed change.</p>	<p>(a) For a completed M&A, TA may not issue a direction to require the licensee concerned to take such action specified in the notice served by TA to eliminate or avoid any anti-competitive effect if he is satisfied that the change has, or is likely to have, a benefit to the public and that the benefit outweighs any detriment to the public that is, or is likely to be, constituted by any such effect.</p> <p>(b) For a proposed M&A, TA may not issue a direction to require the licensee concerned to take such action specified in the notice</p>

			served by TA to eliminate or avoid any anti-competitive effect if he is satisfied that the proposed change would have, or be likely to have, a benefit to the public and that the benefit would outweigh any detriment to the public that would be, or would likely to be, constituted by any such effect.
9. Persons who may appeal to the Appeal Board	<p>(a) Any carrier licensee aggrieved by an opinion, direction or decision of the TA may appeal to the Appeal Board against the opinion, direction or decision (and whether or not the opinion, direction or decision was formed, issued or made in respect of the licensee).</p> <p>(b) The acquirer of the relevant carrier licensee concerned.</p>	Nil	<p>(a) Any carrier licensee aggrieved by an opinion, direction or decision of the TA may appeal to the Appeal Board against the opinion, direction or decision (but the licensee may so appeal only if the opinion, direction or decision was formed, issued or made in respect of the licensee).</p> <p>(b) Same as original proposal.</p>

Abbreviations:

- Appeal Board Telecommunications (Competition Provisions) Appeal Board
CSAs Committee Stage Amendments
M&A merger and acquisition
M&A Guidelines Guidelines on the Competition Analysis of Mergers and Acquisition in Telecommunications Markets
TA Telecommunications Authority

TO Telecommunications Ordinance (Cap. 106)

Council Business Division 1
Legislative Council Secretariat
26 June 2003

TELECOMMUNICATIONS (AMENDMENT) BILL 2002

COMMITTEE STAGE

Amendments to be moved by the Secretary for Commerce,
Industry and Technology

<u>Clause</u>	<u>Amendment Proposed</u>
1	<p>By deleting subclause (2) and substituting -</p> <p>"(2) Subject to subsection (3), this Ordinance shall come into operation on the day on which it is published in the Gazette.</p> <p>(3) Sections 3, 4, 5, 6, 7 and 10 shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette.".</p>
New	<p>By adding -</p> <p>"1A. Interpretation</p> <p>Section 2(1) of the Telecommunications Ordinance (Cap. 106) is amended, in the definition of "carrier licence", by repealing "the Schedule" and substituting "Schedule 1".</p>

2 By deleting everything before paragraph (b) and substituting -

"2. Guidelines

Section 6D is amended -

(a) in subsection (2) -

(i) in paragraph (a),
by repealing
everything after "
方式" and
substituting "(包
括發牌準則以及他擬考
慮的其他有關事宜)的指
引";

(ii) by adding -

"(aa) subject
to
subsect
ion (2A),
specify
ing the
matters,
includi
ng but
not
limited

to those
listed
in
Schedul
e 2,
that he
shall
take
into
account
before
forming
any
opinion
under
section
7P(1) or
(6)(a)
or
(b);";

(iii) in paragraph (b) -

(A) by adding "關
於" before "
第14(6)(a)條
";

(B) by repealing

everything
after "問
題" and
substituting
"的指引，但該指
引的發出須受第
(3)款的規限。";

(iv) by repealing "就以
下事項發出指引" and
substituting "發
出";".

New By adding -

"2A. Issue of licences

Section 7(4) is amended by repealing "the
Schedule" and substituting "Schedule 1".

3 In the proposed section 7P -

(a) by deleting the heading and
substituting -

**"Authority may regulate changes
in relation to carrier
licensees";**

(b) by deleting subsection (1) and
substituting -

"(1) Where, after the

commencement of this section, there is a change in relation to a carrier licensee -

(a) subject to subsection (1A), the Authority may conduct such investigation as he considers necessary to enable him to form an opinion as to whether or not the change has, or is likely to have, the effect of substantially lessening competition in a telecommunication s market; and

(b) (where the Authority, after conducting such investigation, forms an opinion

that the change has,
or is likely to have,
the effect of
substantially
lessening
competition in a
telecommunication
s market) the
Authority may, by
notice in writing
served on the
licensee, direct
the licensee to
take such action
specified in the
notice as the
Authority
considers
necessary to
eliminate or avoid
any such effect,
but the Authority
may not issue such
direction if the
Authority is
satisfied that the

change has, or is likely to have, a benefit to the public and that the benefit outweighs any detriment to the public that is, or is likely to be, constituted by any such effect.

(1A) An investigation under subsection (1)(a) may only be commenced within 2 weeks after the Authority knows or ought reasonably to have known (whichever is the earlier) that the change has occurred." ;

(c) by deleting subsection (2) and substituting -

"(2) The Authority shall, before forming any opinion or

issuing any direction under

subsection (1) -

- (a) give all carrier
licensees and any
interested person
a reasonable
opportunity to
make
representations to
the Authority; and
- (b) consider the
representations,
if any, made under
paragraph (a).";

- (d) in subsection (3), by deleting
everything after "subsection" and
substituting "(1)(b), the action may
include the procuring of modifications
to the change.";

(e) in subsection (4), by deleting "(1)" and substituting "(1)(b)";

(f) by deleting subsection (5) and substituting -

"(5) Where there is a proposed change in relation to a carrier licensee, the licensee or any interested person may apply in writing to the Authority for consent to the proposed change.";

(g) in subsection (6) -

(i) in paragraph (a) -

(A) by deleting "is of the opinion" and

substituting "forms an opinion";

(B) by deleting "may decide" and substituting "shall decide";

(C) by adding "作出的" after
"建議";

(ii) in paragraph (b) -

(A) by deleting "is of the
opinion" and
substituting "forms an
opinion";

(B) in subparagraph (i), by
deleting "or" at the end;

(C) by deleting
subparagraph (ii) and
substituting -

"(ii) give consent
subject to
the direction
that the
carrier
licensee
concerned
takes the

action that
the Authority
considers
necessary to
eliminate or
avoid any
such effect;
or

(iii) give consent
without
issuing a
direction
under
subparagraph

(ii) if the
Authority is
satisfied
that the
proposed
change would

have, or be
likely to
have, a
benefit to
the public
and that the
benefit would
outweigh any
detriment to
the public
that would be,
or would
likely to be,
constituted
by any such
effect.";

(D) by adding "作出的" after
"建議";

(h) by deleting subsection (7) and
substituting -

"(7) The Authority shall,
before forming any opinion, making
any decision or issuing any
direction under subsection (6) -

(a) give all carrier
licensees and any
interested person
a reasonable
opportunity to
make
representations to
the Authority; and

(b) consider the
representations,
if any, made under
paragraph (a).";

(i) by deleting subsection (8) and
substituting -

"(8) The Authority shall, by
notice in writing served on the

carrier licensee referred to in subsection (5) and (where an interested person makes an application under that subsection) the interested person, inform the licensee and (if applicable) the person of -

(a) the decision made under subsection (6)(a) or (b)(i), (ii) or (iii);

(b) where a decision is made under subsection (6)(b)(ii), the action that the Authority directs the licensee to take.";

(j) in subsection (9), by deleting
everything after "modifications" and
substituting "to the proposed change.";

(k) in subsection (10) -

(i) in paragraph (a), by adding
"or (b)(iii)" after "(6)(a)";

(ii) by deleting "in respect of the
change under subsection (1)"
and substituting "under
subsection (1)(b) in respect
of the change";

(l) by deleting subsection (11) and
substituting -

"(11) Subject to subsection
(11A), the amount of any costs or
expenses incurred by the Authority

-

(a) in making a
decision under
subsection (6)(a)

or (b)(i), (ii) or
(iii); or

(b) in relation to the
processing of an
application made
under subsection
(5),

is recoverable as a debt due to the
Authority from the carrier licensee,
or the interested person, who makes
the application under subsection
(5).";

(m) by adding -

"(11A) The amount recoverable
under subsection (11) shall not
exceed the amount specified in
Schedule 3.

(11B) The Authority shall
publish -

(a) where he forms
any opinion or
issues any
direction under
subsection (1),
the opinion or
direction; or

(b) where he forms
any opinion,
makes any
decision or
issues any
direction under
subsection (6),
the opinion,
decision or
direction,

in such manner as he considers
appropriate.

(11C) The Secretary may by
order published in the Gazette
amend Schedule 3.";

(n) by deleting subsection (12) and
substituting -

"(12) For the purposes of
subsections (1) and (5), there is
a change in relation to a carrier
licensee if -

(a) subject to
subsection (12A),
a person, either
alone or with any
associated person,
becomes the
beneficial owner
or voting
controller of more
than 15% of the

voting shares in
the licensee;

(b) a person, either
alone or with any
associated person,
becomes the
beneficial owner
or voting
controller of more
than 30% of the
voting shares in
the licensee; or

(c) a person, either
alone or with any
associated
person -

(i) becomes
the
benefic
ial

owner or

voting

control

ler of

more

than 50%

of the

voting

shares

in the

license

e; or

(ii)

acqu

ires the

power

(includ

ing by

the

acquisi

tion of
voting
shares),
by
virtue
of any
powers
conferr
ed by
the
memoran
dum or
article
s of
associa
tion or
other
instrum
ent
regulat

ing the
license
e or any
other
corpora
tion or
otherwi
se, to
ensure
that the
affairs
of the
license
e are
conduct
ed in
accorda
nce with
the
wishes

of that

person.

(12A) Subsection (12)(a) does not apply if the person referred to in that subsection, when becoming the beneficial owner or voting controller of more than 15%, but not more than 30%, of the voting shares in the carrier licensee concerned -

(a) either alone or with any associated person, is not, or does not concurrently become, the beneficial owner or voting controller of more than 5% of the voting shares in

any other carrier

licensee; and

(b) either alone or
with any
associated person,
does not have the
power (including
by the holding of
voting shares), or
does not
concurrently
acquire the power
(including by the
acquisition of
voting shares), by
virtue of any
powers conferred
by the memorandum
or articles of
association or

other instrument
regulating any
other carrier
licensee or any
other corporation
or otherwise, to
ensure that the
affairs of such
other carrier
licensee are
conducted in
accordance with
the wishes of that
person." ;

(o) in subsection (13) -

(i) in the definition of "表決控
權人", by deleting the full
stop at the end and
substituting a semicolon;

(ii) by adding -

"associated person" (相
聯人士), in
relation to a
person, has the
meaning assigned
in the definition
of "associated
person" in section
2(1), but -

(a) the
referen
ces to
"the
license
e" in
that
definit
ion
shall be
constru

ed as

referen

ces to

the

person;

and

(b) where

the

person

is a

corpora

tion,

the

referen

ces to

"associ

ated

corpora

tion" in

that

definit

ion

shall be

constru

ed as

referen

ces to a

corpora

tion

over

which

the

person

has

control,

a

corpora

tion

which

has

control
over the
person
or a
corpora
tion
which is
under
the same
control
as is
the
person;

"interested person" (有利

害關係的人) means -

(a) in

relatio

n to a

change

referre

d to in
subject
ion (1),
a person
who does
any of
the acts
referre
d to in
subject
ion
(12)(a),
(b) or
(c) in
relatio
n to the
carrier
license
e

concern

ed;

(b) in

relatio

n to a

propose

d change

referre

d to in

subsect

ion (5),

a person

who

propose

s to do

any of

the acts

referre

d to in

subsect

ion
(12)(a),
(b) or
(c) in
relatio
n to the
carrier
license
e
concern
ed;".

- 5 (a) In paragraph (a), by deleting "or (1A)" and substituting ", (1A), (1B) or (1C)".
- (b) In paragraph (b), in the proposed definition of "appeal subject matter", by deleting paragraph (b) and substituting -
- "(b) in relation to an appeal under section 32N(1A), (1B) or (1C), means an opinion, direction or decision of the Authority published under section 7P(11B);".

6 By deleting the clause and substituting -

"6. Appeals to Appeal Board

Section 32N is amended -

(a) by adding -

"(1A) Any carrier licensee aggrieved by an opinion, direction or decision of the Authority published under section 7P(11B) may appeal to the Appeal Board against the opinion, direction or decision (but the licensee may so appeal only if the opinion, direction or decision was formed, issued or made in respect of the licensee).

(1B) Any person who -

(a) is, in relation to a change referred

d to in
section
7P(1),
an
interes
ted
person
within
the
meaning
of
paragra
ph (a)
of the
definit
ion of
"intere
sted
person"
in
section
7P(13);
and

(b) is
aggriev
ed by an

opinion
or
directi
on of
the
Authori
ty
publish
ed under
section
7P(11B)
(a) in
respect
of the
change,

may appeal to the Appeal
Board against the
opinion or direction.

(1C) Any person who -

(a) is, in
relatio
n to a
propose
d change
referre
d to in

section

7P(5),

an

interes

ted

person

within

the

meaning

of

paragra

ph (b)

of the

definit

ion of

"intere

sted

person"

in

section

7P(13);

and

(b) is

aggriev

ed by an

opinion,

decisio
n or
directi
on of
the
Authori
ty
publish
ed under
section
7P(11B)
(b) in
respect
of the
propose
d
change,

may appeal to the Appeal
Board against the
opinion, decision or
direction." ;

- (b) in subsection (3), by adding
"subsection (1A), (1B) or (1C)
or" before "section 36C".

substituting "", or before the opinion, direction or decision referred to in section 32N(1A), (1B) or (1C) was formed, issued or made, as the case may be."."

New By adding -

"8. Licences which are not carrier licences within the meaning of section 2

The Schedule is renumbered as Schedule 1.

9. Schedule 2 added

The following is added -

"SCHEDULE 2 [s. 6D(2)]

MATTERS TO BE TAKEN INTO ACCOUNT BY

AUTHORITY

1. The height of barriers to entry to a telecommunications market.
2. The level of market concentration in a telecommunications market.
3. The degree of countervailing power in a telecommunications market.
4. The likelihood that the change would result in the carrier licensee or

interested person being able to significantly and substantially increase prices or profit margins.

5. The dynamic characteristics of a telecommunications market, including growth, innovation and product differentiation.

6. The likelihood that the change would result in the removal from a telecommunications market of a vigorous and effective competitor.

7. The extent to which effective competition remains or would remain in a telecommunications market after the change.

8. The nature and extent of vertical integration in a telecommunications market.

9. The actual and potential level of import competition in a telecommunications market.

10. The extent to which substitutes are available in a telecommunications market."

10. Schedule 3 added

The following is added -

"SCHEDULE 3 [s. 7P]

SPECIFIED AMOUNT

\$200,000."."