Hutchison Telecom

HUTCHISON TELEPHONE COMPANY LIMITED
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Hutchison Global Communications

HUTCHISON GLOBAL COMMUNICATIONS LIMITED

JOINT SUBMISSION
TO
LEGISLATIVE COUNCIL
BILLS COMMITTEE

ON

PROPOSED REGULATION OF
MERGERS AND ACQUISITIONS IN
THE TELECOMMUNICATIONS MARKET

UNDER

TELECOMMUNICATIONS (AMENDMENT) BILL 2002

21 FEBRUARY 2003

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EXECUTIVE SUMMARY

1. Hutchison Telephone Company Limited, Hutchison 3G HK Limited and Hutchison Global Communications Limited (together, "**Hutchison**") welcome the opportunity to comment on the "*Explanatory Note on the Guidelines on the Competition Analysis of Mergers and Acquisitions in Telecommunications Markets*" as set out in the LC Paper No. CB(1) 597/02-03(1) ("**Explanatory Note**").

2. In summary, we make the following submission.

Absence of objective justification

3. The Hong Kong telecommunications sector is one of the most open and competitive markets in the world; the facts do not warrant the introduction of sector specific merger control to the telecommunications industry.

Impediment to investment

4. Globally, the telecommunications industry is undergoing uncertain times with rapidly falling values, increasing debt, lack of investor confidence and numerous failing firms. Adding a further level of sector specific regulation is poorly timed and will give rise to distortionary effects by treating one sector of the economy different to the others.

5. In comparison, one of the stated aims of the new EU regulatory framework for electronic communications is to roll back regulation where it is no longer required and to provide greater legal certainty for business.

6. Whilst this EU framework does not concern itself with merger control (in Europe there is a general merger control law which applies to all business sectors), the framework is indicative of the international trend not to add further layers of regulation on the telecommunications sector, and to move towards a light-handed approach.

7. Any perceived problems in connection with carrier licensees are already addressed by the existing regulatory framework and the extensive powers the TA has to regulate anti-competitive conduct.

8. The increasingly heavy-handed approach to the regulation of carrier licensees in Hong Kong is an impediment to investment, and therefore an impediment to development and innovation.

Out of step with international practice

9. We are not aware of any other major economy in the world that regulates telecommunications mergers only. With the introduction of the Bill, Hong Kong will be out of step with international practice.

10. Even if one were to accept the logic of sector specific merger control, which we do not, the proposed Bill does not even seek to cover the sector as a whole (including for instance both telecommunications and broadcasting). The approach being adopted, which

separates telecommunications from other parts of the economy, is out-dated and ignores technological convergence.

Timing is premature

11. The introduction of sector specific merger control in the telecommunications sector will pre-empt a more in-depth consideration of a generally applicable merger regime in Hong Kong. Further, timing is also premature since we understand from press reports that the Commerce, Industry and Technology Bureau is currently reviewing the structure of the Office of Telecommunications Authority and the Broadcasting Authority.

Decision-making by a panel is more accountable

12. A board or panel structure is a more appropriate and accountable regulatory structure than a single-person regulator. International best practice dictates that merger decisions taken by a multi-disciplinary body of individuals are more likely to result in decisions that reflect the broader public interest.

13. Indeed, even the study conducted by the Commerce, Industry and Technology Bureau and presented to the Bills Committee in its paper of December 2002 (LC Paper No. CB(1)499/02-03(01)) confirms that in the 6 jurisdictions studied – Australia, Canada, the European Union, Singapore, the United Kingdom and the United States – none have a single person making the decision to block a merger.

Lack of consideration of merger control experience elsewhere

14. The European Union and the UK have mature merger control regimes that are generally applicable to all business sectors. Both regimes are undergoing reform to address perceived failures. We are concerned that many of these perceived failures are either being replicated, or are not being taken account of, in the proposals for Hong Kong.

Minimum requirements absent from the Bill

15. The ITBB and OFTA argue that the Bill reflects merger control regimes that have been in place in other jurisdictions for some time. Certain elements may be reflective, but the Bill lacks key procedural safeguards and statutorily enshrined minimum requirements provided for in other regimes.

16. At a minimum, the Bill should contain certain baseline requirements that should not be left to the Guidelines. For instance:

- **principle of proportionality**: the Bill grants the TA wide discretionary powers, but there is no requirement on the TA for his actions to be proportionate to the lessening of competition identified. The proportionality of the actions to be taken by the TA should be expressly provided for in the Bill;

- **standard of proof**: the substantive test to be applied by the TA in his evaluation of mergers is whether a merger "*has, or is likely to have, a "substantial lessening* *of competition*" (***SLC***). This is an imprecise formulation, and it should be made clear that the relevant test should be whether a merger "*has a substantially lessening of competition*", and not whether such an effect is likely;

- **onus of proof**: the Bill lacks precision as to the types of decisions that the TA may take, and does not oblige the TA to provide written reasons (including the economic basis) for his decisions. Without written reasons, it is very difficult for an aggrieved party to formulate its grounds for appeal;

- **statutory rights of appeal**: there are no provisions in the Bill setting out the grounds upon which an appeal may be made to the Appeals Board against a decision of the TA. The statutory rights of appeal on both factual and legal grounds should be made clearer, and a statutory right of appeal based on grounds of judicial review should also be enshrined in the Bill;

- **procedural safeguards**: there are no procedural safeguards to protect merging parties' rights of defence and commercially sensitive information, including no guaranteed rights to a hearing, access to the TA's file, making representations on its contents, and reviewing third party submissions; and

- **transparency**: the TA is not obliged to keep merging parties informed of the case against them nor of the basis of his objections. The TA is not even required to provide written reasons where he blocks a merger, or where he requires the merging parties to take actions, including possible divestments actions.

17. In addition to the need for checks and balances on the powers of the TA, and the inclusion of procedural safeguards and measures to ensure transparent decision-making, the Bill contains the following additional defects:

- **control test**: the "changes" set out in Clause 7P(1) are too broad, and make no attempt to focus on true structural changes in an undertaking:

(i) merger control, as commonly understood, does not concern itself with changes of directors or the acquisition of minority shareholdings. As drafted, the TA is entitled to review any change in director, or a transaction whereby any person acquires the direct or beneficial ownership of just one voting share in a carrier licensee;

(ii) we understand OFTA's position to be that that the TA only has jurisdiction to review a "change" where it has, or is likely to have, the effect of substantially lessening competition. It is important that the test for the TA's jurisdiction to review a merger is separated from the substantive test by which a merger will be evaluated. The Bill (section 7P(1)) combines both these elements and as a result allows the TA to review any change as specified in section 7P(1); and

(iii) we submit that transfer of shares of less than 50%, as well as changes in directors, should not constitute change of control.

- **back-stop date**: the Explanatory Notes propose an administrative back-stop date following which the TA will have no jurisdiction to review a completed merger (being a period of three months post transaction). A statutory back-stop is more appropriate, and given that the Bill is intended to apply only to a finite number of carrier licensees, a much shorter timeframe (eg. 2 weeks) would be more appropriate;

- **statutory time limits**: similarly, the Bill does not contain statutory time limits, which will also be left to the Guidelines. Further consideration of the applicable time limits, and the distinction between transactions which give rise to no appreciable effects on competition and those that may merit further investigation, is required;

- **thresholds**: for reasons of legal certainty, prevention of an inefficient use of regulatory resources and reduction of transaction costs, a feature of most modern merger control laws is thresholds below which a merger control authority does not have jurisdiction. No such provision appears to have been considered in connection with the Bill – any merger regardless of size can be reviewed by the TA; and

- **costs**: instead of unchecked powers of the TA to levy costs and expenses, there should be a limit on the costs and expenses, which may be recovered by the TA.

Explanatory Note

18. The Explanatory Note provides a very general and simplistic outline of merger control procedures and analyses and creates further uncertainties for merging parties and the business community. We strongly submit that the complete Guidelines should be released for public consultation before the Bill is passed.

Concluding remarks

19. For the reasons set out in this Submission, we believe that further review, study, discussion and deliberations are required before we rush forward with legislation targeted at one sector.

INTRODUCTION

1. In this Submission, we provide our views on the Bill and the Explanatory Note. We are of the view that the application of sector specific merger control regulation to the telecommunications industry is unjustified and inappropriate. More particularly:

- there is an absence of objective justification for increased regulation of carrier licensees, and the imposition of sector specific merger controls will give rise to a distortionary effect by treating one sector of the economy different to the others (see Part 1);

- sector specific merger control is out of step with international practice and ignores technological convergence (see Part 1);

- a board or panel structure is a more appropriate and accountable regulatory structure for merger decisions than a single-person regulator (see Part 2);

- the European Union and the United Kingdom have mature merger control regimes, which are generally applicable to all business sectors. Both of these regimes are undergoing reform to address perceived failures. We are concerned that many of these perceived failures are either being replicated, or are not being taken account of, in the proposals for Hong Kong (see Part 3);

- the ITBB and OFTA argue that the Bill reflects merger control regimes that have been in place in other jurisdictions for some time. Certain elements may be reflective, but the Bill lacks key procedural safeguards and statutorily enshrined minimum requirements provided for in other regimes (see Part 3);

- enclosed for your reference a paper prepared by Freshfields Bruckhaus Deringer summarizing the recent reforms to merger control laws and procedures in the European Union and the United Kingdom (see Annex A); and

- the Explanatory Note provides a very general and simplistic outline of merger control procedures and analyses and creates further uncertainties for merging parties and the business community (see Part 4 and Annex B).

2. We are of the view that the introduction of sector specific merger control in the telecommunications sector will pre-empt and be inconsistent with a more in-depth consideration of a generally applicable merger regime in Hong Kong.

3. Further, it is premature to introduce sector specific merger control regulation by the TA – applicable only to carrier licensees - when we understand from press reports[1] that the Commerce, Industry and Technology Bureau is currently reviewing the structure of the Office of Telecommunications Authority and the Broadcasting Authority, the result of which could be the merger of both authorities.

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[1] Hong Kong Economic Journal and Hong Kong Economic Times 14 January 2003

4. For the reasons set out in this Submission, we believe that further review, study, discussion and deliberations are required before we rush forward with legislation targeted at one sector.

PART 1 INTRODUCTION OF SECTOR SPECIFIC MERGER CONTROL IS INAPPROPRIATE AND UNJUSTIFIED

Absence of objective justification

5. The application of sector specific merger control regulation to the telecommunications industry is unjustified and inappropriate:

- the Hong Kong telecommunications sector is one of the most open and competitive markets in the world;
- the facts do not support the conclusion that the structural features of the telecommunications sector warrant special treatment through merger control;
- any perceived problems are already addressed in both the existing regulatory framework and the extensive powers the TA has to regulate anti-competitive conduct; and
- the heavy-handed approach to the regulation of carrier licensees in Hong Kong is an impediment to investment, and therefore an impediment to development and innovation.

6. Globally, the telecommunications industry is undergoing uncertain times with rapidly falling values, increasing debt, lack of investor confidence and numerous failing firms. Adding a further level of sector specific regulation, especially given the defects and uncertainties associated with this Bill, is poorly timed.

7. In comparison, one of the stated aims of the new EU regulatory framework for electronic communications[2] is to roll back regulation where it is no longer required and to provide greater legal certainty for business. Just recently, whilst commenting on the European Commission's Recommendation identifying certain markets where regulation may still be required[3], European Commissioners Erkki Liikanen and Mario Monti said: "*…Our joint initiative will promote consumer benefits and provide a clear perspective of decreasing regulation.*" Commissioner Liikanen added: "*The message that we want to send to the market today is our desire to promote and secure investments in networks and technologies….*", and Commissioner Monti added: "*Sector specific regulation should be the exception, antitrust rules should be the norm….*"

8. Whilst this new EU regulatory framework does not concern itself with merger control (in Europe there is a general merger control law which applies to all business sectors), these statements are indicative of the international trend not to add further layers of regulation on the telecommunications sector, but to move towards a light-handed approach.

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2 See http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm

3 Press release "Commission puts in place final piece of new framework for electronic communications" (IP/03/221 12 February 2003)

Distortionary effect

9. A decision to regulate only telecommunications mergers creates a distortionary effect: carrier licensees would be required to comply with merger laws whereas other licence holders and other sectors in the economy would not.

10. The delays, risks and uncertainties of a regulatory process are a major consideration of any investor, especially in an industry that already has large commercial risks and requires substantial capital investment. As noted, capital markets already are taking an extremely cautious approach to the telecommunications industry. The Government's decision to regulate only telecommunications mergers could lead to investment funds being diverted to other sectors of Hong Kong, which are less heavily regulated. We are concerned telecommunications operators would be seriously disadvantaged in the competition for capital, at a time when the telecommunications industry could well do without such a disadvantage.

11. In view of the possible harm to the long-term competitiveness of the telecommunications sector and Hong Kong, we urge the Legislative Council Bills Committee to consider further the potential distortionary effects of the Bill before rushing forward with legislation targeted at one sector.

Out of step with international practice

12. We are not aware of any other major economy in the world, which regulates telecommunications mergers only. With the introduction of the Bill, Hong Kong will be out of step with international practice.

13. As previously submitted:

- reporting in 1999 on the relationship between regulators and competition authorities, the OECD Committee on Competition Law and Policy clearly preferred a general merger control regulator to a sector specific regulator;

- in the United States, the review of mergers in the telecommunications sector is undertaken by both the Federal Communications Commission (FCC) and the Department of Justice. Michael Powell, Chairman of the FCC, has stated that he favours an end to the FCC's role in merger clearances. Recognizing the role that the regulatory policy can play in the long-term prospects for the telecommunications sector, he has pressed the need for regulatory reform and simplification of the merger control process to create incentives for effective and sustainable competition and to provide a regulatory framework that promotes competition, investment and innovation;[4] and

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[4] Statement of Michael K Powell, Chairman, Federal Communications Commission, on "Financial Turmoil in the Telecommunications Marketplace: Maintaining the Operations of Essential Communication" Before the Committee on Commerce, Science and Transportation, United States Senate 30 July 2002

- neither the United Kingdom (where recent reforms of merger control are being implemented) nor the European Union have sector specific merger control laws.

Ignores technological convergence

14. Even if one were to accept the logic of sector specific merger control, which we do not, the proposed Bill does not even seek to cover the sector as a whole (including for instance both telecommunications and broadcasting).

15. Conduct regulation which separates telecommunications from the wider sector of electronic communications has become old-fashioned and is out of pace with developments in the industry:

- in the European Union, the new regulatory framework applies to "electronic communications" as a whole and not just to a particular class of telecommunications licensees; and

- in the UK, the new Communications Bill 2002 will abolish the current system of telecommunications licences regulated by Oftel (Office of Telecommunications). A new regulatory body called OFCOM (Office of Communications) is being set up to regulate telecommunications, broadcasting and spectrum management.

16. The "telecom" sector specific M&A proposals in the Bill are out of step with this trend in conduct regulation, and ignore the realities of technological convergence.

PART 2 – DECISION-MAKING BY PANEL IS MORE ACCOUNTABLE

17. A board or panel structure is a more appropriate and accountable regulatory structure than a single-person regulator. International best practice dictates that merger decisions taken by a multi-disciplinary body of individuals are more likely to result in decisions that reflect the broader public interest.

18. In the UK, for instance, the Government has introduced reforms to depersonalise the decision making process for mergers. Up until this year the UK Secretary of State, on advice of the Director General ("**DG**") of Fair Trading, took merger decisions. The fact that so much responsibility was placed in the hands of one person (the DG) was perceived to be a failing. Under the new Enterprise Act 2002, the DG will be replaced by a board with a majority of non-executive members and headed by a chairman.

19. In Europe, the European Commission's procedures have been criticised for lacking procedural fairness because (i) the Commission both investigates the merger case and takes the final decision on whether it should proceed and (ii) there is not a check on its decisions by an independent body: dissatisfied parties are required to appeal to the European courts, which can take several years. To remedy this defect, the Commission is implementing new internal procedures, including "peer review panels" composed of experienced officials whose task it will be to scrutinise the investigating teams' conclusions with a fresh pair of eyes.

20. Indeed, even the study conducted by the Commerce, Industry and Technology Bureau and presented to the Bills Committee in its paper of December 2002 (LC Paper No. CB(1)499/02-03(01)) confirms that in the 6 jurisdictions studied – Australia, Canada, the European Union, Singapore, the United Kingdom and the United States – none have a single person making decisions to block a merger.

21. In the absence of the structural reform of OFTA and the depersonalisation of the office of the TA, an independent board or panel would be a more appropriate and accountable body to take merger decisions.

PART 3 – MINIMUM REQUIREMENTS ABSENT FROM THE BILL

22. ITBB and OFTA argue that the Bill reflects merger control regimes that have been in place in other jurisdictions for some time.

23. The European Union and the United Kingdom have mature merger control regimes, which are generally applicable to all business sectors. Both regimes are undergoing reform to address perceived failures. We are concerned that many of these perceived failures are either being replicated, or are not being taken account of, in the proposals for Hong Kong (eg. decision-making by one person versus a panel, and lack of checks and balances, transparency, and procedural safeguards).

24. We enclose for your reference a paper prepared by Freshfields Bruckhaus Deringer summarizing the recent reforms to merger control laws and procedures in the European Union and the United Kingdom (see Annex A).

25. Certain elements may be reflective, but the Bill lacks key procedural safeguards and statutorily enshrined minimum requirements provided for in other regimes.

26. Further, many of the basic tenets of the proposed merger regime are left to the TA to determine through the Guidelines, allowing the TA to act as legislator to change the fundamental character of the Bill by changing the Guidelines. The result is a lack of certainty and transparency, and scope for unbridled discretion on the part of the TA.

27. At a minimum, the Legislative Council Bills Committee should consider further whether certain baseline requirements should be included in the Bill and not left to the Guidelines. We elaborate further below.

The principle of proportionality

28. The Bill grants the TA wide discretionary powers, but there is no requirement on the TA for his actions to be proportionate to the lessening of competition identified. The powers of the TA, as currently drafted, are entirely discretionary. The TA may direct a licensee to take "*any action…as the Authority considers necessary*".

29. By way of contrast, decisions taken by the European Commission are subject to the general principle of proportionality under EC law, which holds that "*the individual should not have his freedom of action limited beyond the degree necessary for the public interest*"[5]. With the entry into force of the Maastricht Treaty, the principle of proportionality has been incorporated as an express provision of the EC Treaty. Article 5 of the Treaty states: "*Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty*".

30. Under English law, the courts also review punishments imposed or other actions taken by administrative bodies if they are wholly out of proportion to the aim sought to be achieved. The courts have not been clear as to whether proportionality is a separate

[5] Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125

head of judicial review or forms part of the "unreasonableness" test. The current thinking, however, is leaning towards treating “proportionality” as a separate test, and in Attorney-General v Guardian Newspapers Limited [1999] EMLR 904 it was stated by Sedley LJ that English public law should develop by reference to the doctrine of proportionality in European law (pg 923).

31. We submit that the proportionality of the actions to be taken by the TA should be expressly provided in the Bill.

Standard of proof

32. Under the Bill, the substantive test to be applied by the TA in his evaluation of mergers is whether a merger “*has, or is likely to have, a “substantial lessening of competition*” (***SLC***). Whilst the SLC test is widely accepted in modern systems of merger control, the standard of proof required of the regulator is a separate question.

33. The Bill states merely that the TA may take remedial action where it is “likely” that a SLC will occur. This is an imprecise formulation and leaves the TA with inappropriate levels of discretion as to how to interpret what “likely” means.

34. It is submitted that the standard of proof should be made clear in the Bill, as it is a cornerstone of the proposed merger control regime. The relevant test should be whether a merger “has a substantially lessening of competition”, and not whether such an effect is likely.

35. If, however, the SLC test goes forward in its current form and the TA is permitted to take action where an SLC is likely to occur, then it is essential for this to be expressed in terms of “more likely than not” or “on the balance of probabilities”. In its draft merger reference guidelines the Competition Commission in the United Kingdom has stated that it will normally consider that a merger "may be expected" to result in a SLC (the test under the Entreprises Act 2002) if it is "more likely than not" that a SLC will result.

Onus of proof

36. It should be clearer on the face of the Bill that the onus of proof is on the TA, and not on the merging parties. The Bill lacks precision as to the types of decisions that the TA may take, and does not oblige the TA to provide written reasons (including the economic basis) for his conclusion that a particular transaction has, or is likely to have, the effect of substantially lessening competition.

37. By contrast, both the European Commission and the Competition Commission are required to provide written reasons for their decisions, and such further information as is appropriate for facilitating a proper understanding of the decisions taken and the reasoning.

38. Without written reasons, it is very difficult for an aggrieved party to formulate its grounds for appeal.

Statutory rights of appeal

39. There are no provisions in the Bill setting out the grounds upon which an appeal may be made to the Appeals Board against a decision of the TA. The statutory rights of appeal on both factual and legal grounds should be made clearer, and a statutory right of appeal based on grounds of judicial review should also be enshrined in the Bill.

40. In the UK, the new Enterprise Act 2002 introduces rights of appeal for parties adversely affected by merger decisions to appeal to the Competition Appeals Tribunal on judicial review grounds.

41. Further, section 32N of the Bill provides that "*any carrier licensee aggrieved by a direction*" of the TA may appeal to the Appeal Board. Does this mean the merging parties only? Or do competitors have standing to appeal a merger decision – whether that be a decision to approve, modify or reject a merger? We submit that only parties to a merger should have the right to appeal otherwise we risk an approved merger being delayed by third parties with suspicious motives.

Procedural safeguards and transparency

42. The Bill lacks procedural safeguards and transparency to protect merging parties' rights of defence and commercially sensitive information. There are no obligations on the TA to inform parties of the competitive concerns and the factual basis upon which these concerns are based, or to provide written reasons where he blocks a merger or requires actions to be taken.

43. The TA merely has an obligation to consider representations made by merging parties. Merging parties have no guaranteed rights to a hearing, access to the TA's file, making representations on its contents, and reviewing third party submissions.

44. There is a general lack of transparency. The TA has no obligation to keep merging parties informed of the case against them nor of the basis of their objections. The TA is not even required to provide written reasons where he blocks a merger, or where he requires the merging parties to take actions eg. divestment.

45. As previously mentioned, the well-established merger control regimes in the European Union and the United Kingdom are undergoing reforms to address perceived failures, many of which relate to increased transparency and procedural safeguards. We request that this experience be considered further in connection with the Bill.

Definition of change of control

46. The "changes" (section 7P(1) of the Bill) triggering a merger control review and possible action by the TA are extremely broad, and make no attempt to focus on true structural changes in an undertaking, which are the proper concern of merger control, and represent an excessive arrogation of jurisdiction to the TA.

47. The Bill puts forward three tests of control:

- section 7P(12): a change of control occurs over a carrier licensee if a person becomes a director or principal officer of the licensee or a person becomes the holder of 15% of the voting or economic shareholding in a licensee or a person otherwise acquires power to ensure that the affairs of the licensee are conducted in accordance with its wishes;

- section 7P(1)(b): the TA is entitled to review a transaction whereby a person (including an existing shareholder) acquires beneficial ownership of just one voting share in a carrier licensee; and

- section 7P(1)(c): similarly, the TA is entitled to review a transaction whereby a person acquires control of just one voting share in a carrier licensee.

48. Merger control law, as commonly understood, does not concern itself with changes of director or of the acquisition of minority shareholdings. Neither the UK nor EU merger control laws concern themselves with changes of directors.

49. We understand OFTA's position to be that that the TA only has jurisdiction to review a "change" where it has, or is likely to have, the effect of substantially lessening competition. It is important that the test for the TA's jurisdiction to review a merger is separated from the substantive test by which a merger will be evaluated. The Bill (section 7P(1)) combines both these elements and as a result allows the TA to review any change as specified in section 7P(1).

50. We submit that transfer of shares of less than 50%, as well as changes in directors, should not constitute change of control.

Statutory back-stop date

51. Where merger control laws do not require suspension of a transaction until prior clearance has been received, the legislation must also prescribe a time period beyond which a regulator will have no jurisdiction to review a completed merger.

52. This has long been provided for in the relevant United Kingdom legislation (see section 64(4) FTA which provides that the Director General of Fair Trading may not refer a merger to the Competition Commission more than four months after completion of the transaction).

53. A back-stop date is a minimum guarantee of legal certainty for businesses which need to be able to conduct their affairs without the fear that transactions may be subjected to regulatory scrutiny several months or even years following their completion.

54. The Explanatory Notes propose that the Guidelines will provide for an administrative back-stop date, being the end of a three month period following a transaction being completed. We submit that a statutory back-stop date to be included in

the Bill is more appropriate, and that the timeframe should be limited to no more than two weeks.

55. We recognise that jurisdictions such as in the United Kingdom provide for longer periods, but we do not believe this precedent can be directly transposed to Hong Kong. Hong Kong has a much smaller economy, and the Bill is intended to only apply to a finite number of carrier licensees. With the TA's knowledge of the marketplace, we do not understand why, nor agree that, he will require several months to decide whether to initiate an investigation.

Statutory time limits

56. Modern merger control laws specify statutory time limits within which a merger control authority must reach a decisions.

57. Provisions laying down time limits for a merger control process provide certainty for the merging parties, the business community and the authority as to the time frame within which decisions will be reached. It should not be left to the TA to determine (and potentially alter) the time limits by way of issuing guidelines or an administrative notice.

58. The International Competition Network's (***ITN***) Guiding Principles for Merger Notification state: "*The review of transactions should be conducted and any resulting enforcement decision should be made within a reasonable and determinable time frame*". Thus the EC Merger Regulation (***ECMR***) and the UK Fair Trading Act 1973 (***FTA***) and Enterprise Act 2002 (***EA***) all contain provisions dealing with time limits within which decisions must be reached by the authorities (see Article 9(4), Article 10 ECMR, sections 70, 75B FTA and sections 24 and 39 EA).

59. The Explanatory Notes propose that the Guidelines will provide for administrative time limits (i) in the case of completed transactions: 4 months and (ii) in the case of proposed transactions: one month plus 4 months. We submit that a statutory time limits to be included in the Bill is more appropriate, and that further consideration of the applicable time limits, and the distinction between transactions which give rise to no appreciable effects on competition (phase 1) and those that may merit further investigation (phase 2), is required.

60. For a small economy such as Hong Kong, and the fact that the Bill is intended to only apply to a finite number of carrier licensees, we would expect the time limits to be shorter, perhaps in the region of 2 to 4 weeks for phase I decisions and 10 weeks for phase II decisions.

Mergers with no appreciable effect on competition

61. Nearly all modern merger control systems have a distinction between an initial examination phase, during which basic information about a merger is obtained from the parties and from third parties and evaluated, and an in-depth examination phase, where mergers requiring more serious investigation are reviewed in greater detail.

62. The distinction between phase I and phase II has been created for good administrative and economic reasons. The majority of mergers ought to be cleared with a minimum of intervention by the authorities. Those mergers which do give rise to competition issues usually present issues which are straightforward and which can be dealt with quickly. It is only a small minority of mergers that require a more in-depth examination.

63. It is therefore wasteful, in terms of the resources of the authorities as well as the transaction costs of parties, to devote limited regulatory time and resource to examining most mergers in detail.

64. The distinction between phase I and phase II inquiries therefore allows a quicker review process for uncomplicated transactions. No such process is provided for in the Bill.

Qualifying thresholds

65. A feature of most modern merger control laws is thresholds below which a merger control authority does not have jurisdiction. This is to provide legal certainty for businesses and to ensure that the merger control authority does not devote its resources to reviewing small transactions that are highly unlikely to an adverse effect on competition. It also reduces transaction costs.

66. There is no threshold in the Bill. Qualifying thresholds are recognised as a recommended practice by the ITN which states "*merger notification thresholds should…incorporate appropriate standards of materiality…such as material sales or assets levels*".

67. It is important that the test for the TA's jurisdiction to review a merger is separated from the substantive test by which a merger will be evaluated. The Bill (section 7P(1)) combines both these elements and allows the TA to review any change as specified in section 7P(1), which has or is likely to have the effect of substantially lessening competition in a telecommunications market.

68. The Explanatory Note (paragraph 34) seems to consider that it would be appropriate to "screen" mergers by assessing market shares which the Note considers would be "relatively simple". In fact, questions of market share and market definition are often exceptionally complicated in the telecommunications sector and it is not generally thought to be appropriate to "screen" mergers according to a market share test.

69. For this reason, most merger control legislation provides for a "bright line" jurisdictional rule according to turnover or assets, which, unlike market share is information that is normally readily accessible and objectively verifiable. No such provision appears to have been considered in connection with the Bill.

Costs

70. Instead of unchecked powers of the TA to levy costs and expenses, there should be a limit on the costs and expenses which may be recovered by the TA under section 7P(11).

PART 4 – COMMENTS ON THE EXPLANATORY NOTE

71. The Explanatory Note provides a very general and simplistic outline of merger control procedures and analyses and creates further uncertainties for merging parties and the business community.

72. The proposed analytical framework contained in the Explanatory Note is incomplete, and does not attempt (except in a most cursory fashion) to provide tailored sector-specific guidelines or analysis. Detailed comments on the deficiencies of the Explanatory Note are set out in Annex B.

73. We strongly submit that the complete Guidelines should be released for public consultation before the Bill is passed.

PART 5 – CONCLUDING REMARKS

74. Given the recent international developments, potential distortions brought about by specific sector merger control regulation, and the uncertainties and issues raised in relation to the Bill and the Explanatory Note, we are of the view that further review, study, discussion and deliberations are required.

75. We urge the Legislative Council Bills Committee to allow sufficient time for satisfactory resolution of all the issues and concerns identified and raised in this Submission, as well as those raised by other carrier licensees and interested parties.

ANNEX A

Recent reforms to the EU and UK merger procedures – Summary prepared by Freshfields Bruckhaus Deringer

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By fax

20 February 2003

Dear Mrs Nardi, Mr Wong

Recent reforms to EU and UK merger procedures

You have asked us to provide you with a brief summary of key recent reforms to merger control laws and procedures in the European Union (***EU***) and the United Kingdom (***UK***), especially as regards the telecommunications sector. As you know, the procedures and legislation in both the EU and UK have both been the subject of wide-ranging reforms and our summary is therefore necessarily selective.

1. INTRODUCTION AND BACKGROUND

1.1 The European Union gained powers to review mergers in 1990 with the coming into force of the EC Merger Regulation (***ECMR***)[1]. Since then, mergers which meet the

1 Council Regulation (EEC) No 4064/89 of 21 December 1989, as amended (OJ L395 30.12.1989 p1; corrected version OJ L257 21.9.1990. Amended by Council Regulation (EC) No 1307/97 of 30 June 1997, OJ L180, 9.7.1997 p1

thresholds for mandatory notification under ECMR have been reviewed by the Competition Directorate-General of the European Commission. From 1990 to 31 January 2003 there have been 2204 merger notifications to the Commission of which 126 cases were referred for a Phase II, in-depth investigation[2]. On 11 December 2002, the Competition Commissioner Mario Monti announced a series of measures that he intends to take to reform its procedures[3]. These reforms were prompted in part by criticism of the European Commission's merger control procedures, particularly by the European Court of First Instance which, in the latter part of 2002, overturned three of the Commission's merger prohibition decisions in succession. Prior to the criticisms by the Court of First Instance, the Commission had already initiated a reform process by publishing a Green Paper on merger control reform in December 2001[4].

1.2 In the UK, a series of reforms to the merger control regime have recently been enacted by Parliament in the Enterprise Act 2002[5]. One of the UK Government's stated aims in introducing the new legislation was to provide for increased "procedural improvements for business" and to introduce reforms to the decision-making bodies to increase their independence and the transparency and accountability of their decisions[6]. Prior to the introduction of the Enterprise Act, the UK Government had consulted on proposed reforms to the mergers regime and set out its proposals in a White Paper[7] published on 31 July 2001.

1.3 There is no sector-specific merger control applicable to telecommunications companies either in EU or UK law. Indeed, recent developments, both in the UK and the EU, have seen a move away from sector-specific rules applying only to "telecommunications" to broader regulation for all types of electronic communications. A

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2 For statistics on notifications made under the ECMR see the European Commission, Competition Directorate-General website: http://europa.eu.int/comm/competition/mergers/cases/stats.html

3 See: "Commission adopts comprehensive reform of EU merger control" European Commission Press Release IP/02/1856 of 11 December 2002 (http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc= IP/02/1856|0|RAPID&lg=EN&display=)

4 European Commission document COM (2001) 745 final

5 For further information see the Department of Trade and Industry's dedicated website for this Act: http://www2.dti.gov.uk/enterpriseact/

6 See UK Department of Trade and Industry Press Release P/2002/193 "Hewitt Introduces Bill to Boost Enterprise and Prosperity for All" 26 March 2002, available from http://www.dti.gov.uk/ccp/topics2/ukcompref.htm

7 "Productivity and Enterprise: A World Class Competition Regime" (Cm 5233) available from http://www.dti.gov.uk/ccp/topics2/pdf2/compwp.pdf

"New Regulatory Package" was adopted by the EU in February 2002[8] which is technology neutral, treating all transmission networks in an equivalent manner. It is intended to ensure that market players are only regulated where necessary[9]. Similarly in the UK, the Communications Bill has been introduced to Parliament. The intention of that legislation, partly in implementation of EU measures, is to regulate communications in a technology neutral manner. A new regulator, the Office of Communications or OFCOM has been created which will assume the responsibilities of several former sector-specific regulators, including the Director General of Telecommunications, the Radiocommunications Authority, the Radio Authority and the Independent Television Commission[10].

2. INTERNAL CHECKS AND BALANCES

2.1 Some critics of the European Commission cited a lack of internal checks and balances in its procedures and it was alleged that this gave rise to a lack of procedural fairness for merging parties, and other parties, contributing to the criticisms of the Commission by the Court of First Instance[11]. In particular, criticism of the Commission focused on two aspects of its procedures:

(a) the Commission was criticised for acting as both "judge and jury", in that it both investigates and evaluates the merging parties' economic case for the merger and makes the final administrative judgement on whether a merger may be permitted; and

(b) that there was a lack of proper scrutiny of Commission decisions from any independent body: parties dissatisfied with a Commission merger decision are required to appeal to the European Court of First Instance, a procedure which can take several years. In practice merging parties did not often choose to do so[12].

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8 See further: http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#Introduction

9 See Commission Press release IP/02/259: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/259|0|AGED&lg=EN&display=

For further information on the Communications Bill see www.communicationsbill.gov.uk. For further information on OFCOM see www.ofcom.gov.uk

11 See Daily Telegraph, 23 October 2002 "EU Court overturns Schneider veto: Second blow to Mario Monti in four months adds to rising calls for reform"; Financial Times, 23 October 2002 "Brussels wrong to block French merger court ruling: Pressure rises on European Union competition Commissioner to make radical changes to M&A rules"

12 See press discussion of the Court of First Instance's judgement in *Airtours v Commission*, for example: Financial Times, 13 June 2002 "Monti's Trials – Europe's Competition Commissioner faces a barrage of criticism".

2.2 To address these criticisms, Competition Commissioner Mario Monti has decided to put new internal procedures in place, while retaining the administrative (rather than judicial) nature of EU merger proceedings. These include the creation of "peer review panels" composed of experienced officials whose task will be to scrutinise the investigating case team's conclusions with a "fresh pair of eyes" at key points in every merger inquiry[13].

2.3 In the UK, there has long been a formal separation between the bodies reviewing mergers at the initial "Phase I" stage of an inquiry and the in-depth "Phase II" stage. Phase I is conducted by the Director General of Fair Trading (***DGFT***) and his Office and Phase II by the Competition Commission. This ensures that a fresh pair of eyes examines the case at each stage.

3. DEPERSONALISATION AND DEPOLITICISATION OF DECISION MAKING

3.1 At present, merger control decisions in the UK are taken by the Secretary of State on the advice of the DGFT. In practice, the Secretary of State nearly always followed the DGFT's advice. The fact that so much responsibility was placed in the hands of one person was perceived to be a defect in the institutional framework[14]. Under the Enterprise Act 2002 the DGFT will be replaced by a new body, the "Office of Fair Trading" (***OFT***) which will, in future be headed by a Board rather than by one person.

3.2 The OFT's Board will contain a majority of non-Executive members and will be headed by a Chairman. The current DGFT, John Vickers, will be appointed as the first Chairman and Chief Executive, but thereafter the roles of Chairman and Chief Executive will be split. The UK Government wished to move to a Board structure which it considered would be more appropriate and lead to more accountable decision-making. The Government has now appointed the first OFT Board which will comprise Lord Blackwell, Prof Richard Whish, Rosalind White and Christine Farnish[15]. The Board contains multi-disciplinary skills, and includes a professor of competition law and policy and those with experience at the highest levels of business and government in the UK.

3.3 The creation of a Board structure brings the OFT more into line with the reporting side of the Competition Commission. Competition Commission inquiries are conducted by a reference panel, comprised of members of a standing panel of members of the Competition Commission (there are separate panels with specific sector expertise). Members of the Competition Commission are appointed by the Secretary of State and include members with

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13 See Commission press release IP/02/1856 *op cit* note 3 above.

14 See White Paper "A World Class Competition Regime" *op cit* note 6, paras 4.28 to 4.29

15 See Department of Trade and Industry Press Release P/2003/32 "Patricia Hewitt appoints members of the new Strategic Board of the OFT", 21 January 2003 (Details of the board members are available from http://www.oft.gov.uk/OFT+Board.htm)

a variety of backgrounds in business, law, government and economics[16]. In our experience, every member of a Competition Commission inquiry team takes an active role on cases on which they are involved and we would expect the OFT Board to operate in a similar manner.

4. INDEPENDENT REVIEW OF DECISIONS

4.1 Decisions taken by the European Commission have always been subject to review by the European Courts. The fact that obtaining final judgment in proceedings before the European Courts has tended to take several years has meant that merger decisions were rarely appealed in practice. The European Court of First Instance recently adopted a "fast-track" procedure in certain recent cases to seek to remedy this criticism. However, this procedure will not be suitable for all cases.

4.2 The European Commission has now undertaken to work with the European Courts to ensure that speedy and effective judicial review of Commission decisions takes place "in a period of time that makes sense for all commercial transactions"[17].

4.3 In the UK, the Enterprise Act introduces new rights of appeal for parties adversely affected by merger decisions to appeal to the Competition Appeals Tribunal, a specialist body, on judicial review grounds[18].

5. INCREASED RIGOUR OF ECONOMIC ASSESSMENT

5.1 The rigour of the European Commission's economic analysis in some cases was subject to criticism, especially following its recent defeats before the European Court of First Instance. For example, in the *Schneider/Legrand* case (October 2002)[19] the Court stated in its judgment that the Commission's analysis was vitiated by errors "such as to deprive of probative value the economic assessment of the impact of the concentration which forms the basis for the contested declaration of incompatibility."[20]. The European Commission's economic analysis was also criticised by the Court in its judgments in *Airtours/First Choice* (June 2002)[21] and *TetraLaval/Sidel* (October 2002)[22]. For example, in *Airtours* the Court

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16 For biographies of the members of the Competition Commission see http://www.competition-commission.org.uk/about/role2.htm

17 Commission press release IP/02/1856 *op cit* note 3 above

18 section 120 Enterprise Act 2002

19 Cases T-310/01 and T-77/02 *Schneider Electric SA v Commission* judgment of 22 October 2002, see Court Press Release: http://www.curia.eu.int/en/actu/communiques/cp02/aff/cp0284en.htm

20 Case T-310/01 *Schneider Electric SA v Commission* para 411

21 Case T-342/99 *Airtours v Commission* judgment of 6 June 2002, see Court Press Release: http://curia.eu.int/en/actu/communiques/cp02/aff/cp0250en.htm

concluded "that the [Commission's] Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position"[23]

5.2 The European Commission has announced the creation of a new post of Chief Competition Economist intended to bolster its economic analysis. According to the Commission, he or she will be a prominent industrial economist on temporary assignment to the Commission and will be directly involved in merger investigations.

6. INCREASED TRANSPARENCY

6.1 The European Commission's current procedures provide for "rights of defence" for parties in merger proceedings. However, the Commission was criticised for a lack of transparency in its dealings with businesses. The Commission has also proposed reforms to increase the transparency of its procedures including:

(a) merging parties will have an earlier opportunity to "inspect the Commission's file" i.e. the Commission's dossier of documents in the case, and to make representations on its contents;

(b) merging parties will have increased rights to have an early opportunity to review third party submissions and, where possible, will be given the opportunity to discuss any concerns raised by third parties at "face to face" meetings; and

(c) regular "state of play" meetings will be held between the Commission and the merging parties so that parties are constantly kept appraised of progress in the Commission's evaluation of a merger and are given the opportunity to discuss the case with senior Commission officials[24].

6.2 The UK Competition Commission has also been criticised for a lack of transparency in its procedures, in particular surrounding discussions of possible "remedies" for perceived detriments to competition (this followed, in particular from the High Court's decision to quash the Competition Commission's decision on remedies in the *Bass/Interbrew* merger

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22 Case T-5/02 and Case T-80/02 *TetraLaval BV v Commission* judgment of 25 October 2002, see Court Press Release: http://curia.eu.int/en/actu/communiques/cp02/aff/cp0287en.htm

23 *Airtours* case *op cit* para 294

24 see Commission press release IP/02/1856 *op cit* note 3 above

case[25]. In that judgment the Competition Commission's recommendations to the Secretary of State on a proposed merger between Bass Brewers and Interbrew SA was quashed by the court, on grounds of unfairness. The court held that the Competition Commission had not adopted a fair procedure, in that Interbrew was not given a proper opportunity to comment in relation to potential remedies to any anti-competitive effects from that proposed merger. The new Enterprise Act provides that the Competition Commission shall have a duty to consult parties and to state reasons for its proposed decisions prior to those decisions being taken[26].

7. HEARINGS

7.1 Both the EU and UK authorities have proposed modifying their procedures for hearings which are held with merging parties during the administrative review of their proposed merger. The European Commission has proposed providing for an increased role for the "Hearing Officer", an official charged with ensuring that merging parties receive a fair hearing before the Commission and that the Commission observes procedural rules, enshrined in legislation, entitling merging parties to certain "rights of defence". The European Commission recently announced that more staff will be allocated to the Hearing Officers[27].

7.2 In the UK, the Competition Commission has also recognised that it needs to improve its procedures connected with hearing parties and is consulting about its procedures for the manner in which it conducts hearings[28].

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25 *Interbrew SA and another v The Competition Commission and another* judgment of 23 May 2001 [2001] All ER (D) 305

26 section 104 Enterprise Act 2002

27 see Commission press release IP/02/1856 *op cit* note 3 above

28 see Competition Commission consultation pages: http://www.competition-commission.org.uk/inquiries/enterprisebill.htm and http://www.competition-commission.org.uk/inquiries/ebrules.pdf

I trust that you find this helpful. Please do not hesitate to contact me or my partner Connie Carnabucci in our Hong Kong office should you wish to discuss this further.

Kind regards,

Yours sincerely

Rod Carlton.

Rod Carlton
Partner
Antitrust, Competition and Trade Group

Antitrust, competition and trade

Freshfields Bruckhaus Deringer's antitrust, competition and trade group is widely recognised to be at the forefront of these practice areas and is one of the world's largest such practices.

Many of our lawyers are leading practitioners who also speak publicly and are recognised authors in their fields of expertise. In total, we have more than 250 antitrust, competition and trade specialists based in 16 countries in Europe, the US and Asia. The 2002 launch of our US antitrust practice in Washington DC has enabled us to deliver the co-ordinated transatlantic services our clients require and underscores our commitment to provide an integrated service around the world.

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We provide leading edge experience under the European Community Merger Regulation (ECMR) and under the merger control regimes of major national competition authorities including the US Department of Justice (DOJ) and US Federal Trade Commission (FTC) and those of the EU member states. We have particular experience in complex global merger cases involving detailed remedy negotiations. We have handled many complex full Phase II ECMR investigation proceedings and US Second Request proceedings, as well as equivalent proceedings in other major jurisdictions. We regularly advise on court litigation arising from merger proceedings and also advise third parties including complainants in merger investigations.

We are the co-publisher, consulting editor and contributor to *Merger Control 2003: The international regulation of mergers and joint ventures* (in conjunction with Law Business Research). This is a guide to the legal implications of merger control regulation in 45 jurisdictions worldwide. Now in its seventh edition, it has quickly become a widely used and respected guide.

Recent complex ECMR and US merger work includes advising:

- Amerisource on the FTC's Second Request investigation of the acquisition of Bergen Brunswig (US);
- Bayer on its acquisition of Aventis Crop Science (ECMR);
- Birmingham Steel on the DOJ's Second Request investigation of its proposed acquisition by Nucor (US);
- Deloitte and Touche on its acquisition of the UK business of Andersen (ECMR);
- Deutsche Bahn on its acquisition of Stinnes (ECMR);
- Hewlett-Packard on its merger with Compaq (ECMR);
- Nestlé on its acquisition of Schöller Group (ECMR);
- Northrop Grumman on its acquisition of TRW (ECMR);
- P&O Princess Cruises on the bid by Carnival Cruises and on the subsequent dual-listed company transaction with Carnival Cruises (ECMR, US);
- Phillips Petroleum on its merger with Conoco to create ConocoPhillips (ECMR);
- RTL Group on its acquisition of joint control over n-tv and TV Media (ECMR);
- Solvay on its acquisition of Ausimont from Montedison; and
- Thomson on its acquisition of the Harcourt publishing business (US).

A few examples of recent merger control work before other national competition authorities include advising:

- Atel, a Swiss energy company, on its acquisition of the Csepel power plant (Hungary);
- E.ON on its proposed acquisition of Ruhrgas (Germany);
- Gaz de France on its joint venture project with Société Générale for the trading of energy products (France);
- Eastman Kodak on its photoprocessing sector mergers with Colourcare (UK) and Spector (Austria, France, Germany);
- Hewlett-Packard on its bid for Indigo (Netherlands);
- Intel on its joint venture for wafer production (Germany);
- Liberty Media on its proposed acquisition of Deutsche Telekom's broadband cable business (Germany);
- Marks & Spencer on the sale of its French stores to Galeries Lafayette and its Spanish stores to El Corte Inglés (France, Spain);
- Microsoft on its acquisition of Navision (Germany);
- P&O Princess Cruises in relation to the proposed merger with Royal Caribbean Cruises (Germany, UK); and
- UBS on the divestment of its Kipling business (Belgium).

ANNEX B

Detailed comments on the Explanatory Note

Lack of "sector specific" tailoring

1. The proposed analytical framework is deficient in that it does not attempt (except in a most cursory fashion) to provide tailored sector-specific guidelines or analysis. The Explanatory Note provides only a very general and simplistic outline of the merger control procedures and analyses.

2. The TA already knows a great deal about the markets in which licensees operate. It is therefore unhelpful and inappropriate to propose a set of Guidelines which deal with market definition in only the most general sense.

3. From the Explanatory Note, it appears that the Guidelines will do nothing to increase the predictability of regulation and will therefore fail to meet carrier licensees' and the capital markets' expectations.

4. In order to provide proper guidance in a sector-specific context it is necessary to progress the analysis beyond merely describing the hypothetical monopolist test and demand and supply-side substitutability and to give examples based on experience and market knowledge of the markets in which telecom licensees operate. For example, what will the TA's approach be to telecommunications services where there could be said to be different "products" which have the same consumer "end", such as access to the internet provided via cable and via satellite? Or where there is one "product" with different target consumers, such as fixed voice telephony services for residential and business customers.

5. These issues and issues like them have been considered in detail by other authorities, for example, by the European Commission, which has issued its own guidance on the relevant product and service markets in the area of electronic communications and networks (the EU does not have a sector-specific merger control law but has other sector-specific regulations and these guidelines are designed to provide greater clarity to those subject to the regulations on the manner in which sector-specific market definitions will apply in practice).

Technological change

6. There is no attempt in the Explanatory Note to provide coherent guidance or comment on the undoubted fact that telecommunications markets are subject to rapid technological change and the effect that this may have on the assessment of mergers in the telecommunications sector.

7. Technological change is mentioned only briefly at the end of the Explanatory Note under "other factors". One could have expected the TA, with market expertise in the sector, to have provided greater comment and clarity on the effect of technological change in the telecommunications sector and its impact on the TA's assessment of mergers.

Over simplistic

8. The Explanatory Note provides a simplistic outline of merger control analysis. As such, it would seem that the Guidelines will not in fact provide much guidance on the proposed working of the proposed Hong Kong law at all. There are a number of complex areas of merger control assessment which are not mentioned or mentioned in only cursory fashion.

9. For example, when discussing the "hypothetical monopolist" test no mention is made of the so-called "cellophane fallacy" and the potential drawbacks of that test. Nor does the Explanatory Note deal with the possibility of "chains of substitution" when discussing market definition. These are just examples demonstrating that important elements of the analytical framework have not been addressed.

10. The Explanatory Note tends to simplify the process of market definition. It describes a mechanical process of product market definition based on the SSNIP test, whereas other regulators have made clear that "*market definition is not a mechanical or abstract process but requires an analysis of available evidence of past market behaviour and an overall understanding of the mechanics of a given sector*"[6]. In particular, the Guidelines do not recognise with sufficient clarity that a dynamic rather than a static approach is required when conducting a forward-looking market analysis, such as is required for merger control. This too is recognised in the guidelines of the European Commission[7].

Lack of clarity

11. The Explanatory Note mentions mergers that give rise to so-called "co-ordinated effects" only very briefly and without giving any clear guidance as to the approach that the TA will follow in this controversial area.

12. This area is probably the most controversial issue internationally in merger control and experienced merger regulators, such as the European Commission Merger Task Force has been criticised for a lack of clarity in their decision-making practice in this area, most notably in the judgment of the European Court of First Instance in the *Airtours/First Choice* case. Clear guidance by the TA in this highly controversial and difficult area has not been provided.

13. Furthermore, no clear distinction is made in the Explanatory Note between the treatment of horizontal, vertical and conglomerate mergers, yet the analysis required for each type of merger is very different (see the UK Office of Fair Trading's Draft Guidelines on the assessment of a substantial lessening of competition which clearly differentiates between each type of merger).

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6 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and networks, para 35

7 *ibid*

Over emphasis on market shares

14. The Explanatory Note places too much emphasis on market shares and concentration when considering market power. High market shares are not necessarily synonymous with market power. The section of the Explanatory Note dealing with "market share and concentration" does not consider factors such as potential market entry, countervailing buyer power[8], technological developments and the fact that market power over time rather than transitory power is important. This shows that the analysis adopted, with its emphasis on market shares, is simplistic, to the point of being crude.

Access issues

15. The sections of the Explanatory Note which deal with vertical effects state that "*particularly in telecommunications, competitors at a downstream functional level…may have to rely on a vertically integrated network provider to carry their services while at the same time compete with that network provider's downstream arm*" (paragraph 62). Issues such as access to networks for new entrants are best dealt with by regulation not be merger control. Merger control is a poor tool for dealing with vertical issues such as that described in the Explanatory Note because it depends (i) on relevant transactions being notified to the TA and (ii) provide a piecemeal approach (any remedy only affects the merging parties) rather than an industry-wide solution.

16. Similarly there is no proper discussion of the interconnection regime and the effect that may have on assessment.

[8] The section of the Note entitled "Buyer Power" does not consider the effect of countervailing buyer power on a merged entity but mergers which may lead to the creation of a monopsony