CB(1)963/02-03(06)
Revised on 28/2/03

Submission to Bills Committee of the Legislative Council on the Telecommunications (Amendments) Bill 2002

RE: Guidelines on the competition analysis of mergers and acquisition in telecommunications market

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(28/01/2003)

The telecommunications industry is experiencing structural transition from telecommunications to infocommunications, and the traditional value chain has been deconstructed and a new value web is emerging, hence mergers and acquisition (M&A) has been, and would continually be, a popular phenomenon. Between 1996 and 2001, more than 20 M&A deals worth over US$20 billion each took place in the worldwide telecom sector, with 14 of which in the US.

Regulation over M&A has been a challenge to governments in many countries and regions. A rigid regulatory framework over M&A would slow down the industrial transition and transformation, while a loosely regulated M&A might weaken the competitiveness of the market. If the former turns out to be true, Hong Kong will lose its leading status as an information hub in Asia-Pacific. If the latter turns out to be true, the preliminary achievements of telecommunications deregulation and liberalization would come to a premature end. In this case, a carefully designed regulatory framework over M&A is of significant implications.

There are two trends of M&A in contemporary telecommunications sector. One trend is to cross the geographic borders, like the US$180 billion hostile bid successfully launched by Vodafone in November 1999 on the Mannesmann conglomerate to build the pan-Europe mobile operator. Another trend is to cross industrial borders, like the US$160 billion merger between the world leading Internet provider AOL and the media giant Time Warner. Due to these two trends, two parallel partial shifts from sector-specific authorities to general competition bodies have been witnessed: from national telecom regulators to the EC Competition General Directorate in Europe and from the FCC to the US Justice Department and the Fair Trade Commission (FTC) in the US.

In Hong Kong, due to the absence of a general Competition Law and the absence of a general regulatory body overseeing the competition issue, regulation over M&A in telecommunications sector has to take a sector-specific approach and has to be conducted by the telecom regulator. In the long run, it is necessary to have a general Competition

Law and a general regulatory institute overseeing M&A issues, and partly relieve OFTA from the regulation over M&A issues, especially those that cross the industrial borders.

It seems drafting a general competition law has not been on the top agenda of the current government yet, as the government worried that a competition law would be harmful for a free economy. However, a free economy does not necessarily imply that a company is free to be monopoly. In fact, the domination of a single firm in some specific industrial sectors will leave no space for other investors to freely enter the market. Additionally, a free economy is not necessarily a healthy economy, as an economy that is in shortage of competition will be in shortage of vitality. The economy in the United States is commonly regarded as the most powerful economy, while at the same time it has had a set of anti-trust laws for more than one century. Hong Kong has boasted itself the rule of laws, but in terms of competitions issue, such a rule of law is in absence except in such specific sectors as telecommunications and broadcasting.

Before such a general Competition Law and regulatory agency available, OFTA is the right party to fully regulate M&A issues in the telecommunications sector, while a clear guideline on the M&A issues is urgent and critical, especially in the context that Hong Kong is to take an *Ex Post* approach in regulating M&A issues in the telecommunications sector.

The “Explanatory Notes on the Guidelines on the Competition Analysis of Mergers and Acquisitions in Telecommunications Market” addressed potential impacts of M&A on the competitiveness of telecommunications market, and highlighted key factors to be considered in drafting the guidelines, such as the threshold of 15% of the voting shares in carrier licensee, the benchmark of market share by 15% and 40%, and the timeframe for investigation. These considerations are necessary and significant.

To reduce the transaction cost for operators and to facilitate the transition and transformation of the industry, it would be appropriate if the guidelines to be drafted are clear and explicit.

Because the proposed Bill applies to carrier licenses only, the proper deployment of these guidelines can guarantee that the new licensees will not possess significant market power in the telecommunications market. However, if the merger happened between a carrier licensee and a non-telecom company, and the merger passed the test of OFTA in the telecom market, this merger may still have significant market power in the non-telecom sector. For example, more and more financial institutions have joined the value web of mobile communications, whose interests is not in telecommunications but in such benefits of mobile transactions. They might be able to take their advantage of affiliating with one network to disadvantage other financial intuitions. In this sense, a general Competition Law and general regulatory body overseeing the M&A is urgently needed in Hong Kong.