Consumer Council
Supplementary Submission to LegCo Bills Committee on Telecommunications (Amendment) Bill 2002

Request for Council comment

1. At the Bills Committee meeting of 27 March 2003 to discuss a Government paper setting out the key matters that should be addressed in the "guidelines on the competition analysis of mergers and acquisitions in telecommunications markets", the Council was requested to provide a formal response to a suggestion made at the meeting that:

> *mergers or acquisitions in the telecommunications industry that prima facie were at risk of substantially lessening competition should be referred straight to the Telecommunications (Competition Provisions) Appeal Board (the Board), rather than to the TA for one decision and then another decision after a hearing de novo on appeal by that board.*

Council comment

2. The Council's views are as follows.

The need for simplicity and expediency

3. An important issue in mergers or acquisitions regulation is that excessive delays occasioned by regulatory processes may well stifle efficient mergers or acquisitions. This is due to the possibility of respective parties tiring of the procedural difficulties and abandoning the transaction, or that the delay in consummation has resulted in a loss of initiative and that the benefits of the merger or acquisition have been negated because of an inability to respond to changing market circumstances that have occurred while the transaction is in an indeterminate state.

4. The need for simplicity and expediency in merger or acquisition regulatory processes is a constant theme that occurs in the formulation of competition policy in other competition law jurisdictions (for example, the European Commission's 'Notice on Simplified Procedure for Treatment of Certain Concentrations O.J.C.217/32 (2000)).

5. The streamlining of the decision making process implied in the suggested role for the Board, which is in any event the final decision making body, would on its face meet the need for simplicity and expediency. However, a number of other issues arise.

The role of OFTA

6. The first issue is under what circumstances would the Board be required to consider a merger or acquisition. Under current proposed processes OFTA has a decision making role on whether a merger or acquisition has the purpose or effect of substantially lessening competition, and that decision is subject to appeal by an aggrieved person to the Board.

7. The Board itself has no staff, nor the resources to carry out an investigation itself, to determine a *prima facie* case. If a merger or acquisition that was *prima facie* at risk of substantially lessening competition was to be put before the Board in the first instance,

then some entity will have to make a decision on whether the merger or acquisition is at risk, and put together the theory of a case for the Board to consider.

8. It would be inappropriate for this form of intervention to be left to private action, primarily because of the misuse that could arise where there are hostile takeovers and the reluctant party seeks to frustrate the transaction, or where competitors wish to frustrate restructuring in the industry for their own private benefit, rather than for sound public benefit.

9. Clearly, an agency representing the public interest should have that interventionist role. This is similar to the process that is used in general competition law jurisdictions where competition authorities have the right to seek an injunction before a court or tribunal to prevent a merger or acquisition from going ahead. (See for example, the Annex to Commerce, Industry and Technology Bureau submission to the Bills Committee 'Further Information on Regulation of Mergers and Acquisitions in Telecommunications Industry by the Telecommunications Authority' dated December 2002)

10. The most appropriate agency to make a preliminary decision and refer a matter for final decision to the Board would clearly be the TA, based on work undertaken by his staff in OFTA.

11. Under the present draft legislation, it is proposed that OFTA will do initial inquiries and analysis of mergers that reach a particular threshold, and the TA will make a decision based on OFTA's work, which can then be appealed to the Board that has the final say on the merits of the case.

12. In practice, there seems little significant difference (in terms of the work undertaken by the TA and OFTA, and the chain of decisions) between:

a) a decision made by the TA that a merger or acquisition substantially lessens competition and an aggrieved person subsequently refers to the Board for a final decision, or

b) a decision made by the TA that a merger or acquisition *prima facie* substantially lessens competition, and he refers the matter to the Board for a final decision.

13. In both cases:

a) the TA would have to make a decision on the merits of the merger or acquisition which would be reviewed by the Board as the final appeal body;

b) OFTA would be involved in undertaking inquiries and analysis to put before the TA first and then the Board;

c) the Board would in effect be reviewing a TA decision, and the opportunity of rectifying an erroneous decision would remain in place.

14. One difference would be that in the case of the scenario suggested by industry (i.e. in paragraph 1 above) the regulatory process might be marginally shorter due to shorter legislative procedural steps, and the interests of expediency might therefore be achieved.

General competition law

15. The suggested role for the Competition Board has been made in the context of comments from industry that if mergers and acquisitions prohibitions are to be introduced into the *Telecommunications Ordinance*, then similar prohibitions should apply to all economic sectors in Hong Kong.

16. In fact, the Council recommended in its 1996 report 'Competition Policy – The Key to Hong Kong's Economic Success' that a general competition law should be introduced into Hong Kong. The Council is still of that view. Moreover, it does not consider that having some telecommunications specific provisions within that general law framework is inconsistent with having a general competition law that covers the whole economy. This is similar to what occurs in many other comparable advanced economies that have general competition laws.

17. However, the Council would be concerned if the debate on general competition law and in particular the debate on the role of the Competition Board was used to delay the passage of the telecommunications mergers and acquisitions provisions. Even if the Hong Kong government were to now decide that it would introduce a general competition law, it would take a number of years for the legislation to be finalized and in place.

Conclusion

18. The Council considers that the development of competition laws for the telecommunications sector in Hong Kong is part of a gradual learning process that will contribute towards the evolution of general competition law, with appropriate institutions to enforce that law.

19. It is important that the evolutionary process should continue and not lose momentum through being sidetracked by debates that may only serve to delay that evolution. The most important issue that arises in the context of the Telecommunications (Amendment) Bill is the passage of safeguards to prevent mergers or acquisitions that will be detrimental to consumer welfare from going ahead. The manner in which those safeguards are enforced, whilst being important, are secondary to the urgent need for the safeguards to actually be in place.

Consumer Council
March 2003