17 April 2003

Your ref.: CB1/BC/11/01
Our ref.: LG83117A

Ms Debbie Yau
Clerk to Bills Committee
Legislative Council
8 Jackson Road
Central
Hong Kong

By fax 2121 0420 and mail

Dear Ms Yau,

Re: Telecommunications (Amendment) Bill 2002

We refer to your letters of 19 March and 28 March 2003 inviting our comments on the Administration's paper (Ref.: CB(1)1168/02-03(01)).

Our general comment to the above paper is that the current Committee Stage Amendments fall short of the expectation of the industry that the Bill should provide a transparent and certain regulatory regime on M&A transactions in the industry. While the Administration has agreed to our suggestion to specify a list of factors which the TA must take into account in determining whether a completed or proposed M&A has the effect of substantially lessening competition in the telecommunications market, we note with disappointment that most of our other comments on the Bill have not been accepted by the Administration.

Since we have expressed our views in our previous submissions, it may not be necessary for us to repeat them fully in this submission. Instead we would like to briefly reiterate several issues which we think are most critical for the Bills Committee's consideration.

1. M&A Guidelines

It has been our view that the full M&A Guidelines should be subject to review by the Legislative Council before passage of the Bill. The M&A Guidelines are the crux of the proposed legislation. Whether the industry and investors can make informed decisions on M&A transaction, which is the stated policy objective of

the Bill, depends on whether or not the M&A Guidelines can set out a clear, practical and objective assessment criteria and process. Given the importance of the M&A Guidelines, we consider that merely consulting the industry and the public is insufficient to ensure that the final M&A Guidelines are capable to achieve the original objective of the legislation. The review of the full M&A Guideline should be subject to the formal scrutiny power of the Legislative Council and form part of the legislative review process of the Bill.

2. The Back-Stop Date and the Time Frame for Investigation

It has been our view that the proposed back-stop date and the time frames for investigation are too long. The Administration has not explained why it would need 3 months to just decide whether investigation is necessary. Unlike UK and Australia, Hong Kong is a small economy and the M&A regulation will only apply to the telecommunications sector. Similarly, we consider that the maximum time frame that the TA can take for evaluating M&A application, which currently is 5 months as proposed by the Administration, is too long. We consider that such a long time frame would inevitably increase uncertainties of M&A transaction in the sector. Hence we would like to propose the following:

- In the case of a completed M&A transaction, the back-stop date for TA to conduct investigation should be 2 weeks after the M&A transaction is completed or made known to the public.
- In the case of an application for TA's prior consent, the time frames for phase 1 and phase 2 investigations should be 2 weeks and 10 weeks respectively.

3. Definition of Change of Control

We would like to reiterate our view that the scope of the M&A regulation should be confined to genuine change of control, that is, in our view, a person becomes the beneficial owner or voting controller of more than 50% of the voting shares in a licensee. Adopting the threshold of 15% as proposed by the Administration would substantially widen the scope of the regulation to cover a lot of competitively neutral mergers, such as the introduction of strategic partner or investor which cannot exercise control of the licensee. This would hinder investment in the sector, especially in the current economic environment.

4. Committee vs. TA to review M&A transaction

We consider that, should M&A control be implemented in the telecommunications sector, the final decision of whether an M&A transaction has the effect of substantially lessening competition should be made by a committee instead of by the TA. As mentioned in our previous submissions, it is the common practice in overseas jurisdictions to have a committee to make the final decision of

whether to approve or disapprove M&A transaction. The sector-specific regulator is only responsible for monitoring the market and referring suspected case to the committee for review.

The Telecommunications (Competition Provisions) Appeal Board ("**Appeal Board**") could be an appropriate body to review M&A transaction as the evaluation of M&A transaction is basically a competition analysis. OFTA should only be responsible to refer suspected case to the Appeal Board and OFTA should bear the burden of proof to show to the Appeal Board that why it considers a particular M&A transaction has the effect of substantially lessening competition. This arrangement can ensure that there are sufficient check and balance on the TA power and avoid over-concentration of powers on the TA.

We wish that the Bills Committee will consider the above and make necessary change to the Bill accordingly.

Yours sincerely,
For and on behalf of
SmarTone Mobile Communications Limited

Eric Lee
Regulatory Affairs Manager
Legal & Regulatory Affairs