For Information

Legislative Council Bills Committee on Telecommunications (Amendment) Bill 2002
Summary of Deputations on Administration's Proposed Committee Stage Amendments and Other Improvements and Administration's Response on issues not covered in the paper of "Administration's Further Committee Stage Amendments and Other Improvements"

Introduction

In response to two rounds of industry deputations in October 2002 and March 2003, and Bills Committee's views, the Administration has provided the following response :-

(a) Information Regarding Regulation of Mergers and Acquisitions Activities in Overseas Jurisdictions;

(b) Summary of Deputations' Views and the Administration's Response issued in October 2002;

(c) Further Information on Regulation of Mergers and Acquisitions in Telecommunications Industry by the Telecommunications Authority issued in December 2002;

(d) Explanatory Note on the Guidelines on the Competition Analysis of M&A issued December 2002;

(e) Summary of Deputations' Views on the Key Proposals in the M&A Guidelines and Administration's Response issued in March 2003; and

(f) Administration's Proposed Committee Stage Amendments and Other Improvements issued in March 2003.

2. We have carefully considered the views submitted in the third round of deputations on 30 April 2003, and proposed further committee stage amendments (CSA) and other improvements in another paper issued on 7 May 2003. For issues which are not covered in

that paper, Members may note that they have been raised in previous rounds of deputations and we have responded in full in the above papers (a) to (f). Our responses are set out below again for easy reference.

Response

Organisations	Concerns/Views	Administration's Response
Hutchison Telstra	• The Telecommunications Authority (TA)'s powers are expressed to be applied subjectively "in the opinion of the Authority"/"where Authority … forms the opinion".	• TA is the agent to enforce the Bill. Hence, the words "where the Authority is in the opinion that" only specify who is to make the decision under the proposed section 7P of the Bill. In exercising the power under the Bill when enacted, the TA is required by section 6A of the Telecommunications Authority (TO) to act on reasonable grounds and have regard to relevant considerations. • We have introduced a CSA to specify the list of factors for consideration in assessing a merger and acquisition (M&A). TA must make his decision after consideration of these factors. The TA's consideration must be based on objective economic and legal analysis performed within a framework defined in TA's guidelines on M&A matters to be issued under the proposed section 6D(2) of the Bill. Therefore the decision of the TA cannot be based on subjective opinion not backed up by objective analysis. Moreover, his decisions are subject to appeal to the Telecommunications (Competition Provisions) Appeal Board (the Appeal Board), which can quash, vary or uphold TA's decisions. There are sufficient safeguards in the legislation.

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	• The TA may direct a licensee to take "any action … as [he] considers necessary". The TA's actions must be proportionate to what is necessary to prevent the substantial lessening of competition.	• Under administrative law, an administrative action taken by the TA must be reasonable and proportionate to the objectives based on the particular circumstances of the case.
Hutchison	• The relevant test should be whether the substantially lessening of competition is "more likely than not" or "on the balance of probabilities" to occur, not just likely to occur.	• Our test that a M&A "*has, or is likely to have,*" the effect of substantially lessening competition is widely adopted in advanced competition or anti-trust jurisdictions:- (a) In the USA, section 7 of the Clayton Act enables control of mergers the effect of which "*may be*" substantially to lessen competition; (b) The Australian Trade Practices Act 1974 has adopted the wording of the acquisition "*would have the effect, or be likely to have the effect*" of substantially lessening competition; and (c) The UK Enterprise Act 2002 also adopts the wording of a merger situation "*has resulted, or may be expected to result in*" a substantially lessening of competition as the competition test for assessing mergers. • We consider it appropriate to follow the competition test commonly used in overseas jurisdictions so that international practices and jurisprudence can be used as

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		references. • The wording of "*more likely than not*" or "*on the balance of probabilities*" to occur is unprecedented. We consider such wording undesirable and unnecessary as the standard of proof of the TA is usually"on the balance of probabilities" under administrative law.
Consumer Council	• Suggest to adopt the same test as that in sections 7K – 7N (i.e. preventing or substantially restricting competition).	• The competition test used for assessing M&A is distinguishable from the test used for assessing anti-competitive behaviour e.g. cartel and abuse of dominant position. In assessing anti-competitive practices, we assess past behaviour, while in assessing M&A, we assess the effect of the M&A on the structure of the market on a forward looking basis. Therefore the two assessments need not be identical. The competition test for assessing M&A is therefore distinguished from the competition test used for assessing anti-competitive behaviour under sections 7K – 7N of the TO. • For example, the UK Enterprise Act uses the competition test of "substantially lessening competition" for assessing the effect of a M&A on competition. The UK Competition Act, on the other hand, uses the competition test based on the "object or effect of preventing, restricting or distorting competition" and the abuse of dominant position for assessing anti-competitive behaviour.

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Hutchison	• In its draft merger reference guidelines the Competition Commissions 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 Enterprises Act 2002) if it is "more likely than not" that a SLC will result.	• The quote on UK is from the draft merger reference guidelines, not in the legislation. The test in the legislation (i.e. the Enterprises Act 2002) is similar to that in our Bill, that is, whether a M&A has, or is likely to have, the effect of substantially lessening competition. Therefore the phrase "more likely than not" does not appear in the UK legislation.
Hutchison Telstra	• OFTA should not be allowed to impose a charge for processing M&A cases. If a charge is to be imposed, there should be a limit or a schedule of fees specified.	• This levy of fees only applies to the cases where the carrier licensee or the acquirer chooses to seek TA's prior consent. For those cases where TA investigates into a completed M&A on his own initiative, no fees will be levied. • OFTA operates as a Trading Fund under the Trading Funds Ordinance. It is required to recover the cost of services from the relevant revenue. This arrangement is similar to that already put into practice in respect of determinations on interconnections under section 36A of the TO. As in the case of fees to be charged on making determination on interconnections, the fees for processing applications for prior consent under the Bill will depend on the actual costs and expenses incurred in processing the particular application. It is therefore not appropriate to set a cap on the fees to be levied. • OFTA envisages that, based on its experience in the levy of fees for interconnection cases, the level of fees for

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		M&A cases would be around HK$55,000 per case for minor cases; and around HK$110,000 per case for major cases. Such level of fees will be comparable to those levied by competition authorities overseas for similar work. Examples are given below:- (a) Australia: Australian $15,000 or HK$60,000 per case; (b) Canada: Canadian $26,750 or HK$133,750 per case; and (c) UK: Pound Sterling 5,000 – 15,000 or HK$60,000 - $180,000 depending n the value of the gross assets acquired.
Hutchison	• A drafting point that a person should only be regarded as a "voting controller" if he alone or with his related person (to be defined by reference to concepts in existing legislations) hold voting control. Otherwise, the current drafting would make any shareholder a "voting controller" since such holder with other shareholders, albeit unrelated, will inevitably holds voting control.	• The present drafting is in order. The voting controller is defined with respect to each voting share, not control of the licensee as set out in the proposed section 7P(12) of the Bill.
Hutchison Telstra	• The Bill should expressly set out that the provisions of the Bill regarding change of ownership or control of a licensee shall override licence conditions on the same subject.	• This is not necessary. After enactment of the Bill, we shall seek amendment, by mutual consent, to carrier licence conditions which are covered by the Bill.

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Telstra	• The TA should only be permitted to issue a direction under section 7P(1) if it is in the public benefit to do so. • Moreover, the TA should be permitted under section 7P(6) to consent to changes in control which are in the public benefit.	• The objective of the Bill is to promote effective competition in the telecommunications market. Hence, our proposal to allow the TA to issue directions if there is a "substantially lessening of competition" is appropriate. It would be in the interest of the consumers/public to promote effective competition. • "In the public benefit" covers a much wider scope of issues than promotion of effective competition, which is not the objective of the Bill.
Telstra	• The time period for appeals to be lodged (14 days) needs to be increased.	• As the industry suggests, time is of essence to the M&As. The 14-day period, which is also used for lodging appeals on anti-competitive conduct under the existing sections 7K-7N of the TO, is in order. We do not consider it appropriate to lengthen it.
PCCW	• Where a licensee or acquirer feels that there is need for confidentiality, there should be a procedure where they can apply to have specific information treated as confidential and limited embargoes placed on certain information.	• In making any submission, a person may request the TA to treat specific information as confidential. The TA will consider the request on a case by case basis.

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Consumer Council	• Where the TA has a prima facie concern that a proposed transaction will lead to a position of control and subsequent substantial lessening of competition, he should have interim injunctive powers, so as to prevent a transaction from going ahead in the first place, until the final ruling on the merger or acquisition has been made.	• We adopt a light-handed *ex post* regulatory regime whereby TA is empowered to intervene after a M&A is completed, with a voluntary channel for the relevant parties to seek prior consent. There is no need for the power to issue injunction.
	• Some indication should be given as to how efficiencies can be demonstrated to such an extent that the TA will be satisfied that a merger, which raises a prima facie concern of substantial lessening of competition, should be allowed to proceed.	• As we set out in the Explanatory Note on the Guidelines on the Competition Analysis of M&A issued December 2002, efficiency will be considered as a factor in assessing a M&A. Details will be set out in TA's draft guidelines for consultation after enactment of the Bill.

Abbreviations

Hutchison : Hutchison Global Communications Limited
Telstra : Telstra International HK Limited
Consumer Council : Consumer Council
PCCW : PCCW Limited

Commerce, Industry and Technology Bureau
7May 2003