Date: 21 May 2003

Your Ref: CB1/BC/11/01

By Hand and By Email (dyau@legco.gov.hk)

Bills Committee
on Telecommunications (Amendment) Bill 2002
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sirs

Telecommunications (Amendment) Bill 2002

We refer to the Administration's paper "Further proposed Committee Stage Amendments and Other Improvements".

We have all previously made lengthy and detailed submissions on this subject and remain opposed to introducing telecom sector specific merger and acquisition control. This is a particularly inopportune time to consider such legislation. Moreover, recent merger and acquisition activities in the telecom industry has not disclosed any need for this legislation at this time.

If the Government is, however, adamant about introducing the Bill at this time, while we welcome the three additional changes made by the Administration to the Bill, there still remain a number of very substantial issues that need to be comprehensively addressed and resolved. In particular, we would like to respond to the Administration's rejection of some of our proposals. We elaborate on these issues in the attached submission. Also attached for your reference is a table containing a summary of our Response.

We request that members of the Bills Committee consider these issues with a view to ensuring that the proposed mergers control regime works with the most predictability and objectivity possible, and with the least uncertainty and burden to investors and operators. Our proposals are based on global best practices and attempt to apply such practices to the unique features of the Hong Kong telecommunications market.

If the Administration does not address our remaining concerns before the Second Reading of the Bill, we would ask that the Bills Committee include this submission in the report to the House Committee in order that other members of LegCo can be fully aware of our concerns to the Bill and would have an opportunity to take into account our views in their consideration of whether to support this Bill.

Yours faithfully

For and on behalf of
Hutchison Telephone Company Limited
Hutchison 3G HK Limited

Oswald Kwok
Senior Legal Counsel

For and on behalf of
PCCW Limited

Stuart Chiron
Director of Regulatory Affairs

For and on behalf of
Hutchison Global Communications Limited

Agnes Mu
Director of Legal and Regulatory

For and on behalf of
Telstra Corporation Limited
Hong Kong CSL Limited

Simon Brookes
General Counsel International

For and on behalf of
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Dumas Chow
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For and on behalf of
SmarTone Mobile Communications Limited

Elaine Lau
Head Legal Counsel

cc: CITB – Ms Marion Lai, Deputy Secretary for Commerce, Industry and Technology, ITBB
OFTA – Mr M.H. Au, Acting Director-General of Telecommunications
Consumer Council – Ron Cameron, Consumer Council, Principal Trade Practice Officer

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HUTCHISON 3G HK LIMITED

NEW WORLD TELECOMMUNICATIONS LIMITED

PCCW LIMITED

SMARTONE MOBILE COMMUNICATIONS LIMITED

TELSTRA CORPORATION LIMITED

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JOINT SUBMISSION

TO

LEGISLATIVE COUNCIL
BILLS COMMITTEE

RESPONSE TO "ADMINISTRATION'S FURTHER PROPOSED COMMITTEE STAGE AMENDMENTS AND OTHER IMPROVEMENTS" TO TELECOMMUNICATIONS (AMENDMENT) BILL 2002

21 May 2003

Response to "Administration's Further Proposed Committee Stage Amendments and Other Improvements" to Telecommunications (Amendment) Bill 2002

I. We remain opposed to the Bill

The Administration has proposed two rounds of Committee Stage Amendments ("CSAs"). Despite some positive features of the CSAs, we all remain opposed to the introduction of the Bill, see it as unnecessary and believe that it will have a significant adverse effect on the Hong Kong telecommunications sector for the following reasons:-

1. Sector specific regulation of mergers and acquisitions is out of line with international practice. We are not aware of any other major economy in the world that regulates telecommunications mergers only. Nor are we aware of any other major economy that places primary oversight of telecommunications mergers in the hands of the sector regulator instead of an independent and specialized competition authority.

2. Sector specific regulation is generally inferior to regulation that is applied on a competitively neutral basis economy-wide and will cause distortion of the economy. We refer the Bills Committee to a paper prepared by Henry Ergas, a highly regarded economist, attached to the submission of Telstra International dated 21 February 2003 which details the distortionary effects of sector specific measures.

3. The imposition of merger and acquisition regulation only on the telecommunications sector is unjustified as the Hong Kong telecommunications sector is one of the most open and competitive markets in the world, as well as one of the most competitive markets in the Hong Kong economy. 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.

4. Globally the telecommunications industry is operating in a very challenging environment. Adding a further level of sector specific regulation is poorly timed and will deter the much needed investment and activities in the telecommunications sector. There has been no market failure or abuse that requires legislation at this time.

5. Despite certain improvements to the Bill as a result of the CSAs, the operation of the Bill still remains uncertain as it largely depends on guidelines yet to be promulgated by OFTA. In the absence of an independent competition law regime, attempts by OFTA to develop and at the same time administer telecom specific merger and acquisition regulation go against our basic constitutional concept of dividing law making and law administration/enforcement functions. Neither LegCo nor the policy secretary should cede their jurisdiction and powers to the policy implementing entity.

6. Despite our request and the request of the Bills Committee members in the very early days of discussions on the Bill for the draft guidelines to be prepared, the Administration has only produced a very general and simplistic Explanatory Note outlining the proposed working procedures and analytical framework which are to be developed following the introduction of the Bill. Rather than clarifying matters, the Explanatory Note has created further uncertainties. To the extent that the principles of the guidelines are known, they appear to be vague and substantially subjective rather than being objective and able to produce predictability for the industry.

II. Further Amendments Required If the Bill were to be passed

If the Government and LegCo are nonetheless adamant about passing the Bill at this time, despite the CSAs, there remain a number of fundamental changes that need to be made to the Bill to prevent the Bill from being defective and unduly intrusive. We would like to reiterate these changes as follows:-

1. Circumstances under which the TA can exercise its power under the Bill

In developed economies it is generally recognized that the vast majority of mergers and acquisitions do not give rise to any anti-competitive concerns. While certain mergers may in theory raise some questions, consolidation often is a healthy development with pro-competitive effects.

It is therefore very important that we do not too widely define the scope of the Bill to catch innocuous transactions. To do so will be a waste of public resources and will discourage investments. Too broad a bill would be unduly intrusive and burdensome on investors and licensees, and ultimately harmful to consumers.

Accordingly, we reiterate again our request that merger and acquisition review be limited to a "change of control" situation which changes the core structure of a licensee. The Bill as currently drafted extends beyond a "change of control" to cover any change in the beneficial ownership or voting control of **any single voting share** in a carrier licensee. As has been already noted by certain LegCo members at the Bills Committee meetings, this is clearly far too wide. Until now, the Administration has not offered any explanation for this excessively wide

approach. Such extension of the Bill renders any discussion on the definition of "change of control" meaningless. It is certainly of no assistance to the business community which require certainty in their dealings to note that of the vast range of transactions potentially caught by the Bill, it is only those which happen to be regarded by the TA as "substantially lessening competition" that will actually be rejected. The fact that the TA has the power of investigating all transactions is disturbing enough and creates too much uncertainty.

Giving the TA power over innocuous share transfer transactions which do not involve a "change of control" is without objective justification and will have a chilling effect on investments in Hong Kong. It is also inconsistent with Hong Kong's reputation as a free economy and the Government's stated objectives of promoting investment by introducing this Bill. The Bill in its current form is only going to make it even more difficult for companies to search for investors and capital.

2. Definition of "Change of Control"

Consistent with international best practice, the TA should only be empowered to review mergers and acquisitions which give rise to true "changes in control" over a licensee i.e. those changes which result in a change in "effective control". This concept of effective control is used in most jurisdictions to screen out those transactions that are unlikely to raise competition issues.

The Bill, however, has defined a change of control by reference to any person becoming the beneficial owner or voting controller of more than 15% of the voting shares of a licensee. This is not correct. A transfer of 15%, 20%, 30% or even 40% in a situation when the licensee was previously 100% owned by another person does not necessarily involve a change of control.

15% is an extremely low threshold and will catch many transactions that neither involve a change of control nor yield any anti-competition effect. This can give rise to enormous uncertainty and create a heavy compliance burden for licensees and investors.

The 15% low threshold is all the more inappropriate when Section 7P(12)(d) has already provided an effective control test. Section 7P(12)(d) deems a "change of control" to have occurred if a person is given the power to "ensure that the affairs of the licensee are conducted in accordance with the wishes of that person". This test already allows the determination of whether a change of control has occurred to be independent from the level of shareholding which may or may not deliver control over company. This effective control test also allows consideration to be given to the ownership distribution of the remaining shares, the distribution of voting rights including any special voting rights, control over the composition of the board of directors, etc. in determining whether a change of control has occurred.

We propose that if the Administration would like to prescribe a change of control test by reference to a level of shareholding, the only appropriate percentage that can be prescribed with certainty is a change of more than 50% which in almost all instances invariably represents a controlling interest in a company. The effective control test provided in Section 7P(12)(d) will allow the TA to review a change in shareholding of less than 50% if other facts of the case establishes a change of effective control.

As an example of this approach, section 50A(8) of the Australian Trade Practices Act defines a "controlling interest" (in the context of offshore transactions) by reference, essentially, to control of more than 50% of the voting shares or control over the composition of the board of directors of the company.

In the European Union, there is no specific shareholding test to determine control. Instead, control is based on the ability to exercise decisive influence, a more sophisticated analysis which is determined on a case-by-case basis, and not by reference to any specific level of shareholding.

We would also like to draw the attention of the Bills Committee to the concept of control under the Hong Kong Code on Takeover and Mergers and the Listing Rules. These regulations provide that "change of control" occurs only where there is an acquisition of a legal or beneficial interest or ability to control 30% or more of the voting shares of a company. Obligations that hinge on the control of a company, for example, obligations to make a general offer to other shareholders or obligations to notify shareholders of interests in competing business do not apply unless the concerned party crosses the 30% threshold.

3. <u>The role of the Competition Board in merger and acquisition regulations and timetable for decisions</u>

The latest proposal from CITB is that the TA be given one month from the time he knows of or ought reasonably to have known of a transaction to decide whether to initiate an investigation, then three months to complete his investigation and make a decision, and a party aggrieved by a decision of the TA can appeal to the Competition Board. There is no time limit set for how long the entire appeal can take or the period in which the Competition Board must act.

The Administration has rejected two different models proposed by the industry which seek to completely or partially move power over merger and acquisition matters from the TA to the Competition Board. The Administration's reasons are: the industry does not have an agreed

model, overseas models do vary and therefore do not point to any particular one as a required model for Hong Kong, and the existing system works well.

Our unanimous view is that the TA should **NOT** be given the power to oversee a merger or acquisition, for the following reasons:

(a) Merger and acquisition regulation presents complex economic and legal issues. Global best practice indicates that specialized competition agencies and the courts, not sector specified regulators, should be the "judges" in these matters.

(b) The study conducted by the CITB itself and presented to the Bills Committee in its paper of December 2002 (LC Paper No.CB(1)499/02-03(01)) reveals clearly that in the 6 jurisdictions studied – Australia, Canada, the EU, Singapore, the UK and the US, only a board, a panel or a committee consisting of members from different disciplines is empowered to make decisions on mergers and acquisitions, not a single person. In some of our previous submissions, we have also quoted reforms which have been underway in the UK and the EU to depersonalize the decision making process for mergers and acquisitions. These reforms came about as a result of criticisms of the old procedures being lacking in procedural fairness and checks and balances.

(c) The Administration tried to answer the industry's concern regarding checks and balances over the TA's powers by providing a mechanism for appeal to the Competition Board. This is not anywhere close to a practical or efficient solution for the industry, investors or consumers. Given the critically time-sensitive nature of mergers and acquisitions, in practice, after having waited a long period for a decision from the relevant governing body in the first instance, merging parties often do not choose to go on appeal. There is a

considerable risk that an incorrect decision to block a merger or acquisition will result in a meaningful transaction being abandoned and hence consumer loss. We refer the Bills Committee again to a paper prepared by a world-renowned economist, Jerry Hausman, dated 12 June 2001 and submitted to the LegCo, which studied the loss to consumers resulting from regulatory failures over merger and acquisition control.

(d) A panel such as the Competition Board consisting of different members reflects both the diversity of views and the diversity of expertise regarding legal, economic and consumer affairs. Its decisions will better reflect the broader public interest.

(e) In the Bills Committee meeting on 12 May 2003 certain Bills Committee members questioned the Administration as to why the Government was insisting on giving power to the TA to decide on mergers and acquisitions instead of entrusting the power to an independent committee or the Competition Board. The response from the Administration, as explained by Ms Marion Lai, was that the Government did not see any reason to draw a distinction between the enforcement of competition provisions and regulation of mergers and acquisitions, and since the TA is currently empowered to enforce the competition provisions of the Telecommunications Ordinance, he, therefore should be equally empowered to control mergers and acquisitions under the same regulatory structure.

This argument is not convincing. As some Bills Committee members rightly pointed out in that meeting, there is a world of difference between enforcement of competition provisions and the regulation of mergers and acquisitions. The former is about the regulation of the conduct of licensees which, as a condition for their operation, are

subject to the jurisdiction of the TA. The latter is about regulating investments and investors' entry into and exit from a market. It is about regulating the structure of the market. Such regulation has huge consequences for investors in the telecommunications sector who normally are not subject to the jurisdiction of a telecom specific regulator and for licensees and consumers alike as it closely affects the development of the market.

The magnitude of harm under an erroneous regulation of structure is greater than the magnitude of harm under an erroneous regulation of conduct. In the case of regulation of conduct, there is always an option for the regulated party to take mitigating steps (by choosing other, albeit less efficient, means of achieving its objective). In the case of regulation of market structure, it involves a regulator making decisions as to what the desirable industry structure should be, which decisions are more difficult, if not impossible, to unravel. Given how dynamic the telecommunications industry is, delay caused by regulatory approval or parties abandoning meaningful transactions as a result of regulatory disapproval will translate into significant long-term losses for consumers.

(f) We have not at all been appeased by the Administration's assurance that they would eventually look at the entire structure of the TA if there were continuing complaints about too much concentration of power in one person. As soon as the Bill comes into effect, we need to have a predictable, transparent and accountable mechanism with the expertise to conduct merger and acquisition review correctly and speedily, not when the Government does its eventual review of the TA structure. We cannot support a 'trial and error' approach to critical regulatory, business and investment decisions. We continue to support a single review mechanism by the Competition Board, as time is of the essence

and a single comprehensive review by an expert body best serves the interests of all the concerned parties and the public.

4. An alternative, but second best approach

To address our concerns, but noting the Government's apparent preference to vest substantial authority with the TA and noting the Administration's comments on our earlier proposed models, we present an alternate model described as follows for the consideration of the Administration and LegCo members.

This approach attempts to meet the industry's need for expeditious merger and acquisition review by a panel of decision makers and the Government's preference for the TA to have a role. Coupled with objective and predictable guidelines, this proposal has the potential to work and is based on international best practice.

Under this proposal, the TA will have the critical role of initially reviewing merger and acquisition proposals. Instead of the TA having a month to decide whether to initiate an investigation and 3 months to make an investigation and draw a conclusion on a merger or acquisition, we would propose that the TA be given two weeks after the TA knows of a change of control or ought reasonably to have known of the change, whichever is the earlier, to decide whether to initiate an investigation. Deciding whether to initiate an investigation should be a straight forward matter and need not take as long as 4 weeks, particularly in the context of Hong Kong's small economy and limited number of carrier licensees. The TA will then have one month to make investigation and, if he sees appropriate, approve a transaction. However the TA would not be given the power to block a transaction. If at the end of the one month investigation

period, the TA is of the view that the transaction is to be disapproved or made conditional on grounds of substantially lessening competition, or otherwise raises competition issues as to warrant further investigation, he shall immediately refer the matter to the Competition Board which shall then have 10 weeks to reach a conclusion on the matter.

To keep the mechanism simple, we are not asking for an additional statutory right of appeal from the Competition Board to the Court of Appeal. However, of course, rights for judicial review of decisions of the Competition Board will still exist under common law.

The merits of this model are as follows:

1. It can be implemented within the existing regulatory structure and utilizes the existing resources of OFTA.

2. It allows the vast majority of transactions which do not give rise to competition concerns to be dealt with and approved by the TA within a shorter time frame, i.e. six weeks.

3. In respect of cases which are seen by the TA as raising competition issues as to either warrant further investigation or call for disapproval, they are referred to the Competition Board at an early stage to take the benefits of a decision process by a panel of members from different disciplines. Instead of having to wait 3 months for a first level decision by the TA and having to go on appeal to the Competition Board if aggrieved (with no time limit set for conclusion of the appeal), our proposed model allows the Competition Board to be brought in early to participate in the proceedings so that less time is lost. Under our proposed model, the concerned parties get a final conclusion on a transaction review

within a period of no more than 4 months, with the checks and balances on the TA power already built in.

4. This model reduces the risk of an erroneous decision by a single person regulator and parties losing interest in a transaction for having to wait too long for a conclusion of the review process. The TA's views could certainly be part of the review process before the Competition Board. This approach is similar to that employed in Canada.

5. In the Bills Committee meeting on 30 April 2003 when an earlier version of this model was discussed, the Consumer Council indicated that they had no major objection to it.

We note the Administration's comment in its paper that there is no clear rule to classify "difficult" and "easy" cases to provide an objective basis for determining which cases should be referred to the Competition Board and which should not. We wish to clarify that under this model, the TA is not required to distinguish between easy and difficult cases to decide whether to refer to the Competition Board. The TA is empowered to conduct a first review of all cases. It is only in a situation where, at the end of the one month investigation period, the TA is of the view that the transaction raises competition issues as to warrant further investigation (because of the complexity of the case) or when he is minded to disapprove the case on grounds of the transaction substantially lessening competition (when he has not been empowered to block the transaction), that the TA has to refer the matter to the Competition Board.

We also note with some interest the Administration's comment on an earlier model proposed by PCCW and Telstra in which the Competition Board was the sole reviewer and which did not include a statutory right of appeal from the Competition Board. The Administration criticizes

the model for not providing an appeal based on the merits of the case once the decision is made and therefore suggests a process that would put the integrity of our system in doubt without sufficient checks and balances.

Given that this is the stance of the Administration, we would expect that the current limitations on the scope of the review of the Competition Board be reviewed. The Competition Board is currently only empowered to review the TA's decisions relating to the competition provisions of the Telecommunications Ordinance. The Competition Board does not have the jurisdiction to review the TA's decisions in other areas. From this indication of the Government's support of sufficient checks and balances enhancing the integrity of our system by providing appeal based on merits of the case, we would expect and look forward to the Administration expanding the jurisdiction of the Competition Board over all decisions of the TA.

While we have not asked for a statutory right of appeal in our proposed model, if the Government see the absence of such right as affecting the integrity of our system, we would welcome an additional statutory right of appeal on the merits of the case to the Court of Appeal.

5. Cost for approval of mergers and acquisitions

Under the proposed 7P(11) of the Bill, any cost or expenses incurred by the TA in cases where the carrier licensee or the acquirer chooses to seek the TA's prior consent is to be recovered fully from the licensee or the acquirer.

The Administration has rejected our request for no fees to be charged or a cap on the basis that OFTA needs to recover the cost of its services and similar to the arrangements for the TA's

determination on interconnection issues under Section 36A of the Telecommunications Ordinance, there should be no cap on the recovery of charges by the TA.

We would point out that regulation on mergers and acquisitions is different from the role the TA plays in the determination of interconnection issues. In the latter, the TA assumes the role of a judge at the request of the relevant parties who cannot otherwise resolve their disputes on a commercial basis. In the former, however, the TA plays the role of a regulator of the market for the benefit of other participants in the market and consumers generally. He is not conferring rights or benefits on the applicant or the licensee for which a fee should be charged.

Costs of OFTA in reviewing mergers and acquisitions should be regarded as part of the overhead costs of its performing the function as a market regulator and recouped from other general contributions to the Trading Fund e.g. licence fees. Also, there is certainly enough surplus in the Trading Fund to cover the costs of such reviews which do not occur regularly.

Even if OFTA were to be allowed to impose a charge, it is inappropriate that the TA may incur and recover its costs without any limitation. Considering the indications given by CITB on the likely costs, we propose a cap of HK$100,000.

6. Conflict with licence conditions

With the enactment of the Bill, certain existing licence conditions regarding change of ownership or control will be in obvious conflict with the provisions of the Bill.

The Government has proposed to deal with such conflict by way of seeking amendment to carrier licence conditions after the enactment of the Bill. We suggest that in addition, to avoid having a period of uncertainty while waiting for licences to be amended, the Bill should also expressly provides that the Bill overrides licence conditions on issues regarding change of ownership or control of licensees.

7. Safe Harbours

"Safe harbours" need to be provided in the Bill to exclude transactions which have no practical effect on competition – for example because of the low value of the transaction or small market share of the parties involved.

Other jurisdictions that have merger control have thresholds based on turnover, assets acquired and/or market share which must first be met before the authority has jurisdiction. In the UK, the competition authority has no power to examine a merger or acquisition unless either a certain market share would be achieved or increased by the merger, or the assets of the "target" company exceed a certain level. Taiwan uses a market share test. The US uses a "size of party" or "size of transaction" test. The EU uses a turnover test. In Australia, the ACCC's Merger Guidelines use concentration thresholds as a screening device to eliminate the need for detailed market share studies where the merger is unlikely to give rise to any competitive concerns.

As currently drafted, the Bill empowers the TA to potentially investigate any change of control, irrespective of the turnover of the parties, the assets to be acquired, or the market share of the parties concerned. This is neither in the interests of business certainty nor an efficient use of regulatory resources.

There is also no exclusion in the Bill for internal corporate restructuring within the same group of companies, where control of a company within the group is not shared with or transferred to third parties outside the group. Such transactions should not be the subject of regulatory review and should be expressly excluded in the Bill.

We suggest that the Bill should require "safe harbours" to be provided. We also propose that Bill requires the "safe harbours" to be based on "bright line" jurisdictional rules according to turnover or assets, or market share. The details of such safe harbours, however, can be dealt with in the Guidelines.

8. Public Benefit and Efficiency Gains

The Bill gives the TA wide powers to issue directions where a change in control results in a substantially lessening of competition. There are however other public interest factors which could outweigh the substantial lessening of competition concerned and any adverse effects of such lessening of competition.

For example, in the case of a failing firm, it may be in the public interest to allow a competitor to acquire that firm in order to ensure consumers have continued access to its services and/or technology, continued employment of its employees and protection of its creditors. Equally, the transaction may also serve to strengthen the international competitiveness of Hong Kong carriers and better position Hong Kong as a telecommunications hub.

At present, there is no scope in the Bill for these factors to be considered.

Accordingly, in order to ensure that the TA takes into account the public interest, the TA should only be permitted to issue a direction under the proposed section 7P(1) if there is a substantial lessening of competition and it is also in the public benefit that such a direction is issued.

Furthermore, and in addition to the public benefit exception, an efficiency test should be included in the Bill as a factor to be considered in approving or not approving a merger. Such a factor is a feature of Canadian mergers legislation (section 96(1)) and enables the consideration of efficiencies that are brought about by the merger notwithstanding that the merger might fail the competition test. Examples of efficiencies include:

- Lower prices (through lower costs and economies of scale);

- Increased output (through lower costs and the best combination of labour, capital and technology); and

- Increased range of goods and services and better quality goods and services (through opportunity costs, as well as pooled research and development resources and technological advances and innovation).

9. Guidelines

Given the number of key matters that are currently left to be included in the Guidelines which are wholly within the discretion of the TA (e.g. details as to what constitutes "substantial lessening of competition", procedures for the conduct of merger investigations, safe harbours), it

is essential that LegCo approves the final form of the proposed Guidelines before the Bill becomes effective.

Without the consultation on the Guidelines prior to the passage of the Bill (and not merely an "explanatory note" as to what they may or may not eventually contain), it remains fundamentally uncertain how the extensive powers of the TA (and preferably the Competition Board) in relation to merger and acquisition matters will be exercised. We therefore believe that both the Bill and the Guidelines should become effective only after they have been reviewed together as a package by LegCo.

III. Conclusion

The parties wish to once again stress the key points set out in this submission which have been consistently put forward without any adequate response from the Administration:

- the Bill is unnecessary and poses a significant risk to investment in and the continued viability of the Hong Kong telecommunications sector;

- if there is to be a Bill, it should not, contrary to most international precedent(s), apply purely to the telecommunications industry;

- the Bill provides far too significant a role to the sector specific regulator and to a single person regulator which would be unprecedented and contrary to international best practice;

- the Explanatory Note on the Guidelines as issued by the Administration is too vague and simplistic to provide certainty to investors and licensees.

In order to address these significant shortcomings in the Bill we have proposed the following specific measures in this submission that take into account both global best practice and the unique nature of the Hong Kong telecommunications market:

- limiting the scope of the Bill to cases of a change of control based on change of more than 50% and where there is a change of effective control;

- limiting the initial role of the TA to that of merger approval, but with an ongoing advisory role assisting the Competition Board in relation to those mergers which the TA is not able to approve;

- a revised timetable for decisions that takes into account the need for expediency in merger and acquisition review;

- a specific cap in relation to costs or expenses incurred by the reviewing body;

- giving precedence of the Bill over existing license conditions which deal with changes of control to avoid any uncertainty;

- adding a requirement in the Bill that 'safe harbours' be specified in the Guidelines;

- requiring that the Guidelines be approved by LegCo prior to the commencement of the Bill; and

- adding a public benefit exception and efficiency test to any merger and acquisition review.

Telecommunications (Amendment) Bill 2002
Summary of Requested Amendments in operators' joint submission 21 May 2003

Item	Issue	Government Proposal	Our Comments/Requested Amendments
1.	Triggers for exercise of the powers	Where there is a change in a) the control exercised over a carrier licensee b) the beneficial ownership of any voting share in a carrier licensee; or c) the voting control of any of the voting shares in a carrier licensee.	● Power to be exercised only where there is a "change of control" over a carrier licensee i.e. a true structural change in the licensee. ● It is a waste of public resource and an unnecessary burden to carriers and investors if transfer of shares in a licensee with no real change to the "control" of the company are subject to review by OFTA. ● It is also important to note that most mergers are pro-competitive or neutral in competition terms. Legco should not give powers to the TA to review such mergers. It will be a waste of public resource to do so and will also unduly deter or delay positive mergers. ● Items (b) and (c) defeats any purpose in defining "change of control".
2.	Definition of change of control	Change of control includes a change in the beneficial owner or voting controller of more than 15% of the voting shares in the licensee.	● Even if we adopt an additional test by reference to a level of shareholding, 15% is too low. 50% is more appropriate as that is the level at which a party will invariably have control. Any lower percentage in a situation where there is a real "change of control" will be caught by the "effective control test" under Section 7P(12)(d). ● Section 7P(12)(d) already provides an "effective control" test – where any person is given the "power to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person". ● Even Listing Rules and Takeover Code are only concerned with "30%" as indicative of change for control.

3.	Powers created by the proposed Section 7P – checks and balance	Powers to be exercised by the TA alone subject to appeal to the Competition Board.	● International best practice is that powers to regulate the structure of an industry are vested in a panel of decision-makers, not an individual. Even CITB's own study confirms that among countries like Canada, US, Australia, EU, Singapore and UK, M&A decisions are all made by a panel/committee, not a single power. ● If however Hong Kong should decide not to have an independent body set up for reviewing Telecom M&A but to make use of OFTA's existing resources, the TA should only be empowered to make investigations and grant approvals to M&A. The TA should not be empowered to block a transaction. If the TA believes that an M&A will or will likely result in substantially lessening competition in the market, the M&A case should be referred to the Competition Board for more investigation and decision-making. ● The Competition Board consisting of members from various disciplines should be the only body empowered to make a formal ruling to object to an M&A or to impose conditions, thereby lessening the risk of human error by a single person. ● A person aggrieved by the TA's decision to approve an M&A can appeal to the Competition Board. ● No statutory right of appeal from decisions of Competition Board except the usual judicial review proceedings.
4.	Time Limits	The TA has 1 month from the time the change occurs or 1 month from the time the TA knows of or should know of the change to decide whether to start an investigation. Period for Investigation –3 month.	● We suggest reducing the period during which OFTA must decide whether to initiate an investigation to 2 weeks. ● We suggest that the period of OFTA investigation be reduced to 1 month. If the TA sees grounds for further investigation or disapproval on the basis of competition concerns, the matter goes to the Competition Board which shall make a decision within 10 weeks.
5.	Costs for approvals of mergers and	The amount of any costs or expenses incurred by the Authority to be recovered fully from the	● In deciding whether to allow an M&A to proceed, OFTA is only performing its obligations as a regulator in regulating the market, it is not conferring rights and benefits on the applicant or licensee for which a fee should be charged.

	acquisitions	licensee or the applicant for approval. CITB has indicated that the fee will likely range from HK$50,000 to HK$110,000, depending on the complexity of the case but does not intend to put an amount in the Bill.	● Even if the Bills Committee should allow OFTA to impose a charge, it is inappropriate that the TA may incur and recover his costs without any limitations. ● Given CITB's indication, we propose a cap of HK$100,000.
6.	Conflict with licence conditions	Not dealt with.	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. ● e.g. in the current 3G licence, there is a licence condition requiring a licensee to seek the consent of the TA on any change of control or ownership structure from that stated in its application for licence.
7.	Guidelines	Guidelines to be published and consultation with industry to occur after the Bill is passed. The substantive provisions of the Bill will take effect on a date appointed by the TA (Section 2(b) of Bill).	Given the importance of the guidelines, it is critical that they are subject to independent review. This review should be conducted by the Legislative Council and accordingly the Bill should not come into force until such a review has taken place.
8.	Safe harbours for mergers	None	● The Bill should set out requirements for "safe harbours" to exclude transactions which have no practical effect on competition in the interest of business certainty and efficient use of regulatory resources. ● Such safe harbours can be based on the turnover of the parties, value of the assets to be acquired, or the market share of the parties concerned.
9.	Public benefit and Efficiency gain	None	Certain transactions, if demonstrated to produce public benefit or gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition that will result from the transactions, should be allowed.