THE LAW SOCIETY OF HONG KONG 香港律師會

Comments on the Draft Merger Guidelines for the Hong Kong Telecommunications Markets dated 4 August 2003

We have reviewed the Consultation Paper issued by the Office of the Telecommunications Authority containing the Draft Merger Guidelines for Hong Kong Telecommunications Markets dated 4 August 2003 ("the Guidelines"). The review has been carried out by reference to TA's Preliminary Views on the Key Matters that should be addressed in the M&A Guidelines of December 2002 and the Law Society's Comment of February 2003.

1. General Comments

The purpose of the Guidelines is to give clarity to the issues that the TA will take into account when considering mergers and acquisitions under the Telecommunications (Amendment) Ordinance 2003 passed on 18 July. The draft Guidelines fail to specify clearly when the TA would intervene in respect of mergers and acquisitions in the telecoms section. Much of the language in the Guidelines is couched in vague terms such as the TA takes a view that "it is unlikely there will be a need to carry out a detailed investigation" or the TA will normally take the view that "(see paragraphs 1.16 and 1.20 of the Guidelines)".

Although a number of factors that would be taken into account by the TA when making a decision whether or not to intervene are set out in the draft Guidelines, they are set out in very tentative form and would not be of real assistance to either carriers and/or interested parties in determining whether there is a risk that the TA might intervene. The Guidelines should provide with certainty when such interventions would take place and set out clear and easily identifiable benchmarks for such interventions.

2. Specific Comments

2.1 Paragraphs 1.16 - 1.19

The "Scope of application" set out in paragraphs 1.16 to 1.19 needs to be further clarified. Although interventions where the combined market share in the relevant market of the parties to the matter is less than 15% is unlikely, intervention by the TA in such situations is not categorically ruled out. The Guidelines should state clearly the situations when the TA might intervene even if

the relevant market of the parties to the matter is less than 15% and clear benchmarks for such intervention should be provided.

2.2 **Paragraph 2.20**

While we note that the Guidelines now specify the financial transactions which would not raise competition concerns, TA might consider such transactions as giving rise to competition concerns if certain "considerations" exist. Given that such financial transactions will be very common, it would be helpful to have a clearer indication of the "other considerations" that that would need to be absent before the TA would take the view that such financial transactions do not give rise to competition concerns.

2.3 **Paragraph 4.2**

As noted in our previous submission, the list of structural features should include consumer information given the nature of telecommunications markets.

2.4 **Paragraph 4.27**

We repeat the point made in our submissions of February 2003, namely, that the statement that information on market shares and concentration levels is readily available understates the difficulty often involved in defining the market correctly. As stated previously in many mergers, a great deal of time and argument is taken up in defining the market and it is only when such market has been defined that market share information becomes relevant.

2.5 **Paragraph 4.30**

We suggest that the word "generally" be inserted before the word "necessary" in the second line of this paragraph as it is conceivable that there could be situations in which a company could have the ability to exercise market power without necessarily having market share.

2.6 **Paragraphs 4.48 - 4.54**

As mentioned in our previous submissions, less tangible first mover advantage such as building brand loyalty or locking consumers into a particular type of technology could be included amongst the activities carried out by a dominant market player which amount to abuse of a dominant position.

2.7 **Paragraphs 4.82 - 4.88 (Failing Firms)**

We repeat our comment regarding the merger permitted on the failing firm argument basis which is that, in other jurisdictions, guidelines and/or legislation include words to the effect that if a merger is permitted on the failing firm argument basis and that firm is then revived in substantially the same form as it existed pre-merger, such as to give rise to a suspicion that the firm was not in fact failing, the regulator would pursue the case vigorously.

2.8 **Section 5 - Benefit to the public**

We note there is a new section relating to mergers or acquisitions which are likely to have a perceived public benefit which outweigh any detriment to the public that is likely to be constituted by the anti-competitive effect such a merger or acquisition. The TA may not intervene in such a proposed arrangement but may request commitments guaranteed by way of performance bonds on the part of the entity claiming the existence of such a public benefit. We are not aware of similar requirements in other jurisdictions and we query the need for such requests and note that their effect would be to discourage firms from seeking to provide benefits to the public.

3. **Minor Comments**

We have the following comments which relate to the style of the Guidelines:

3.1 **Paragraph 2.5**

This clause does not read very clearly. The beginning of this paragraph should be changed to read:

"Even if the TA forms and opinion that a completed merger has, or is likely to have, the effect of substantially lessening competition, the TA may decide not to issue a direction to the parties…"

3.2 **Paragraph 3.40**

This paragraph is very unclear. Clarity would be improved if the paragraph read as follows:

"As mentioned, a product is considered to be in the same market as another product if there is a sufficient level of switching to or substitution of that first product to make a price increase in the second product unprofitable."

3.3 **Paragraph 3.47**

Paragraph 3.47 refers to "sunk costs" which is not defined until the following paragraph. Perhaps the order of these paragraphs should be reversed or the definition of sunk costs should immediately follow the first use of that term.

3.4 **Paragraph 3.50**

This paragraph discusses previous cases generally but does not give any specific guidance as to how the TA will deal with previous cases. This could be achieved by adding a sentence at the end of the paragraph as follows:

"Therefore, the TA will consider previous cases as influential but they will not be binding on the TA."

3.5 **Paragraph 4.20**

For clarity this paragraph should read as follows:

"Predicting the exercise of co-ordinated market power is more difficult than predicting the exercise of unilateral market power because there is the added uncertainty of predicting whether market conditions are conducive for co-ordination and detection and punishment of "mavericks"."

3.6 **Paragraph 4.42**

The word "alleviate" should be "alleviates".

3.7 **Paragraph 4.46**

The words "would be" in the penultimate line should be replaced with "is".

3.8 **Paragraph 4.47**

The second sentence should read as follows:

"For example, the TA will not consider granting any fixed carrier licences to those applications who intend to primarily rely on interconnection to and reselling of other operators' infrastructure to roll out their network or provide their services."

3.9 **Paragraph 4.49**

The full-stop after "for example" in the penultimate line should be a comma.

3.10 **Paragraph 4.70**

We assume the word "monopsonists" should be "monopolists".

3.11 **Paragraph 5.2**

The word "is" in the last line should be "are".

The Law Society of Hong Kong
Management & Technology Committee
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