Panel on Information Technology and Broadcasting

Summary of deputations' views on the consultation paper on draft merger and acquisition guidelines for Hong Kong's telecommunications market ("the Guidelines") and Administration's response

Issues	Organization/ Individual	Concerns/Views	Administration's Response
1. Second Round Consultation	General view	• There should be a second round consultation of the draft merger guidelines.	• The Telecommunications Authority (TA) has taken on board the industry's request. A second consultation paper was issued and posted on OFTA's website (www.ofta.gov.hk) on 23 December 2003.
2. General	PCCW Telstra/Hong Kong CSL	• There is a need for a statement of competition policy underlying the new merger laws and their enforcement. • The Guidelines should not contain a negative presumption about mergers being anti-competitive.	• We have taken on board industry's request. A new section headed "Merger Review Principles" has been incorporated into the Guidelines to address these issues.
3. Specific guidance and industry examples	PCCW SmarTone	• More specific guidelines can and should be formulated, and more examples of how the analytical framework will be applied should be provided.	• We have taken on board industry's request as far as practicable. For instance, we have added in the recent decision of the Telecommunications (Competition Provisions) Appeal Board on the meaning of "substantially" lessening of competition. We have also included an example of a decided case from the EU (Vodafone Airtouch) on what constitute co-ordinated effects of a merger.

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			• The revised Guidelines are more specific than similar guidelines in other jurisdictions. Conscious effort has been made to insert examples relevant to the telecommunications sector throughout the document where available and applicable. The Guidelines also include a number of examples based on the TA's previous decisions. • Members may note that unlike other countries, the competition law regime in Hong Kong is relatively new and restricted to the telecommunications and broadcasting industries. There are fewer past decisions on which to draw. We will update and improve the Guidelines as decisions accumulate. • We note that the industry has not provided any specific examples for possible inclusion in the Guidelines. We repeat our invitation to the industry to do so during the second consultation. • We would like to point out that in providing more specific examples and guidelines, we should caution against providing answers to hypothetical questions or to provide answers

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			to questions related to a specific market situation before all relevant facts about the situation are known and submissions from industry participants are received and considered. Each case should be considered on its own merits.
4. Safe harbours	PCCW The Law Society of Hong Kong	• The Guidelines should provide certainty as to when the TA will intervene to stop a merger under section 7P and set out clear benchmarks for such interventions. • A modified Australian approach is recommended of only considering mergers resulting in a combined entity below 40% when the three-firm post-merger market concentration is greater than 75%. • The Guidelines should state clearly the situations when the TA might intervene if the relevant market of the merged entity is less than 15%. • A modified HHI threshold should be applied to promote predictability and transparency.	• Under OFTA's original proposal as set out in the first consultation paper, the TA will adopt a market share test to provide safe-harbour provision whereby:- – TA will unlikely carry out a detailed investigation into mergers which result in a merged entity having a market share of less than 15%; and – TA will likely examine merges which result in a merged entity having a market share of 40% or more; and – TA will decide whether to carry out a detailed investigation into mergers which result in a merged entity having a market share between 15% to 40% on a case-by-case basis. • We have taken on board industry's suggestion for more "safe harbour" provisions which accord with international best practice :- (a) reference to the HHI based on the US Horizontal Merger Guidelines has been

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			added. Similar thresholds have been adopted in the guidelines published by the Office of Fair Trading in the UK; and (b) the "safe harbour" has been redefined, and instead of relying only on market shares, it now uses the four firm concentration ratio as well, following the practice of the Australian competition authority. In other words, TA will likely consider mergers which result in a merged entity having a market share of less than 40% only if the post-merger combined market share of the four (or fewer) largest firms is 75% or more. We welcome industry's comments on whether both (a) and (b) should be adopted, and if only one is appropriate, which one is to be preferred. • A modified HHI index as proposed by PCCW has been included in the revised Guidelines for industry comment. We would like to point out that if the modified HHI is used, any merger between two existing operators in the mobile market would not merit investigation. Any merger between two existing operators in either the residential or business fixed line markets

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			would likewise not be investigated, save for a merger involving PCCW and another operator with more than a very small market share.
	Telstra/Hong Kong CSL	• In *pro forma* transactions, where the ultimate ownership of the relevant entities remains unchanged, the TA should not seek to apply a section 7P review to such transactions and should therefore include them in his list of "excluded" transactions. • The TA should clarify the position of financing transactions that could fall within the ambit of section 7P. • Corporate restructuring within the one corporate group should be excluded from regulatory review.	• The TA has provided further comfort in the Guidelines for those involved in transactions that section 7P was not intended to cover. In this regard, specific amendments have been made to the section headed "Financial transactions which do not raise competition concerns."
	Telstra/Hong Kong CSL	• Mergers between businesses with turnover of less than HK$2 billion should not be considered under section 7P.	• The TA does not consider that section 7P needs to be augmented by a turnover threshold, particularly given the other screening and threshold mechanisms that will be applied. In addition, the fact that the regulation applies to carrier licensees only like fixed and mobile operators, but not to ISPs and IDD operators etc., is in itself already a screening criterion.
5. Failing firm defence	PCCW	• There should be no negative presumption about the acquisition of a failing firm when its assets do not exit the market.	• We take the industry's point, and have set out clearly that the TA does not presume that the acquisition of a "failing firm" whose assets do not exit the market will substantially lessen

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			competition. However, like other regulators, he intends to assess this situation as he would in respect of any other acquisition using the assessment process described in the Guidelines.
	The Law Society of Hong Kong	• The burden of proving the acquisition of a failing firm would substantially lessen competition should rest with the TA.	• The burden of proof that any acquisition is anti-competitive rests with the TA, as is acknowledged in the Guidelines. In practical terms, it means he will undertake the usual competition assessment as described in the Guidelines.
	Hutchison	• The TA should adopt a more lenient approach towards the failing firm defence, given the pro-efficiency effects of mergers and acquisitions of failing firms, eg avoiding disruption to service, loss or employment and user inconvenience etc.	• The TA will adopt an approach which is consistent with that adopted in other leading competition law jurisdictions, including Australia, New Zealand, the US, the UK, the EU and Singapore. As far as we are aware, no jurisdiction including Singapore will give automatic approval to mergers involving failing firm without careful consideration of relevant factors.
6. Public benefits	Consumer Council	• The TA's public benefit analysis should be confined to factors external to competition, eg other than efficiency claims which should be assessed during the TA's competition analysis prior to assessing public benefits.	• The TA does not wish to limit the public benefits that might be claimed by merger proponents. However, any benefits which relate directly to competition (such as claimed efficiencies) will be considered during the competition analysis prior to the consideration of the public benefits.

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	Telstra/Hong Kong CSL	• It is not clear why public benefits will only be considered if they are real, will be realised within a reasonable time and are sustainable.	• The TA considers he has a responsibility to ensure that claimed benefits are real, rather than merely illusory, and therefore adopts the usual tests accepted as normal practice in other countries.
	PCCW	• The TA should provide guidance on what public benefits he would consider.	• The TA has added further discussion of the kinds of public benefits he would consider, which may include more innovation (perhaps as a result of engagement in R&D), wider choice, higher capacity or better quality of services as a result of investment in network infrastructure, continuity of service and enhancement of the international competitiveness of Hong Kong's industry. However, this list should not be read as exhaustive or in some way limiting the kinds of public benefit claims that merger proponents may wish to make.
		• There should be no requirement for public benefit 'performance bonds' to be given by merger proponents.	• We have taken on board industry's request, and the requirement for 'performance bonds' has been deleted from the Guidelines.
7. Market definition	PCCW	• Market definition should be forward looking and take into account technological trends and rapidly changing market boundaries. More information on what markets are covered should be provided.	• The TA acknowledges that technological trends can affect market boundaries, which is one of the reasons why he does not consider it appropriate to attempt to define markets in the Guidelines. Rather he has adopted the more usual approach of explaining in detail

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			the processes he will follow in actual cases. This is consistent with the approach followed in similar guidelines in other countries. • As an illustrative example of the difficulties involved in this context, the inclusion of fixed-line and mobile telephone services in the same market may be supportable in future depending on consumer trends. However, previous TA and Appeal Board decisions have maintained a distinction between the two technologies and analysed them separately. Accordingly, it would not be appropriate to express in the Guidelines a decided view on this issue without the TA's careful consideration of all relevant factors, as will occur during the assessment of an actual transaction.
	Hutchison	• The Guidelines should provide guidance on how the relevant markets will be defined in relation to an acquisition of each type of carrier licensee, including a merger between two licensees holding the same type of licence and licensees holding different types of licences.	• As noted above, it is not appropriate for the TA to use the Guidelines to attempt to define markets or to indicate his likely approach to particular hypothetical transactions. The Guidelines are provided to give the industry guidance on the TA's approach, not his views on possible arrangements. This is consistent with the approach adopted in similar guidelines in other countries. It also comports with the TA's view, based on clear

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			international precedent, that previous market definitions should not be automatically applied in new cases.
8. Substantial lessening of competition	Telstra/Hong Kong CSL Hutchison	• Further guidance should be provided on what, in the TA's view, constitutes a "substantial" lessening of competition. • The Guidelines should provide "a very clear and unequivocal statement of what the substantial lessening of competition test means for Hong Kong".	• The Guidelines contain references to the meaning given to the substantial lessening of competition test in a number of other jurisdictions. They now also contain an authoritative statement on this issue in the Hong Kong context as recently stated by the Telecommunications (Competition Provisions) Appeal Board.
	PCCW	• More elaboration is needed on the factors that indicate 'effective competition remaining'.	• The question of whether there will be 'effective competition remaining' constitutes a second order of analysis used to assist in the broader assessment of post-merger competition. It is therefore not an issue that should be over-emphasised. It is one of a number of relevant factors, and as such is dealt with in the Guidelines in a similar way to those other factors.
	Consumer Council	• The TA should consider a list of factors including consumer behaviour, consumer outcome, supplier behaviour and market structure in assessing the competition status of the telecommunications market.	• The TA will consider these factors as and when they are relevant to the case in question.
9. Vigorous and effective competitor	Telstra/Hong Kong CSL PCCW	• The TA should elaborate what constitutes "a vigorous and effective competitor", particularly in the mobile sector.	• The Guidelines now include further information on this factor.

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		• More guidance should be given on the concept of 'vigorous and effective competitor'.	
10. Co-ordinated conduct	Hutchison	• Notwithstanding international practices, the TA should not take into account how the remaining competitors may co-ordinate with each other in the exercise of market power.	• The Guidelines reflect international best practice in this area. The TA is not aware of any factor peculiar to the Hong Kong telecommunications industry that indicates he should take any other approach.
	Telstra/Hong Kong CSL	• More guidance is needed on how the TA will assess concerns about post-merger co-ordinated conduct.	• We have taken on board industry's suggestion to discuss these issues in more detail. We have also included an example of a decided case from the EU to provide further practical elaboration.
	PCCW	• Invoking section 7P because of concern over potential co-ordinated conduct without firm evidence is inappropriate.	• The TA will only invoke section 7P where he is satisfied that there is sufficient evidence to justify his intervention, in accordance with the statutory requirement.
11. Remedies	Telstra/Hong Kong CSL PCCW	• The TA should not give preference to structural remedies over conduct or behavioural remedies as conditions for approving a merger. • If the TA considers a merger is likely to substantially lessen competition, he should first consider modifications to the merger (such as the implementation of a compliance and monitoring program) before considering action to block the merger.	• The TA's preference for structural remedies compared with behavioural remedies is consistent with the approach adopted in other leading competition law jurisdictions. It reflects the view that a structural solution to a section 7P concern is entirely consistent with the objectives of this regulation and avoids having to devote the TA's resources to ensuring ongoing compliance with typically less efficient behavioural remedies.

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	PCCW SmarTone	• The TA should provide more explanation as to the kinds of remedies he would consider to overcome a concern about a merger being likely to substantially lessen competition.	• The TA has already described the kinds of remedies he is likely to consider in a number of situations. However, the list is not exhaustive as different cases may call for remedies appropriate for the unique circumstance of the case. Besides we need to allow room for merger proponents who may wish to volunteer solutions in the light of the specific situation of individual cases.
12. Efficiencies	Telstra, Hong Kong CSL	• There should be no limit on the efficiencies the TA will take into account, the parties should not have the onus proving efficiencies and the required proof should not be higher than for other factors.	• The Guidelines have been amended to describe in greater detail the TA's approach in this area and how it is consistent with the approach adopted in other jurisdictions. The TA does not limit the kinds of efficiencies that can be claimed by merger proponents. He does expect, however, that the parties will present their strongest case not only because it is in their interests to do so but also because they are likely to be better placed than the TA or anyone else to identify and describe these efficiencies.
	Hutchison	• The requirement for evidence of efficiency claims should be only that "the efficiencies must be clear and very likely to arise", therefore avoiding the need for verification.	• Where efficiencies cannot be verified conclusively, evidence that they are "clear and very likely to arise" will obviously be taken into account.
13. Burden and standard of proof	PCCW	• The Guidelines should contain the enforcement principle that where there is reasonable doubt about the likelihood of	• The Guidelines have been amended to clarify the onus of proof on various parties during the assessment process contemplated under

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		substantial lessening of competition, the TA will not take any action under section 7P. • The Guidelines should state that the TA has the burden to show a merger is anti-competitive. • The TA should bear the burden of proving that claimed efficiency gains are not relevant or not sufficient to overcome a finding of a substantial lessening of competition once the merger proponents have presented a *prima facie* case.	section 7P. The Guidelines accord with the TA's clear legal responsibilities and international best practice in these areas:- (a) the burden of proving that there is a substantially lessening of competition under section 7P rests with the TA. The civil standard of proof applies, and he is required to decide on a balance of probabilities. (b) However, when the parties to a transaction raise an issue which, in their view, shows that there is no substantial lessening of competition, then it is for them to substantiate their claim. The TA will consider any such claims and verify them to the extent possible, but it is not for the TA to "prove" that the claims are unfounded, in the event that they are rejected. (c) If the parties wish to argue that there are benefits to the public arising from a merger (or claimed efficiencies), the TA will evaluate these claims. Ultimately it is for the TA to decide whether any benefits to the public outweigh any

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			detriments resulting from a substantial lessening of competition.
14. Barriers to entry	Hutchison	• The TA should provide detailed analysis as to how barriers to entry are deemed to affect competition in relation to each type of carrier licence.	• The assessment of barriers to entry requires a detailed analysis of factors at the time a particular transaction is being considered by the TA. Like market definition, it is not possible and is not helpful for the TA to attempt to provide *pro forma* guidance on these kinds of issues.
	Telstra/Hong Kong CSL	• The TA should state how interconnection obligations could reduce apparent barriers to market entry, and how important the availability of spectrum is likely to be in this context in the mobile sector.	• The TA will consider these issues in the context of an actual merger, but outside that context it is not possible for him to make useful remarks beyond what already is stated in the Guidelines.
15. Precedents	PCCW	• Caution should be used when using EC precedents, while preference should be given to US and Australian case law given their underlying efficiency-enhancing policy objectives.	• The TA remains ever mindful of the need to apply section 7P in the context of the Hong Kong telecommunications market in accordance with its legislative intent and using relevant domestic precedent wherever possible.
16. Information disclosure	Hutchison	• The TA should address concerns over the extent of the information to be required from the parties to an M&A transaction, and in particular explain the relevance of particular information to his assessment.	• We have proposed measures to address industry's concerns. The Guidelines have been amended so that the information required from the merger proponents will be divided into two lists. The first list (List A) indicates the information that will be required in all cases. Some or all of the information in

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			the second list (List B) will be required depending on the transaction in question. • In accordance with international best practice, the TA also reserves the right to request further information where necessary. It will therefore be advisable for merging parties to consult early with the TA as to the kinds of information required, and the kinds of information not required, in a particular case.
	Telstra/Hong Kong CSL	• Information should not be required where the information is subject to legal professional privilege, or if to provide the information would be a breach of the law or if compliance would be overly burdensome. • The Guidelines should state that for simple cases, on a case-by-case basis, the TA will be willing to agree to the provision of less information than is described in the Annex to the Guidelines.	• In addition to the creation of a new "List A and List B" approach, the TA reiterates his interest in early discussions with merger proponents to identify relevant and irrelevant information for the purposes of his section 7P analysis. This case-by-case approach is something the TA always envisaged and will seek to encourage. • As to limitations on the information the TA can request, the merger parties are free to explain their reluctance to supply particular documents or other material, but they should also work co-operatively with the TA to ensure that the review process is undertaken as efficiently as possible.
	PCCW	• Information requirements as listed in the Annex to the Guidelines are excessively	• The TA's list of information required for him to assess a merger is not excessive by

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		burdensome, involve extremely commercially sensitive or privileged information, is purely speculative or irrelevant.	international standards, nor is it unusual. • Concerns over the disclosure of commercially sensitive information should be allayed by the TA's normal confidentiality safeguards and in any event cannot in themselves be a reason for not providing information for the purposes of a section 7P assessment.
17. Costs	Hutchison	• The Guidelines should reiterate Government comments that the level of charges for a minor M&A case and a major case would be around HK$55,000 and HK$110,000, respectively.	• The $200,000 cap on actual costs and expenses relating to the assessment of mergers as noted in the Guidelines, is prescribed in Schedule 3 of the Telecommunications Ordinance.
18. Periodical review	Telstra/Hong Kong CSL	• The TA should undertake a review of the Guidelines, involving industry consultation, every two years.	• The Guidelines have been amended to reflect the TA's intention to undertake periodic reviews of the Guidelines in the light of changing market circumstances and the emergence of new analytical approaches. We will take into account industry's suggestion on the timing for the review, but would like to point out that a review every two years would be unusual by international standards and may unduly increase the cost of the regulatory process for all concerned.
19. Other anti-competition provisions	PCCW	• The Guidelines should make clear that agreements relating to merger will only be assessed under section 7P, and not the other anti-competition prohibitions in the	• It is the TA's intention, as far as possible, to provide a clear merger framework and to remove uncertainties about the potential application of other provisions that might

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		Ordinance.	apply to mergers and acquisitions. Consequently the TA will rely primarily on the provisions of section 7P of the Ordinance when considering mergers and acquisitions. When a transaction falls within the scope of section 7P, the TA will not apply any of the following provisions to the same transactions : – sections 7K and 7L of the Ordinance; – equivalent provisions to sections 7K and 7L in licences issued under the Ordinance prohibiting anti-competitive conduct and abuses of dominance.

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