

**Consumer Council**

**Submission to the Panel on Information Technology and Broadcasting  
of the Legislative Council**

**on**

**Draft Merger Guidelines for Hong Kong Telecommunications Markets**

1. The Council welcomes this opportunity to provide comments to the Panel on its submission on Draft Merger Guidelines prepared by the Office of the Telecommunications Authority (TA) that explain how the TA will apply and enforce the new *Telecommunications (Amendment) Ordinance 2003*.

**Proposed methodology for assessing 'substantial lessening of competition'**

2. The proposed methodology, as set out in Sections 3 (Market Definition) and 4 (Competition Analysis) that the TA proposes to use in assessing the circumstances where there will, or will likely be a 'substantial lessening of competition' follows similar general principles as found in guidelines issued by competition authorities in other jurisdictions that administer general competition laws. As such, the Council is pleased that Hong Kong, in the telecommunications sector at least, is adopting established practice in competition analysis.

**Efficiencies**

3. The Council is also pleased to note that the TA has indicated in paragraph 4.80 of the Draft Guideline, that as far as claimed efficiencies are concerned, it will need to be demonstrated how each claimed efficiency would enhance the merged firms' ability and incentive to compete and that the onus will rest on the parties to the merger to provide convincing evidence that the claimed efficiencies will come to fruition.
4. In previous Council submissions to the Legislative Council regarding the extent of service coverage of telecommunications networks, the Council had stressed the need for the TA to recognise the importance of ensuring that competitive advances are made across all sectors of telecommunications users.
5. To assist in determining the effectiveness of the current regulatory regime as a means of promoting a competitive environment, the Council suggested the need for increased market information to gain a better understanding of the nature, extent and impact of competition in Hong Kong telecommunications markets. For example, apart from market share, such information typically should include the quality of service provided by the operators, consumer satisfaction and consumer benefits obtained as a result of competition.
6. The Council noted that in the UK, the telecommunications regulator, OFTEL, lists as effective competition indicators a range of factors, including:

*(A) Consumer outcomes.*

- Consumers enjoying “best or near best deal” in comparison with consumers in similar economies
- A wide range of services available to consumers
- Consumers satisfied with quality of service they receive
- Sets of prices, which broadly reflect underlying costs (i.e. absence of persistent excessive profits)

*(B) Consumer behaviour.*

- Consumers able to access information to help make effective choices.
- Consumer confident/knowledgeable in using information and in taking advantage of market opportunities.
- Absence of barriers for consumers to switch suppliers.

*(C) Supplier behaviour.*

- Active competition in price and quality and innovation
- Absence of anti-competitive behaviour
- Absence of collusion
- Meeting consumer needs
- Efficient provision of services
- Recent entry of new competitors

*(D) Market structure.*

- Limited entry barriers for potential competitors.
- Absence of inefficient suppliers.
- Limited ability of operators with market power in related markets to lever this market power into the particular market segment.
- Changes in market structure over time, especially a tendency to reduce concentration.

7. The Council is pleased to note that the Office of the Telecommunications Authority produced a *'Report on the Effectiveness of Competition in Hong Kong's Telecommunications Market: An International Comparison'* in June 2003 that addressed some of the above issues. However, the Council suggests:

- a) the collection of marketplace information based on the above factors should be conducted on an ongoing basis, to continuously gauge the state of competition in relevant markets; and
- b) that the TA specifies in the guideline that the above factors will be indicative of the overall approach the TA will take in assessing how any claimed efficiencies will be measured when considering claims by parties who are putting forward evidence of potential efficiencies arising from mergers or acquisitions.

**Public benefit arguments**

8. Section Five of the Draft Guideline addresses the power given to the TA in subsections 7P(1)(b) and 7P(7)(b)(iii) to allow a merger or acquisition to proceed even though he "forms an opinion" that it has the effect or likely effect of substantially lessening competition. The test that determines whether the TA

should use this power to allow an anticompetitive merger or acquisition is whether he is satisfied there is a benefit to the public that outweighs the detriment to the public constituted by the substantial lessening of competition.

9. The Guideline notes in Section Four that the TA will interpret a substantial lessening of competition in terms of the creation or enhancement of market power. Market power is defined as being a situation where a firm is able to act without competitive constraint in a market with regard to the major determinants of competition; i.e. prices, choices and quality.
10. The necessity for making claims of public benefit therefore only need to be made and assessed if the TA has formed the opinion that a merger or acquisition creates or enhances market power that allows the subject licensee to act without competitive constraint with regard to prices, choices and quality.
11. The TA notes in paragraph 5. 3 that a party claiming the existence of a public benefit in these circumstances may be required to propose measures, including commitments guaranteed by performance bonds or the modification of licence conditions to ensure that the claimed public benefit will be realized and sustained. The Council welcomes this standpoint taken by the TA.
12. The legislation does not define what constitutes a benefit to the public in these circumstances; the matter being left to the TA's discretion. The TA's guideline therefore presents an opportunity for the TA to clearly set out his understanding of public benefit circumstances he will use to allow a merger or acquisition to proceed, notwithstanding the fact that he has, after investigation, formed the opinion it will allow the subject licensee to act without competitive constraint with regard to prices, choices and quality.
13. The TA indicates (at paragraph 5.4) that an example of a such a public benefit is "any consumer benefit" and further notes that a benefit may include:
  - a) lower prices as a result of improved efficiencies arising from the merger or acquisition;
  - b) more innovation;
  - c) wider choice;
  - d) better quality of services as a result of investment in network infrastructure;
  - e) engagement in research and development activities; or
  - f) continuity of service that cannot be achieved without the merger or acquisition.
14. However, there appears to be an inconsistency in listing the factors (a) to (d) above, as being benefits to the public that the TA will define as outweighing the substantial lessening of competition that, in his opinion, is posed by a particular merger or acquisition. While factors (a) to (d) are benefits to the public, the fact

that they will exist, or will be likely to exist as a result of a merger or acquisition, should mean that competition will not be substantially lessened. In these circumstances the TA will not need to proceed with a weighing process and consider any other factors that will outweigh the detriments posed by a substantial lessening of competition.

15. Accordingly, it would seem that the TA's discretion to allow a merger or acquisition to proceed, notwithstanding his forming the opinion that it substantially lessens competition, should rightly be confined to factors external to competition; such as factors (e) and (f).
16. Under the Telecommunications Ordinance, competition as a public benefit is protected by the prohibition against mergers and acquisitions that will lead to a substantial lessening of competition. If that benefit is put to one side, as the TA can do when he forms an opinion that a substantial lessening of competition will arise but he will entertain an argument that he will allow the merger or acquisition anyway, the TA will need to be clear on what a public benefit (where it is not a competition benefit) actually is.
17. More detail from the TA on how he will exercise his discretion to apply a non competition public benefit such as those in (e) and (f) would be helpful, in order to assist consumers in understanding the circumstances where the TA will allow a merger or acquisition to proceed, notwithstanding that he has formed an opinion that it is anti competitive.

Consumer Council  
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