

CTB CR 7/13/14 (04)XI

(852) 2189 2233

(852) 2827 0373

17 May 2004

The Honourable Sin Chung Kai  
Chairman  
Panel on Information Technology and Broadcasting  
Legislative Council  
3/F, Citibank Tower  
3 Garden Road  
Central  
Hong Kong

Dear Mr Sin,

**Telecommunications Authority Guidelines  
Mergers and Acquisitions in  
Hong Kong Telecommunications Markets (M&A Guidelines)**

We refer to the letter by Hutchison Telecommunications (Hong Kong) Limited, SmarTone Mobile Communications Limited and Sunday dated 10 May 2004 on the captioned subject (the letter). Our response in respect of the issues raised in the letter are set out below.

First, the letter suggests that the M&A Guidelines fall short of the expectation that they would specifically address how the relevant principles will be applied to the local telecommunications market. It also suggests that the

opinions provided by Professor Whish of King's College London have not addressed the issue of how adequate the M&A Guidelines are in addressing the special features of the telecommunications industry and in particular, those of the Hong Kong telecommunications market.

As noted previously, we have taken on board the industry's requests for more specific guidelines as far as practicable. We have inserted into our M&A Guidelines, where appropriate and applicable, examples and guidance to illustrate how the relevant merger and acquisition principles would apply in Hong Kong's telecommunications market. 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 a decided case from the EU (Vodafone Airtouch) on what constitutes coordinated effect of a merger. These have made our M&A Guidelines more specific to the telecommunications sector than similar guidelines in other jurisdictions.

At the same time, we have been careful not to prejudge or appear to be prejudging any particular cases or issues that might arise in the future. In this sense, we have understood the responsibility that all competition regulators have, as Professor Whish notes in his expert opinion, of striking "the correct balance between providing practical advice to the business, investment and legal communities as to what might be expected of a system of merger control on the one hand and avoiding too much hypothesis and speculation, which can lead to a loss of clarity, on the other." This was one of the issues that Professor Whish explicitly considered when he concluded, in his expert view and having regard to similar guidelines in other jurisdictions and the Telecommunications (Amendment) Ordinance 2003, that the M&A Guidelines provide a sound basis for the application of the Ordinance. It is also relevant to his broader conclusion that the M&A Guidelines are consistent with the regulatory policy for mergers and acquisitions of other jurisdictions including the US, EU, UK and Australia.

Secondly, the letter suggests that many parts of the M&A Guidelines are repeated verbatim in the "Draft Telecommunications Authority Guidelines on Anti-competitive Conduct in Hong Kong Telecommunications Market" (the Draft Anti-competitive Conduct Guidelines). It is suggested that the industry would expect that possible flaws or ambiguities in the M&A Guidelines should be fully and satisfactorily resolved as the M&A Guidelines

may become a precedent for the Telecommunications Authority to follow in other guidelines concerning competition analysis.

Contrary to the suggestion of the letter, our M&A Guidelines are well balanced, appropriate and in line with international best practices. They provide a sound basis for the application of the Telecommunications (Amendment) Ordinance 2003 as supported by Professor Whish. We do not believe there are flaws or ambiguities that need to be resolved as suggested by the letter.

We would like to take this opportunity to explain why some parts of the M&A Guidelines appear in the Draft Anti-competitive Conduct Guidelines which are a separate set of draft guidelines dealing with anti-competitive conduct under sections 7K, 7L and 7N of the Telecommunications Ordinance. The reason is that in assessing a merger and acquisition, competition analysis needs to be carried out to examine the effect of the merger and acquisition on *the competition of the relevant market*. Likewise, in assessing an anti-competitive conduct, more or less the same competition analysis also needs to be carried out to examine the effect of the conduct *on the competition of the relevant market*. Common concepts such as market definition and barriers to entry are necessary in carrying out such competition analysis. As a rough indication, around 18% of the Draft Anti-competitive Conduct Guidelines consists of words from the M&A Guidelines, as opposed to over 50% suggested by Hutchison Telecommunications (Hong Kong) Limited in its letter dated 17 April 2004. The parts relating to the common concepts in both the M&A Guidelines and the Draft Anti-competitive Conduct Guidelines are consistent with each other in letter and spirit. Indeed, overseas merger and acquisition guidelines and anti-competitive conduct guidelines often refer to the same basic concepts in their competition analysis. For instance, the UK Office of Fair Trading merger guidelines and the draft anti-competitive conduct guidelines both refer to the same guidelines on market definition.

We would like to add that the Telecommunications Authority is separately conducting consultation on the Draft Anti-competitive Conduct Guidelines. If industry members have any views on this set of guidelines, they are welcome to submit them to the Telecommunications Authority.

## **Conclusion**

The M&A Guidelines published on 3 May 2004 are the outcome of two rounds of extensive consultation, and various meetings between the Telecommunications Authority and interested parties. We also briefed the Panel three times in October 2003, April 2004 and May 2004. While recognising that it is not possible to have all industry members agreed on every provision of the M&A Guidelines, we have incorporated many of their comments without deviation from international best practices. The M&A Guidelines, as they now stand, reflect a proper balance between providing certainty to the industry and protecting consumers.

With the publication of the M&A Guidelines on 3 May 2004, we are in a position to bring the Telecommunications (Amendment) Ordinance 2003 into force. We have gazetted the necessary commencement notice on 14 May 2004. We appeal to Members' support of our proposed commencement of the Ordinance on 9 July 2004. Early commencement of this piece of pro-consumers and pro-business legislation would be in the interest of all concerned. The Consumer Council and the Hong Kong Telecommunications Users Group in particular urged this should take place early.

Yours sincerely,

( Mrs Marion Lai )  
for Secretary for Commerce,  
Industry and Technology

cc

DG Tel (Attn : Ms Gracie Foo  
Ms Jenny Chung  
Mr Peter Macmillan)  
Clerk to ITB Panel (Attn: Miss Polly Yeung)