

Consumer Council
Speaking Notes on Draft Merger Guidelines for Hong Kong Telecommunications Markets

Thank you Chairman for this opportunity to provide comments to the Panel on the Council's submission on the TA's Draft Merger Guidelines.

I would like to briefly summarise the main points in the Council's submission that has been made to OFTA, and has also previously been copied to the Panel.

Proposed methodology for assessing 'substantial lessening of competition'

With regard to the proposed methodology that the TA proposes to use in assessing whether mergers or acquisitions will result in a 'substantial lessening of competition' the Council is pleased to note that this follows similar general principles as found in guidelines issued by competition authorities in other jurisdictions that administer general competition laws.

Efficiencies

The Council is also pleased to note that the TA has indicated that the onus will rest on the parties to a merger or acquisition to provide convincing evidence that any claimed efficiencies will come to fruition.

In previous submissions the Council has stressed the need for the TA to recognise the importance of ensuring that competitive advances are made across all sectors of telecommunications users.

The Council has in the past 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.

In its current submission to the TA the Council has repeated the suggestion and made reference to the effective competition indicators that the UK telecommunications regulator, OFTEL, lists and publishes. Those indicators are Consumer outcomes, Consumer behaviour, Supplier behaviour and Market structure.

The Council is pleased to note that OFTA has 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 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 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

The Council has also sought more information in the Draft Guidelines on the power given to the TA 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 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.

The Guideline notes 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.

The necessity for parties to claim there is a public benefit arising from a merger or acquisition will therefore only arise where the TA has formed the opinion that a merger or acquisition creates or enhances market power. The legislation does not define what constitutes a benefit to the public in these circumstances; the matter being left to the TA's discretion.

However, the examples of public benefits listed in the Draft Guideline include benefits such as lower prices as a result of improved efficiencies arising from the merger or acquisition; more innovation; wider choice; and better quality of services as a result of investment in network infrastructure.

Whilst these are undoubtedly benefits to consumers, the fact that they will exist 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.

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 other factors external to competition. The TA has noted two such factors in the Draft Guideline, for example, engagement in research and development activities; and continuity of service that cannot be achieved without the merger or acquisition. However, there is no further explanation as to how these, or other non competition public benefits will be determined.

Under the *Telecommunications Ordinance*, consumer welfare as a public benefit is protected by the prohibition against anticompetitive mergers or acquisitions. 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 to allow the merger or acquisition to proceed anyway, consumers are rightly justified in seeking clear and detailed explanations as to how he will exercise his discretion.

October 2003