

Consumer Council

Response to Questions Directed to the Council by the Panel on Information Technology and Broadcasting of the Legislative Council on Draft Merger Guidelines for Hong Kong Telecommunications Markets

Introduction

1. On 23 October 2003, at the Panel on Information Technology and Broadcasting in the Legislative Council, the Consumer Council was asked to consider two issues in the eventuality of another round of consultation on the above guidelines:

(a) the need for safe harbours and

b) what consideration failing firms should receive when they are being acquired by a competitor

'Safe harbours'

2. Consumer Council considers that the Telecommunications Authority (TA) should not be bound to a position where he categorically states he will not examine a merger below a certain market share, as a 'bright line' test. While a categorical statement in relation to a particular market share figure would provide some certainty to industry, there could be some circumstances where the TA would wish to examine a particular merger or acquisition below a nominated level, in order to be totally satisfied. Given the fact that there will be opportunity for informal discussions with the TA prior to a transaction, the certainty that the industry requires could be provided through this mechanism.
3. Consumer Council also considers that although an analysis of market concentration based on the Herfindahl-Hirschman Index can be instructive and is used by some other competition authorities, this fact does not make the index, as it is presently constructed and applied by other competition authorities (for example in the United States) appropriate for assessing mergers and acquisitions in Hong Kong telecommunications markets.

Failing firm

4. In relation to acquisitions of 'failing firms', Consumer Council considers that the TA should examine such acquisitions under the same test as applies to mergers or acquisition of other firms. If the TA forms the view that an acquisition of a failing firm would breach the competition test under the Ordinance, he has the power to use the public benefit test under the Ordinance, if justified, to allow the acquisition to proceed.
5. In these circumstances, the TA would need to provide more details (as noted in the Council's original submission to LegCo) as to how he will define what constitutes a public benefit in these circumstances.