

“Merger Review in Hong Kong: Why and How Mergers Affecting Competition should be Scrutinized”

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Why review mergers?

- Anti-competitive behaviours are more prone to happen in more concentrated markets.
- ‘Prevention is better than cure’ – it is more cost effective to stop a player becoming dominant than to stop it from abusing its dominance.
- Merger review is more difficult in small economies:
 - Sensitivity to structural change
 - Under certain conditions, even mergers that reduce competition can enhance efficiency

Two principal risks...

- If merger review provisions are included but their enforcement is delayed:
 - businesses will hurry to conclude mergers that reduce competition, before those will be blocked.
- If structural safeguards are ruled out...
 - the conduct rules are not apt to control transactions that affect market structure, and markets will become less competitive despite the CC's best efforts.

Outline – Three Themes

- EU experience shows that conduct rules are a poor substitute for merger review rules
- HK experience with merger review under telecommunications policy shows structural safeguards can be applied without great cost or disruption to industry
- A review regime has to be tailored to HK circumstances, particularly to:
 - Minimise costs and delay
 - Not prevent mergers that would enhance efficiency

In the EEC, merger rules were left out...

- 1957 - Treaty of Rome forbade collusive agreements and abuse of a dominant position
- 1966 - Memo on the Problem of Concentration
- 1973, 1981, 1984, 1986 - draft resolutions for merger control; failed to win sufficient support
- 1989 - Merger Regulation finally passed, commencing in 1990

Demand for merger control legislation grew over time...

- The activism of the Commission and ECJ resulted in:
 - Art. 86 applying where a dominant undertaking proposed to make an acquisition - *Continental Can* (1972)
 - Art. 85 applied, without dominance, where an acquisition might be instrumental to a collusive arrangement - *Philip Morris* (1987)
 - Businesspeople reacted against legal uncertainty and procedural unpredictability.
 - Member States sought to reassert policy control.
- In 1989 Member States finally agreed on thresholds and centralisation, passing the Merger Regulation.

Merger Review a late addition to HK's Telco Ordinance

- OFTA created in 1993
- Domestic fixed service was a monopoly until 1995
- International telephony was a monopoly until 1999
- Competition conditions in operators' licences
- Pro-competitive regulations from 2000
- Merger review legislated for in 2004 (TO s 7P)

Telco Merger Review

- 7 mergers have been reviewed since 2004:
 - No directions to prevent acquisition or require divestiture
 - No conditional approvals
 - 5 / 7 approved on basis of “preliminary assessment”
 - 2 / 7 approved by way of formal consent
- Why no directions?
 - the industry is highly competitive
 - The deals were pro-competitive or neutral in effect.

Is there a role for merger clearance in competitive markets?

- Merger review ensures competitive markets stay competitive
- Merger review deters anti-competitive mergers from being pursued
- Prompt decision making by OFTA keeps costs and delays to minimum

Elements of a merger review regime suitable for HK

- 1. Window for commencement of review—OFTA has two weeks from notice of a “change.”
- 2. Limited review period – NZCC must determine clearance applications within 10 working days or a period agreed with applicant.
- 3. Commission should set out performance targets for determination of merger reviews, in its Annual Plan.

Elements of a merger review regime suitable for HK

- 4. Conduct rules – should be disapplied to transactions that are subject to merger review.
- 5. Market concentration indicia – the CR4 and HHI measures have a role, but thresholds need to make allowance for small market size.
- 6. Efficiency gains – must be expressly considered, balanced against detriments of increased concentration.

Elements of a merger review regime suitable for HK

- 7. Informal pre-assessment – should be available, on a non-binding basis
- 8. Applicants must do their bit to help:
 - Procure expert input
 - Provide complete information
 - Project manage their application
 - Respond promptly to questions and meetings invitations
 - Not change the transaction part-way
 - Not press for confidential treatment of every piece of info.

Thank you

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