

FORM M

INFORMATION REQUIRED FOR AN APPLICATION FOR A DECISION TO EXCLUDE A MERGER OR PROPOSED MERGER FROM THE APPLICATION OF THE MERGER RULE

This Form lists the information and supporting documents which should be provided when making an application for a decision under section 11 of Schedule 7 of the Competition Ordinance (the “Ordinance”).

Undertaking(s) submitting the application (the “Applicant”) should read the *Guideline on the Merger Rule* carefully. An applicant applying for a decision under section 11(2)(b) (statutory bodies, specified persons and persons engaged in specified activities) is not required to provide the information relating to the business activities, market definition, market shares and competition assessments in paragraphs 4 to 7. **Where the application is in respect of a proposed merger which is not yet in the public domain, the applicant must give consent to the Commission to publicise the proposed merger for inviting representations from the relevant parties pursuant to the statutory requirements, otherwise the application will not be processed.**

The applicant is required to sign a declaration in the form set out in paragraph 10 declaring and confirming that all information given in this Form and all documents annexes hereto are complete and correct to the best of its knowledge and belief. The information should be provided, where relevant, with supporting reasons, evidence (where possible from independent sources) and pertinent examples. Provision of incomplete information may result in the Commission not being able to process the application. The Commission may request further information from the applicant to assist in its review and expects applicants to offer prompt and full cooperation. Pursuant to section 15 of Schedule 7 of the Ordinance, the Commission may rescind a decision made if it has reason to believe that the information provided by a person involved in the merger, on which it based its decision was incomplete, false or misleading in a material particular.

If the Applicant considers that the Commission should treat any item of information submitted under this Form as confidential, the applicant must also provide a non-confidential version of the submission, with the item of information alleged to be

confidential redacted. The non-confidential version should also contain an annex marked “confidential information” identifying each item of information which has been redacted from the non-confidential version and providing a written explanation as to why the information should be treated as confidential. The same treatment should also be extended to supporting documents accompanying this Form containing any information that the applicant considers should be treated as confidential.

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1. GENERAL INFORMATION

- 1.1 Full name and address¹ of the applicant and the contact point of the applicant (his/her name and contact details) with whom the Commission shall communicate in relation to the application.
- 1.2 Identify each party to the merger or proposed merger and provide the registered address of each of the merging parties. Also identify the carrier licensee(s) if the carrier licensee(s) is not a merging party but is nonetheless under the control of a merging party.
- 1.3 Provide a short summary (no more than 250 words) which does not contain any confidential information of the merger or proposed merger which is the subject of the application. The short summary should identify the parties to the merger or proposed merger and the carrier licensee(s) concerned, and describe the nature of the transaction. This summary may be included as part of a non-confidential summary of the application for publication at the Commission's website.
- 1.4 Where the declaration to be made in the Form is signed by an authorized representative of the applicant(s), provide written proof of that representative's authority to act on the applicant(s)'s behalf. The written proof must contain the name and designation of the persons granting such authority.
- 1.5 Where the competition authorities in other jurisdictions have been (or will be) notified of the merger or proposed merger, please indicate the date and status of each notification. The applicant is requested to notify the Commission of any material change in status (for example, approval, unfavourable decision, negotiation of commitments, etc.) in relation to any of the notifications to the overseas competition authorities.

2. OWNERSHIP STRUCTURE

- 2.1 Specify to which corporate group each of the merging parties belongs.
- 2.2 Provide:

¹ Including registered office, where appropriate, and principal place of business, if different.

- (a) an overview of the ownership structure of each of the merging parties and the concerned carrier licensee(s) before the merger; and
- (b) an overview of the ownership structure of the merged entity and the concerned carrier licensee(s) after the merger.

Illustration by the use of organization charts or diagrams should also be provided as far as possible.

- 2.3 Identify and explain any links, formal or informal, between the respective merging parties and the concerned carrier licensee(s) (including interconnected bodies and other persons identified in the preceding question).
- 2.4 For each of the merging parties and the concerned carrier licensee(s):
 - (a) list and provide all relevant information about the registered entities in Hong Kong, including their trading/business/brand names and their business activities in Hong Kong, and particularly of those relating to telecommunications;
 - (b) give a brief overview of the overall activities worldwide, and particularly of those relating to telecommunications.
- 2.5 List all the telecommunications licences (including carrier and non-carrier licences) and broadcasting licences under the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (Cap. 562) held by the merging parties and the subsidiaries under their control.
- 2.6 List all the other companies (including joint ventures) in the telecommunications sector in Hong Kong in which the merging parties or the subsidiaries under their control directly or indirectly hold more than 5% of the voting rights, issued share capital or other securities, and state the percentage held.
- 2.7 List any members of the board of merging parties who are also members of the boards of any other companies in the telecommunications sector in Hong Kong, and identify those other companies, and the position held.

3. THE MERGER TRANSACTION

3.1 Describe the merger transaction by:

- (a) the nature of the transaction by reference to section 3 of Schedule 7 of the Ordinance (for example, acquisition of sole or joint control; acquisition of full control or decisive influence; full-function joint venture; contract or other means of conferring direct or indirect control; acquisition of assets);
- (b) whether the merger involves all, or only part, of the business of the merging parties;
- (c) the involvement of the carrier licensee(s) in the transaction by reference to section 4 of Schedule 7 of the Ordinance;
- (d) the role(s) of any telecommunications or broadcasting licensees involved in the transaction;
- (e) the value of the transaction (for example, the purchase price or the value of the assets involved);
- (f) the proposed, expected or past dates of major events designed to bring about the completion of the merger;
- (g) the completion date or expected completion date of the merger; and
- (h) any financial or other support received from any source by any of the merging parties and the nature and amount of this support.

3.2 Explain the strategic and economic rationale for the merger.

3.3 In the event that the applicant wishes to propose any conditions to address possible competition concerns arising from the merger, please describe the proposed conditions and the way in which they will address these competitive concerns.

4. ACTIVITIES OF THE MERGING PARTIES

4.1 In the last financial year, provide information on each merging party's:

- (a) total (group) worldwide turnover (both overall and those related to telecommunications); and

- (b) total (group) Hong Kong turnover (both overall and those related to telecommunications);
- 4.2 List all the products (including goods and services; both overall and those related to telecommunications) offered or supplied by the merging parties and their subsidiaries in Hong Kong, especially those offered or supplied by the carrier licensees concerned.
- 4.3 Where products offered or supplied by the merging parties and their subsidiaries overlap, identify the areas of overlap and provide each party's turnover in respect of each of the overlapping products and indicate the respective proportions of the relevant merging party's total worldwide and Hong Kong turnover that this represents.
- 4.4 Identify any products in respect of which the merging parties are competitors or potential competitors in Hong Kong.

5. MARKET DEFINITION

- 5.1 Provide a definition of the relevant product and geographic markets for the purposes of this application with rationale in support of such definition.

6. MARKET SHARES

- 6.1 For each relevant product and geographic market identified in paragraph 5.1 above, provide the following data for the last three years:
 - (a) total market size (value and volume);
 - (b) market share estimates (value and volume) for each of the merging parties (and any affiliated or connected undertakings) and the competitors in the market.

For both (a) and (b), please explain any significant year-on-year variations.

7. COMPETITIVE ASSESSMENT

Counterfactual

7.1 If the proposed merger does not proceed or the completed merger did not take place, describe what is likely to happen to the business operations of each of the merging parties in the relevant markets identified in paragraph 5.1 above. Any arguments and evidence relevant for a failing firm defence should be presented here.

Competitors

7.2 With specific reference to Hong Kong, for each of the relevant markets identified in paragraph 5.1 above,:

- (a) describe and name each of the main competitors in the relevant market;
- (b) describe the nature of competition (for example, do firms compete on price, quality, innovation etc);
- (c) describe the cost and the time it takes for a customer to switch between suppliers; and
- (d) describe the ability of actual or potential competitors to expand or utilize their existing supply capacity together with an estimate of their respective unused supply capacity.

Barriers to entry or expansion

7.3 Give an estimate of the capital expenditure required to enter the relevant market(s) identified on a scale necessary to gain a 5% market share, both as a new entrant, and as a company that already has the necessary technology and expertise, and estimate to what extent this cost is recoverable should the firm decide to exit the market.

7.4 Give an estimate of the scale of annual expenditure on advertising/promotion relative to sales required to achieve a market share of 5%.

7.5 With specific reference to Hong Kong, provide details of any other factors affecting entry, for example, planning restraints, technology, R&D requirements,

regulatory barriers, IP rights, length of contracts, etc.

7.6 Give details of instances of market entry and exit in the past five years.

7.7 Identify any companies that would be in a position to enter or expand in the relevant market(s) identified in a manner that would be sufficiently timely and likely and of such scope as to adequately constrain the merged entity.

Countervailing buyer power

7.8 For each of the relevant markets identified:

- (a) Identify the main business activities of the top five customers of each merging parties' and/or the concerned carrier licensees under their control in the relevant wholesale market(s) in Hong Kong and worldwide (if applicable). Briefly describe the business relationship such customers have with each of the merging parties;
- (b) Indicate the proportion of the total revenue of the merging parties and/or the concerned carrier licensees under their control in the relevant wholesale market(s) in Hong Kong and worldwide (if applicable) each top five customer represents.
- (c) Indicate whether the merging entity would be constrained in its actions by the conduct of buyers in the relevant markets in Hong Kong, and if so, the extent they would be able to do so.

Unilateral effects

7.9 Describe the nature and extent of competition between the merging parties and/or the concerned carrier licensees under their control before the merger. Indicate the extent to which:

- (a) customers view the products offered by these parties as the “next best alternative”; and
- (b) the merging parties and/or the concerned carrier licensees under their control supply differentiated products.

7.10 Give a comprehensive assessment of the competitive effects of the merger in

Hong Kong, covering the extent to which the merged entity and/or the concerned carrier licensees under their control would be constrained, post-merger, in its actions by the conduct of:

- (a) existing competitors;
- (b) potential entrants;
- (c) buyers; or
- (d) any other factors.

Co-ordinated effects

7.11 Identify and discuss the various characteristics of the relevant market(s) that could either facilitate or impede co-ordination. How would the merger affect the likelihood of attaining a coordinated outcome in those market(s)?

Cooperative effects of a joint venture

(To be completed if the transaction is a joint venture)

7.12 Does/Will the joint venture function as an autonomous economic entity on a lasting basis? If so, how?

7.13 Do parent businesses/companies retain activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture, or in a neighboring market?

7.14 If the answer to paragraph 7.13 is affirmative, for each of the relevant markets referred there, indicate:

- (a) the activities retained by the parent companies;
- (b) the turnover of each parent company in the preceding financial year, and the expected turnover of the joint venture; and
- (c) the market share of each parent company.

7.15 If the answer to paragraph 7.13 is affirmative, explain why, in your view, the creation of the joint venture will not or does not lead to co-ordination between independent undertakings that restricts competition within the meaning of the

First Conduct Rule.

8. SUPPORTING DOCUMENTS

8.1 Ensure that the following documents (where relevant) are included in the application:

- (a) all documents necessary to support statements and explanations made in this Form;
- (b) in regard to paragraph 1.4, written proof of the representative's authority to act on the applicant's/applicants' behalf;
- (c) copies of the final or most recent version of all documents bringing about the merger, whether by agreement between the merging parties, acquisition of a controlling interest or a public bid;
- (d) in the case of a public bid, a copy of the offer document; if it is unavailable at the time of notification, it should be submitted as soon as possible and not later than when it is posted to shareholders;
- (e) copies of the most recent annual report and accounts (or equivalent for unincorporated bodies) for each of the merging parties and the concerned carrier licensees under their control;
- (f) copies of all internal documents or materials prepared for the board of directors, individual directors, supervisory body or shareholders of the merging parties indicating the transaction structures, and the rationale and/or effects of the merger, as well as copies of all the minutes of meetings in which the transaction was discussed;
- (g) copies of all analyses, reports, studies, surveys (including consumer surveys), and similar documents which the merging parties possess or are prepared for the purpose of assessing, analysing or giving a view on the merger or the competitive conditions of the relevant markets with respect to market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions. For each of these documents, indicate (if not contained in the document itself) the date of preparation and the designation of each individual who prepared the document;
- (h) copies of the two most recent business plans for each merging party and/or the concerned carrier licensees under their control and, where available, a

copy of the (draft) business plan for the merged entity and/or the concerned carrier licensees under their control; and

- (i) copies of any relevant market research reports that are available to either of the merging parties.

Where any of the above documents are not available in Chinese or English, applicants should provide a Chinese or English translation of the document.

9. GROUNDS FOR EXCLUSION

9.1 Demonstrate that the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions under the Ordinance.

9.2 Demonstrate that the application raises a question of exclusion under the Ordinance for which there is no clarification in existing case law or decisions of the Commission.

9.3 Where the applicant applies for a decision that an exclusion under section 3 (application to statutory bodies) or section 4 (application to specified persons and persons engaged in specified activities) of the Ordinance applies, provide evidence in support that section 3 or section 4 (as the case may be) applies to the merger or proposed merger.

9.4 Where the applicant applies for a decision that an exclusion under section 8(1) of Schedule 7 of the Ordinance applies i.e. that the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong, provide the following information with supporting evidence:

- (a) specify the types of efficiencies which result from the merger and explain how such efficiencies are created through the merger;
- (b) explain how the efficiency gains would occur as a direct result of the merger or and why they would not be achieved in the absence of the merger;
- (c) provide estimates on when these efficiency gains would be realised after the

implementation of the merger;

- (d) provide a quantitative estimate on the magnitude of each claimed efficiency gain;
- (e) explain how each claimed efficiency gain would enhance the merging parties' ability and incentive to compete; and
- (f) provide a quantitative estimate on how the claimed efficiency gains would outweigh the adverse effects caused by any lessening of competition in the relevant telecommunications market.

10. DECLARATION

Under Section 172 of the Competition Ordinance, it is an offence, punishable by a fine or imprisonment or both, to provide documents or information which are false or misleading in a material particular if the undertaking or person providing it knows that it is false or misleading, or is reckless as to whether it is. If the undertaking or person is a body corporate, its officers may be guilty of an offence under Section 175 of the Competition Ordinance.

Declaration

The undersigned declares and confirms that all information given in this Form M and all documents annexed hereto are complete and correct to the best of their knowledge and belief, and that all estimates are identified as such and are their best estimates based on the underlying facts.

Signature(s) _____

Name(s) (in block capitals):

Function(s):

Date:

FORM M

ACKNOWLEDGEMENT OF RECEIPT

This acknowledgement of receipt will be returned to the address inserted below if the Applicant(s) provides the information requested below.

To be completed by the Applicant(s)

To: (name and address of Applicant(s))

Re: The application dated (date of application) concerning (brief description of subject matter) involving the following undertakings: (names of undertakings) [and others]

To be completed by the Commission

Received on:

Registered under reference number:

Case Manager Contact Details:

Please quote the reference number in all correspondence with the Commission.