

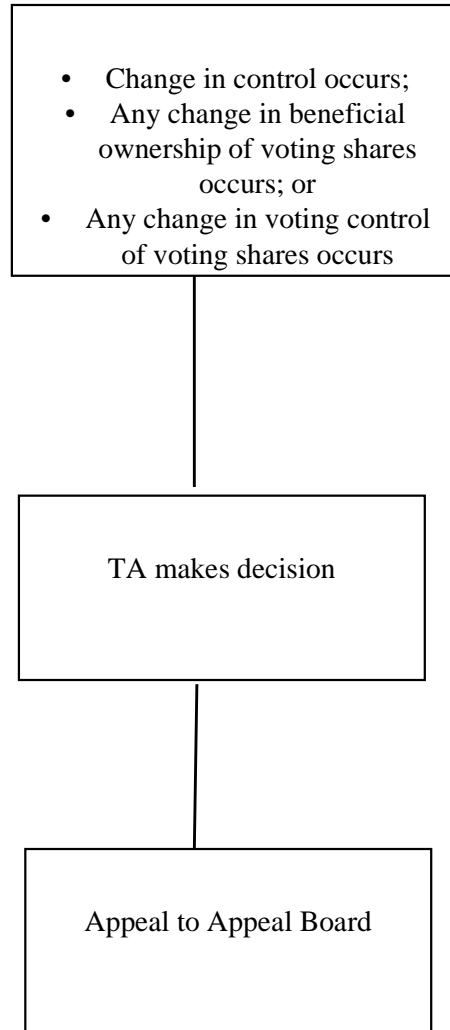
Telecommunications (Amendment) Bill 2002

SIN Chung-kai
9 June 2003

Agenda

- Overview of the Administration's proposal and industry's proposal
- Change in Control Concept
- Role of the Appeal Board in Decision Making
- Approving the Guidelines
- Public interest
- Recovering Costs

Overview of the Administration's proposal



As drafted by the Administration the circumstances in which the TA may intervene in transactions is very broad. It includes (amongst other things):

- the change in ownership of one share (even where the licensee is listed and has millions of shareholders); and
- a person acquiring a 15% interest in a licensee (such been defined as a “change in control”).

An investigation may only be commenced within 1 month of the change in control.

The TA must complete the investigation within 3 months.

TA applies guidelines determined by the TA.

No time limit on how long appeal may take.

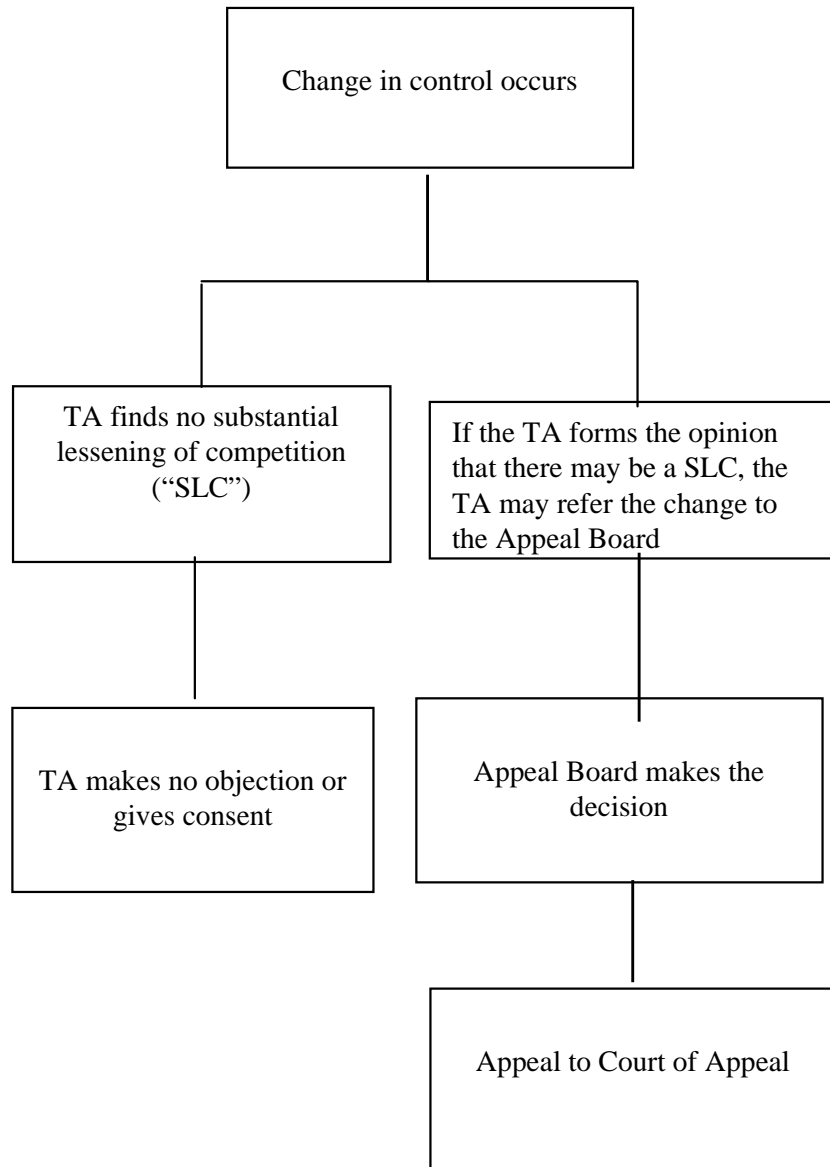
The Appeal Board does not need to apply the guidelines.

Overview of the Industry's proposal

The Industry has developed an alternative to the government's proposal which aims to:

- Maximize predictability and objectivity so as not to deter investments;
- Strike a balance between the parallel objectives of protection of consumer interest and encouraging a business friendly environment;
- Ensure a fair process of review that limits the burden to investors and operators but without impairing consumer interest in competition.

Overview of the Industry's proposal



Note: The above diagram does not represent all issues but is merely intended to convey some key concepts.

Only covers real changes in control. The concept covers:

- acquiring >30% interest in a licensee (this is the same threshold as used in the SFC's Code on Takeovers and Mergers and Share Repurchasers and the HKSE Listing Rules)
- a person becoming the largest single shareholder;
- a person otherwise being able to exercise control;
- a carrier licensee acquiring >15% interest in another carrier licensee in the same market.

The TA has 2 weeks to decide to investigate the change in control and a further 4 weeks to decide if he should refer the change to the Appeal Board.

The TA must apply guidelines which have been approved by the Appeal Board.

Where the TA believes that a transaction is likely to have a SLC, the Appeal Board is the primary decision maker. Vesting such power in a board is consistent with international practice. Moreover, a board is constituted by people from different disciplines and can draw on a much wider pool of expertise.

The Appeal Board must make a decision within 10 weeks.

Change in Control Concept

The Administration has provided for a very wide set of circumstances for when section 7P(1) applies. It covers:

- (a) Where there is a change in control;
- (b) Where there is a change in the beneficial ownership of any of the voting shares in a carrier licensee; and
- (c) Where there is a change in the voting control of any of the voting shares in a carrier licensee.

Change in Control Concept (continued)

- The industry considers that the scope of section 7P is far too wide. It should only apply where there has been a true change in control.
- The industry accepts the general language proposed by the Administration in the proposed section 7P(12)(c). This reflects the core concept of true/effective change in control.

Change in Control Concept (continued)

- The industry is also prepared to accept a deemed change in control where a person becomes beneficial owner of 30% of the voting shares of a licensee or 30% of the voting shares in a licensee (instead of 15%).
 - This 30% threshold is consistent with the thresholds in the:
 - Securities and Futures Commission’s Code on Takeovers and Share Repurchases; and
 - The Hong Kong Stock Exchange’s threshold for notifying cross ownership of competing businesses.
- 15% is only used as threshold for notification of interest in other countries, not as threshold for requiring regulatory approval.

Change in Control Concept (continued)

- The industry's view is that the proposed sections 7P(1)(b) and (c) should be deleted. These provisions are far too wide.
- The industry is willing to accept, in addition, that:
 - if any person becomes the single largest shareholder of a licensee (irrespective of the % of shareholding); or
 - if another licensee in the same telecommunications market as the licensee becomes the beneficial owner or voting controller of more than 15% of the voting shares in the licensee,then the TA should have the rights under section 7P.

Role of the Appeal Board in Decision Making

- The government has proposed that the TA will be the decision maker and that the TA will have a period of one month in which to decide whether or not to investigate a change and then a further 3 months to consider whether he should issue a direction.
- A licensee is given a right of appeal to the Appeal Board. There is no time limit on how long the Appeal Board may take to make a decision.

Role of the Appeal Board in Decision Making (continued)

- Industry requires a decision by an appropriate body in a quick timeframe.
- Most mergers & acquisition transactions are time critical. Any delays in decision making or need to appeal will deter such transactions and associated investment.
- Statistically, very few parties to M&A transactions appeal matters. Transactions are very often aborted as a result of first level decisions.
- International best practice is to vest such decision making in a specialist board rather than an individual (such as the TA). Moreover, the Appeal Board currently consists of 12 members from different disciplines and can draw on a much wider pool of expertise.

Role of the Appeal Board in Decision Making (continued)

- Accordingly, the industry proposes that:
 - The TA is given a short period to form an opinion that a change in control is likely to have a SLC as to warrant further investigation, in which case the TA needs to refer the matter to the Appeal Board.
 - Where a transaction is reasonably believed to have a SLC, the Appeal Board is the primary decision maker. The Appeal Board would be required to make a decision in a reasonable timeframe of 10 weeks.
 - In order to address concerns raised by the Administration the industry suggests that the decision of the Appeal Board can be appealed to the Court of Appeal.
- This approach is based on the Canadian model and is in line with global best practices.

Approving the Guidelines

- The Administration's proposal is that the guidelines are issued and applied by the TA but the Appeal Board would not be involved in their preparation or bound by them.
- The industry is concerned that the TA should not be both the rule making and law enforcement agency. The industry is also concerned that the guidelines provide some degree of certainty as to how the Appeal Board will make its decision.

Approving the Guidelines (continued)

- The industry proposes that the TA is required to obtain the approval of the Appeal Board to the guidelines and any amendments to the guidelines. This requirement should assist in ensuring the guidelines and amendments are reasonable and provide appropriate certainty to persons proposing to engage in mergers and acquisitions.

Benefit to the Public Interest

- The industry considers that it is important that the public interest is taken into account when the TA and the Appeal Board are considering the exercise of their powers to block a transaction or impose conditions on a transaction.
- The industry therefore proposes that the Bill is amended to expressly provide that the TA and the Appeal Board must consider the public interest in making their decisions.
- Additionally, where a transaction would result, or be likely to result, in a benefit to the public interest (e.g preservation of employment, salvage of a failing firm, etc.) that would outweigh the detriment to the public interest caused by any SLC as a result of the change, the transaction should be allowed to proceed.

Recovering Costs

- The Administration proposes that the TA may recover his costs incurred in making a decision under section 7P(6)(a) or (b)(i) or (ii) or processing an application under subsection (5).
- The industry objects to the principle that the TA should have a right to recover his costs for performing the function as a regulator of the market structure , particularly where there is no cap on the amount that may be recovered.
- If this principle is to remain, the costs of the TA should be capped. The industry suggest a cap of \$100,000, in line with amounts indicated by CITB.

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