

TELECOMMUNICATIONS (AMENDMENT) BILL 2002

COMMITTEE STAGE

Amendments to be moved by the Honourable SIN Chung-Kai

- | Clause | Amendments proposed |
|--------|---|
| 1 | <p>By deleting subclause (2) and substituting –</p> <p style="padding-left: 40px;">"(2) Subject to subsection (3), this Ordinance shall come into operation on the day on which it is published in the Gazette.</p> <p style="padding-left: 40px;">(3) Subject to subsection (4), Sections 3, 4, 5 and 8 shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette.</p> <p style="padding-left: 40px;">(4) The Secretary for Commerce, Industry and Technology shall not publish the notice referred to in section (3) until the Authority has issued guidelines in accordance with subsection 6D(2)(aa)."</p> |
| New | <p>By adding –</p> <p>"1A. Interpretation</p> <p style="padding-left: 40px;">Section 2(1) of the Telecommunications Ordinance (Cap. 106) is amended</p> <p style="padding-left: 40px;">(a) by adding -</p> <p style="padding-left: 80px;">""Appeal Board" (上訴委員會) means the Telecommunications (Competition Provisions) Appeal Board established under section 32M(1);"</p> <p style="padding-left: 40px;">(b) in the definition of "carrier licence", by repealing "the Schedule" and substituting "Schedule 1"."</p> |
| 2 | <p>By deleting clause 2 and substituting –</p> <p>"2. Guidelines</p> <p style="padding-left: 40px;">Section 6D is amended –</p> |

(a) in subsection (2) –

(i) in paragraph (a), by repealing everything after "方式" and substituting "(包括發牌準則以及他擬考慮的其他有關事宜)的指引；";

(ii) by adding –

"(aa) subject to subsection (2A), specifying the matters, including but not limited to those listed in Schedule 2, that he and the Appeal Board shall take into account before forming any opinion under section 7P(1), (1B), (6) or (7);";

(iii) in paragraph (b) –

(A) by adding "關於"
before "第 14(6)(a)條";

(B) by repealing everything
after "問
題" and substituting
"的指引，但該指引的
發出須受第(3)款的規
限。";

(iv) by repealing "就以下事項發出
指引" and substituting "發
出";

(b) by adding –

(2A) Without prejudice to the generality of section 6C, the Authority shall, before issuing guidelines under subsection (2)(aa) or any amendments to such guidelines,

(a) carry out such consultation as is reasonable in all the circumstances of the case with persons who may be affected by the operation of section 7P; and

(b) submit the proposed guidelines or amendments for review to the Appeal Board and obtain the written approval of the Appeal Board to issue the guidelines or amendments."

(2B) Upon receiving a submission under section 6D(2A)(b) the Appeal Board shall conduct

such inquiries as it considers necessary to review and approve such guidelines or amendments.

(2C) If the Appeal Board is not able to approve any guidelines or amendments submitted to it under subsection 6D(2A)(b), it shall make such directions to the Authority as it considers necessary to facilitate their approval."

(2D) The Authority shall, upon issuing guidelines under subsection (2)(aa) or any amendments to such guidelines, publish a notice in the Gazette to the effect that such guidelines or amendments have been issued."

New By adding –

"2A. Issue of licences

Section 7(4) is amended by repealing "the Schedule" and substituting "Schedule 1".

3 By deleting clause 3 and substituting -

"7P. Power to regulate changes in control exercised over carrier licensees, etc

(1) Where, after the commencement of this section, there is a change in the control exercised over a carrier licensee, the Authority may -

- (a) subject to subsection (1A), conduct such investigation as the Authority considers necessary to enable him to form an opinion as to whether or not the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market; and
- (b) (where the Authority, after conducting such investigation, forms an opinion within the time specified in subsection (1A)(b) that the change

is likely to have, the effect of substantially lessening competition in a telecommunications market so as to warrant further investigation) within 2 days of the completion of the investigation:

- (i) inform the licensee of his opinion by notice in writing served on the licensee; and
 - (ii) refer the matter to the Appeal Board for determination in accordance with subsection (1B); or
- (c) (where the Authority, after conducting such investigation, does not form an opinion within the time specified in subsection (1A)(b) that the change may have, the effect of substantially lessening competition in a telecommunications market so as to warrant further investigation) by notice in writing served on the licensee within 2 days of the completion of the investigation, inform the licensee that he has no objection to the change.

(1A) An investigation under subsection (1)(a):

- (a) may only be commenced within 2 weeks after the change occurs or within 2 weeks after the Authority knows, or ought reasonably to have known of, the change, as the case may be; and
- (b) shall be completed within 4 weeks of its commencement.

(1AA) The Authority shall, before forming any opinion under subsection (1) –

- (a) give all carrier licensees and any interested person a reasonable

opportunity to make representations to the Authority; and

- (b) consider the representations, if any, made under paragraph (a).

(1B) Where a matter is referred to the Appeal Board by the Authority pursuant to subsection (1)(b), the Appeal Board may, pursuant to section 32OA -

- (a) conduct such investigation as the Appeal Board considers necessary to enable it to form an opinion as to whether the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market, provided that such an investigation shall be completed within 10 weeks of a referral under subsection (1)(b);
- (b) (where the Appeal Board, after conducting such investigation, forms an opinion that the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market and that issuing a direction under this subsection would be in the public interest) by notice in writing served on the licensee within 2 days of the completion of the investigation, direct the licensee to take such action specified in the notice as the Appeal Board reasonably considers necessary to eliminate or avoid any such anticompetitive effect;
- (c) (where the Appeal Board, after conducting such investigation, forms an opinion that the change does not have, or is not likely to have, the effect of substantially lessening competition in a telecommunications market) by notice in writing served on the licensee within 2 days of the completion of the investigation,

inform the licensee that it has no objection to the change; or

- (d) (where the Appeal Board, after conducting such investigation, does not form an opinion within the time specified in subsection (1B)(a) as to whether the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market or not) by notice in writing served on the licensee within 2 days of the completion of the investigation, inform the licensee that it has no objection to the change.

(2) The Appeal Board shall, before forming any opinion or issuing any direction under subsection (1B) –

- (a) give all carrier licensees, any interested person and the Authority a reasonable opportunity to make representations to the Appeal Board; and
- (b) consider the representations, if any, made under paragraph (a).

(3) Without limiting the general nature of the action that the Appeal Board may direct a carrier licensee to take under subsection (1B)(b), the action may include the procuring of modifications to the control exercised over the licensee.

(4) A carrier licensee served with a notice under subsection (1B)(b) shall comply with the direction in the notice.

(5) Where there is a proposed change in the control exercised over a carrier licensee, the licensee or any interested person may apply in writing to the Authority for consent to the proposed change.

(6) Where the Authority receives an application made under subsection (5), the Authority shall -

- (a) conduct such investigation as the Authority considers necessary to enable it to form an opinion as to whether or not the proposed change would have, or be likely to have, the effect of substantially lessening competition in a telecommunications market, provided that such an investigation shall be completed within 4 weeks of an application under subsection (5); and
- (b) (where the Authority, after conducting such investigation, does not form an opinion within the time specified in subsection (6)(a) that the proposed change would be likely to have the effect of substantially lessening competition in a telecommunications market so as to warrant further investigation) give consent by notice in writing served on the licensee within 2 days of the completion of the investigation; or
- (c) (where the Authority, after conducting such investigation, forms an opinion that the proposed change would be likely to have the effect of substantially lessening competition in a telecommunications market so as to warrant further investigation and having obtained the written consent of the applicant referred to in subsection (5)) refer the matter to the Appeal Board within 2 days of receiving the consent of the applicant referred to in subsection (5) for determination in accordance with subsection (7).

(6A) The Authority shall, before forming any opinion or giving any consent under subsection (6) –

- (a) give all carrier licensees and any interested person a reasonable

opportunity to make representations to the Authority; and

- (b) consider the representations, if any, made under paragraph (a).

(7) Where a matter is referred to the Appeal Board by the Authority pursuant to subsection (6)(c), the Appeal Board shall, pursuant to section 32OA -

- (a) conduct such investigation as the Appeal Board considers necessary to enable it to form an opinion as to whether or not the proposed change would have, or be likely to have, the effect of substantially lessening competition in a telecommunications market, provided that such an investigation shall be completed within 10 weeks of a referral under subsection (6)(c); and
- (b) (where the Appeal Board, after conducting such investigation, forms an opinion that the proposed change would not have, or not be likely to have, the effect of substantially lessening competition in a telecommunications market) by notice in writing served on the licensee within 2 days of the completion of the investigation give consent; or
- (c) (where the Appeal Board, after conducting such investigation, forms an opinion that the proposed change would have, or be likely to have, the effect of substantially lessening competition in a telecommunications market and that issuing a notice under this subsection would be in the public interest) by notice in writing served on the licensee within 2 days of the completion of the investigation:

- (i) refuse to give consent; or
 - (ii) give consent subject to a direction that the carrier licensee concerned takes the action that the Appeal Board reasonably considers necessary to eliminate or avoid any such anti-competitive effect; or
- (d) (where the Appeal Board, after conducting such investigation, does not form an opinion within the time specified in subsection (7)(a) as to whether the proposed change would have, or be likely to have, the effect of substantially lessening competition in a telecommunications market or not) by notice in writing served on the licensee within 2 days of the completion of the investigation give consent.

(7A) The Appeal Board shall, before forming any opinion or issuing any direction under subsection (7) –

- (a) give all carrier licensees, any interested person and the Authority a reasonable opportunity to make representations to the Appeal Board; and
- (b) consider the representations, if any, made under paragraph (a).

(8) The Appeal Board shall, by notice in writing served on the carrier licensee referred to in subsection (5) and (where an interested person makes an application under that subsection) the interested person, inform the licensee and (if applicable) the interested person of –

- (a) the decision made under subsection (7)(b) or (c)(i) or (ii) or (d);
- (b) where a decision is made under subsection (7)(c)(ii), the action that

the Appeal Board directs the licensee to take.

(8A) Where the Authority or the Appeal Board, as the case may be, serves any notice in writing under this section, such notice shall include a statement of the reasons for any opinion, decision or direction contained in that notice.

(9) Without limiting the general nature of the action that the Appeal Board may direct a carrier licensee to take under subsection (7)(c)(ii), the action may include the procuring of modifications to the control exercised over the licensee.

(10) Where a proposed change referred to in subsection (5) takes effect –

- (a) pursuant to the consent given by the Authority under subsection (6)(b);
- (b) pursuant to the consent given by the Appeal Board under subsection (7)(b) or (d); or
- (c) pursuant to the consent given, and in compliance with the direction issued, by the Appeal Board under subsection (7)(c)(ii),

the Appeal Board shall not issue a direction under subsection (1B)(b) in respect of the change.

(11) The cumulative amount of any costs or expenses up to but not exceeding the amount specified in Schedule 3 incurred by the Authority and (where applicable) the Appeal Board –

- (a) in making a decision under subsection (6) or (7); or
- (b) in relation to the processing of an application made under subsection (5),

is recoverable as a debt due to the Authority on behalf of himself and (where applicable) the Appeal Board from the carrier licensee, or the interested person, who makes the

application under subsection (5). For the avoidance of doubt, when the cumulative amount of any costs or expenses incurred by the Authority and the Appeal Board in respect of matters referred to in subsection (11)(a) or (b) is in excess of the amount specified in Schedule 3, that excess amount shall not be recoverable.

(11A) The Authority and Appeal Board shall publish –

- (a) where either of them forms any opinion or issues any direction under subsection (1) or (1B), the opinion or direction; or
- (b) where either of them forms any opinion, makes any decision or issues any direction under subsection (6) or (7), the opinion, decision or direction,

in such manner as they consider appropriate.

(12) For the purposes of subsections (1) and (5), there is a change in the control exercised over a carrier licensee if –

- (a) a person becomes the beneficial owner of more than 30% of the voting shares in the licensee;
- (b) a person becomes a voting controller of more than 30% of the voting shares in the licensee;
- (c) a person otherwise acquires the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person;
- (d) a person becomes the beneficial owner of the largest single group of voting shares in the licensee;

- (e) a person becomes a voting controller of the largest single group of voting shares in the licensee;
- (f) another licensee in the same telecommunications market as the licensee becomes the beneficial owner of more than 15% of the voting shares in the licensee; or
- (g) another licensee in the same telecommunications market as the licensee becomes a voting controller of more than 15% of the voting shares in the licensee.

(12A) Any carrier licensee or interested person in respect of whom an opinion, direction or decision of the Appeal Board was formed, issued or made under subsection (1B)(b) or (7)(c) may appeal to the Court of Appeal against the opinion, direction or decision within 1 week of the notice of the opinion, direction or decision.

(12B) On an appeal under subsection 12A, the Court of Appeal may -

- (a) allow the appeal; or
- (b) dismiss the appeal;

and may make such directions and order as to costs as it thinks fit.

(12C) An appeal from the Appeal Board shall be brought in such manner and shall be subject to such conditions as shall be prescribed.

(12D) The filing of an application for leave to appeal under subsection (12A) shall operate as a stay of any direction made under this section.

(12E) The Chief Justice may make rules-

- (a) regulating the procedure for-
 - (i) applying for appeal under subsection (12A)
 - (iii) the hearing of appeals under subsection (12A)

- (b) providing for matters of procedure which are not provided for in this Ordinance;
- (c) prescribing anything which is to be or may be prescribed; and

(d) prescribing the fees and costs applicable to proceedings in the tribunal. (12F) Notwithstanding any other provisions of this section, the Authority or the Appeal Board may raise no objection or consent to a change where the Authority or the Appeal Board is satisfied in all the circumstances that the change or proposed change would result, or be likely to result, in a benefit to the public interest and that that benefit would outweigh the detriment to the public constituted by any substantial lessening of competition that would result, or be likely to result from the change.

(13) In this section -

"interested person" (有利害關係的人) means –

- (a) in relation to a change referred to in subsection (1), a person who does any of the acts referred to in subsection (12) in relation to the carrier licensee concerned.
- (b) in relation to a proposed change referred to in subsection (5), a person who proposes to do any of the acts referred to in subsection (12) in relation to the carrier licensee concerned."

"voting control" (表決控制權) means the control of or the ability to control, whether directly or indirectly, the exercise of the right to vote attaching to one or more voting shares in a carrier licensee---

- (a) by the exercise of a right, where such exercise confers the ability to exercise a right

to vote or to control the exercise of a right to vote;

- (b) by an entitlement to exercise such a right to vote;
- (c) under a duty or obligation;
- (d) through a nominee;
- (e) through or by means of a trust, agreement or arrangement, understanding or practice, whether or not the trust, agreement or arrangement, understanding or practice has legal or equitable force or is based on legal or equitable rights; or
- (f) as a chargor of voting shares in a carrier licensee unless the chargee of the voting shares or the nominee of the chargee has given notice in writing to the chargor under the charge of an intention to exercise the right to vote attaching to such voting shares;

"voting controller" (表決控權人) means a person who either alone or with one or more other persons holds voting control;

"voting shares" (有表決權股份) means shares in the carrier licensee which entitle the registered owner of such shares to vote at meetings of shareholders of the licensee.

(14) For the purposes of this section, the fact that the particular voting share or shares in relation to which a person is a voting controller cannot be identified is immaterial."

5 By deleting the clause and substituting -

"5. Consequential amendments to Part VC of the Telecommunications Ordinance

The following amendments are made to Part VC of the Telecommunications Ordinance (Cap. 106) –

- (a) by deleting the definition of "Appeal Board"
- (b) by adding –

"32OA. Procedure and powers of Appeal Board under section 7P

(1) In the case of a referral under section 7P-

- (a) the Appeal Board shall consist of-
 - (i) the Chairman or a Deputy Chairman who shall preside at the any hearing; and
 - (ii) 2 panel members appointed by the Chairman or Deputy Chairman;
- (b) every question before the Appeal Board shall be determined by the opinion of the majority of the members hearing the referral except a question of law which shall be determined by the Chairman or Deputy Chairman and in the case of an equality of votes the Chairman or Deputy Chairman shall have a casting vote;
- (c) any party shall be entitled to be heard either in person or through a counsel or solicitor, and if any party is a company,

through any of its directors or other officers, or if a partnership, through any of its partners;

- (d) subject to section 32P, the Appeal Board may-
 - (i) subject to subsection (2), receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, and whether or not it would be admissible in a court of law;
 - (ii) by notice in writing signed by the Chairman or Deputy Chairman, summon any person-
 - (A) to produce to it any document that is relevant to the referral and is in his custody or under his control;
 - (B) to appear before it and to give evidence relevant to the referral;
 - (iii) administer oaths and affirmations;

- (iv) require evidence to be given on oath or affirmation;
 - (v) make an order prohibiting a person from publishing or otherwise disclosing any material the Appeal Board receives;
 - (vi) make an order prohibiting the publication or other disclosure of any material the Appeal Board receives at a sitting, or part of a sitting, which is held in private;
- (e) if the term of appointment of-
- (i) the Chairman or Deputy Chairman; or
 - (ii) any panel member appointed under paragraph (a)(ii),
- expires during any hearing, the Chairman, Deputy Chairman or panel member, as the case may be, may continue to hear the referral until the referral is determined.

(2) Every sitting of the Appeal Board shall be held in public unless the Appeal Board considers that in the interests of justice a sitting or part of a sitting should not be held in public in which case it may hold the sitting or part of the sitting in private.

(3) The Chairman may determine any matter of practice or procedure relating to the

hearing of referrals where no provision governing such matter is made in this Ordinance or in regulations made thereunder.

(4) In exercising its powers under section 7P, the Appeal Board when-

- (a) forming an opinion or making a direction or decision shall only do so on reasonable grounds and having regard to relevant considerations;
- (b) forming an opinion or making a direction or decision -
 - (i) shall provide reasons in writing for it;
 - (ii) shall not depart from guidelines issued under section 6D(2)(aa) unless it has provided reasons in writing for the departure.

(c) Section 32P is amended by adding "or 32OA(1)(d)(ii)" after "32O(1)(d)(ii)".

(d) Section 32S is amended –

- (a) in the heading, by adding "referrals," after "appeals,"
- (b) in subsection (1), by adding "or referral under section 7P" after "in relation to an appeal".
- (c) in subsection (2)(a), by adding "or 32OA(1)(d)(v)" after "32O(1)(d)(vii)".
- (d) in subsection (2)(b), by adding "or 32OA(1)(d)(vi)" after "32O(1)(d)(viii)".

6 By deleting the clause and substituting

"6. Licences which are not carrier licences within the meaning of section 2

The Schedule is renumbered as Schedule 1."

7 By deleting the clause and substituting -

"7. Schedule 2 added

The following is added –

"SCHEDULE 2 [s. 6D(2)]

MATTERS TO BE TAKEN INTO ACCOUNT BY AUTHORITY AND
APPEAL BOARD

1. The height of barriers to entry to a telecommunications market.
2. The level of market concentration in a telecommunications market.
3. The degree of countervailing power in a telecommunications market.
4. The likelihood that the change would result in the carrier licensee or interested person being able to significantly and substantially increase prices or profit margins.
5. The dynamic characteristics of a telecommunications market, including growth, innovation and product differentiation.
6. The likelihood that the change would result in the removal from a telecommunications market of a vigorous and effective competitor.
7. The extent to which effective competition remains or would remain in a telecommunications market after the change.
8. The nature and extent of vertical integration in a telecommunications market.
9. The actual and potential level of import competition in a telecommunications market.
10. The extent to which substitutes are available in a telecommunications market.
11. The extent to which the change would be likely to result in a benefit to the public interest."."

New By adding -

"8A. Schedule 3 added

"SCHEDULE 3 [s. 7P(11)]

THE MAXIMUM AMOUNT OF ANY COSTS OR EXPENSES
RECOVERABLE BY AUTHORITY AND APPEAL BOARD UNDER
SECTION 7P

\$100,000".