

ITBB CR 7/13/14(02) Pt.4
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30 September 2002

Miss Connie Fung
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Miss Fung,

Telecommunications (Amendment) Bill 2002

I refer to your letter of 23 August and enclose our response in both Chinese and English.

Yours sincerely,

(Ms Gracie Foo)
for Secretary for Commerce, Industry and Technology

c.c. DG Tel (Attn: Mr M H Au & Mr Edward Whitehorn) (2803 5111)
D of J (Attn : Mr Michael Lam) (2521 3275)
Clerk to Bills Committee (Attn : Ms Rosalind Ma) (2121 0420)

Telecommunications (Amendment) Bill 2002
Responses to Legal Service Division's Letter of 23 August 2002

Clause 3 - proposed section 7P

- (a) The Telecommunications Authority (TA) will consider the impact of a change in ownership or control over a carrier licensee on competition as soon as he receives information on the change.

The TA intends to incorporate into guidelines to be issued the timelines for the TA to conduct investigations to assess the impact of the change on competition. He will follow similar timelines adopted in other jurisdictions, e.g. the European Commission must make a decision within one month on whether a merger notified to the Commission merits detailed investigations, and where detailed investigations are required, the Commission must take a decision within four months.

In line with our streamlined approach for regulation of mergers and acquisition activities, we do not propose to require the licensee to notify the TA of the change. The TA will monitor the market and obtain information on changes in ownership or control over a carrier licensee.

- (b) We consider it more appropriate to set out the factors for consideration in the guidelines rather than in the Bill. This is also the more prevalent practice of similar laws in other jurisdictions. In the cases where a list of factors is included in the legislation (e.g. Trade Practices Act 1974 in Australia or Competition Act in Canada), the list of factors is not an exhaustive one, as it cannot be exhaustive. In any case, the list of factors, if included in legislation, comprises headings only and the details of the factors are left to the guidelines issued by the regulator or competition authority. Likewise, although a list of factors is included in section 7L(3) of the Telecommunications Ordinance for the assessment of dominance, the list is not an exhaustive one and is intended to be supplemented by guidelines issued by the TA (section 7L(3)(e)). In addition, the list in section 7K(2) for assessing anti-competitive effect is also non-exhaustive.

- (c) In assessing the effect on competition of a change or proposed change in the ownership or control over a carrier licensee, the TA will rely on information obtained from the market, in representations from the carrier licensees and others in the market and, in the case of an application for consent under section 7P(5), information provided by the applicant.

The powers to require information under sections 7I, 35A and 36D will be available to the TA to assist him in conducting investigations in order to ensure that a change or proposed change in the ownership or control over a carrier licensee is in compliance with the relevant provisions of the Ordinance, licence conditions and directions of the TA.

- (d) TA will set out the time limit in the guidelines, which when compared with legislation, can be more easily adjusted in the light of experience.
- (e) We consider that the word “eliminate” can also cover forthcoming anti-competitive effect. We, however, have no objection to adding the words “or prevent” after “eliminate” in the two clauses 7P(1) and (6)(b)(ii).
- (f) We have clarified with you that the express provisions in the UK Enterprise Bill you refer to are clauses 40(4) and (5), which specify matters the regulatory authority will take into account in deciding what action should be taken to remedy or prevent the anti-competitive effects. Clause 40(4) requires the authority to take into account the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it, while clause 40(5) requires the authority to take into account the effect of any action on customer benefits in relation to the creation of the relevant merger situation concerned.

Having studied the UK Enterprise Bill, we do not think it necessary to include similar provisions in the Telecommunications (Amendment) Bill 2002. For clause 40(4), section 7P(1) of the Bill already provides that the TA may direct the carrier licensee to take such measures as it considers necessary to eliminate anti-competitive effect, if it considers that the merger and acquisition activity has, or is likely to have, the effect of substantially

lessening competition in a telecommunications market. As for clause 40(5), it allows the authority to take into account the effect of remedies on customer benefits when devising such remedies for the anti-competitive merger in question. We do not consider it necessary to do so in our Bill since competition is ultimately for the benefit of consumers and in deciding the action to be specified in the notice under section 7P(1), consumer benefits will definitely be a relevant factor to be considered by the TA.

- (g) It is intended that the carrier licensee should submit details of the proposed change in the ownership or control over the carrier licensee and its assessment on the impact on competition in the market. If appropriate, the TA may specify an application form to facilitate submission by the licensees. The TA will set out the submission requirements in details in the guidelines after consultation with the industry.
- (h) The Administration does not intend that the TA should refuse to give consent if he forms the opinion that the proposed change would not have anti-competitive effect. The word “may” is intended to empower the TA to give the consent.
- (i) In proposed section 7P(8)(b), we propose to change “in the case of subsection (6)(b)(ii)” to “(where a decision is made under subsection (6)(b)(ii))” so that the English text tallies with the Chinese text.

Clause 6 - proposed 32N(1A)

- (a) In pursuance of the TA’s opinion, the TA will issue a notice (incorporating a direction) under section 7P(1) or make a decision under section 7P(6)(a) or (b)(i) or (ii). It will be the direction or the decision that would affect the carrier licensee or other carrier licensees in the market. It is therefore the notice or the decision that should be subject to appeal. In considering the direction or decision, the TA’s opinion which forms the basis of the notice or decision will also be examined in the appeal.

- (b) The aim of allowing an appeal be made to the Telecommunications (Competition Provisions) Appeal Board is to provide a swift and convenient appeal channel to those who may be affected by TA's decisions. At the same time, we should ensure that the appeal channel will not unduly delay the activity concerned thereby causing uncertainty to the operators and investors concerned. This is especially important for a merger and acquisition activity which is a major commercial transaction and typically involves significant financial considerations. Having balanced the two considerations involved, we consider it appropriate to provide the appeal channel to those who will be directly affected by TA's decisions, i.e. the carrier licensee concerned and the other carrier licensees who are usually its competitors.

The proposed range of persons that can appeal to the Telecommunications (Competition Provisions) Appeal Board is different from that for the competition safeguards in sections 7K-7N in the Telecommunications Ordinance. This is because the latter case is likely to affect a wider range of persons. Moreover, unlike a merger and acquisition, an activity under sections 7K-N usually will not involve a major commercial transaction being dependent upon the TA's decision.

Matters arising from the Bills Committee meeting on 25 July 2002

In line with the best practices in other jurisdictions, the TA intend to consult the relevant parties before making a decision. This will be provided for in details in the guidelines after consultation with the industry. We do not consider it necessary nor appropriate to include a statutory provision to this effect.

Commerce, Industry and Technology Bureau
30 September 2002