

CONSULTATION PAPER

Partial Commencement of Section 8(1)(aa) of the Telecommunications Ordinance and Creation of a Class Licence to Regulate Resale of Telecommunications Services on a Prepaid Basis

Issued by the Telecommunications Authority, Hong Kong

15 October 2004

INTRODUCTION

Section 8 of the Telecommunications Ordinance (Cap 106) (the Ordinance) requires the conduct listed under section 8(1) to be subject to telecommunications licensing¹. In 2000, section 8(1) was amended by introducing to it a new sub-section, section 8(1)(aa). Section 8(1)(aa) provides that a person who “offer[s] in the course of business a telecommunications service” is subject to licensing requirement.

2. In the same legislative amendment exercise, section 8(1A) was also introduced to elaborate on the meaning of “offering a telecommunications service”. Section 8(1A) provides that:

For the purpose of [section 8(1)(aa)], a person is to be regarded as offering a telecommunications service if:

(a) he makes an offer which, if accepted, would give rise to an agreement, arrangement or understanding for the provision of a telecommunications service by him or by another person with whom he has made an arrangement for the provision of the

¹ The conduct includes: (a) establish or maintain any means of telecommunications; (b) possess or use any apparatus for radiocommunications or any apparatus of any kind that generates and emits radio waves; (c) deal in the course of trade or business in apparatus or material for radiocommunications or in any component part of any such apparatus or in apparatus of any kind that generates and emits radio waves; (d) demonstrate, with a view to sale in the course of trade or business, any apparatus or material

telecommunications service; or

- (b) *he invites a person to make an offer of the kind referred to in paragraph (a).*

Both section 8(1)(aa) and section 8(1A) are currently not yet in operation.

3. Section 8(1)(aa) is enacted in general terms encompassing the offer of any telecommunications services in the course of business. There are also no specifications on the mode of business operation by which telecommunications services are offered (other than the elaboration set out in section 8(1A)). Indeed, the business operation can come in very different forms offering different telecommunications services to different customers.

4. Some business operations falling within section 8(1)(aa) generate regulatory concerns. It is the intention of the Telecommunications Authority (“TA”) to bring these operations within the regulatory framework by subjecting them to licensing control. In this Consultation Paper, the TA proposes to

- (a) partially commence section 8(1)(aa)² to regulate two specific kinds of “section 8(1)(aa) conduct”, namely:

- (i) resale of telecommunications services on a prepaid basis; and
- (ii) resale of telecommunications services by an associated corporation³ of a carrier⁴ or a telecommunications licensee in a dominant position, when the services being resold by the associated corporation are operated by the associated carrier or dominant operator; and

- (b) in the case of the resale of telecommunications services on a prepaid basis, to create a class licence to regulate the conduct.

for radiocommunications.

² Commencement is made by the Secretary for Commerce, Industry and Technology by notice in the Gazette.

³ In this paper, “associated corporation” has the same meaning as defined in section 2 of the Ordinance.

⁴ In this paper, “carrier” refers to a person licensed under a fixed carrier licence, a mobile carrier licence, a fixed telecommunications network services licence or a public radiocommunications service licence (for services other than land mobile services), other than a licence listed in Schedule 1 to the Ordinance.

The details are explained below. The TA invites comments from all interested parties on his proposal.

PARTIAL COMMENCEMENT OF SECTION 8(1)(aa)

Resale of Telecommunications Services on a Prepaid Basis

5. The TA proposes to commence section 8(1)(aa) to subject the resale of telecommunications services on a prepaid basis to licensing requirement. The TA will explain in the following paragraphs (paragraphs 6 – 19) the reasons for this proposal.

Resale of telecommunications services

6. Resale of telecommunications services is a form of “offer of telecommunications services” within the meaning of section 8(1)(aa). The reference to “resale” entails that the services are not operated by the person who resells the services (the “reseller”). The reseller rather obtains or purchases the services from a service operator and offers the services to a customer. The services being offered remain operated by the service operator. The reseller hence does not need to operate any means of telecommunications for the business operation. But for section 8(1)(aa) of the Ordinance, the conduct of the reseller will not be subject to telecommunications licensing at all.

7. One obvious example of resale of telecommunications services is the offer of international calling cards. Whilst some international calling cards in the market are issued by telecommunications operators licensed to operate telecommunications networks or systems (such as fixed telecommunications network services (FTNS) operators or external telecommunications service (ETS) operators⁵), there are also cases where the issuers of the cards do not maintain any means of telecommunications at all. What these card issuers typically do is they purchase bulks of call minutes from the network or service operators at wholesale rate, re-package the services in the form of prepaid calling cards, and sell the cards at retail price under their own brand names.

⁵ An ETS operator holds a public non-exclusive telecommunications service (PNETS) licence.

In short, they resell the external telecommunications services provided by others. Although these card issuers do not themselves facilitate the connection of the international phone calls, they would have made an arrangement with the network or service operators who would provide the connection. Thus, purchasers of these international calling cards will be able to use the cards to make long distance calls. The activities of these card issuers fall within the meaning of “offering a telecommunications service”. As these card issuers do not maintain any means of telecommunications, they are, but for section 8(1)(aa), not subject to licensing requirement under the Ordinance.

8. Potentially any telecommunications services can be offered on a resale basis. In addition to international calls, a reseller can also resell voice telephony services, mobile services⁶ and data services. Indeed, the resale in Hong Kong of telecommunications services which are to be consumed outside Hong Kong (such as telephone cards for making calls in the Mainland) also falls within section 8(1)(aa).

9. On the other hand, a shop (such as grocery store or newspaper stand) which merely sells telephone cards, SIM cards or replenishment kits as physical commodities, without involving in making any arrangement with another person for the provision of telecommunications service concerned will not be regarded as “offering telecommunications services” and hence will be outside the scope of section 8(1)(aa).

Prepaid services

10. The international calling card example in paragraph 7 is one in which services are offered on a prepaid basis. This is a popular mode for obtaining telecommunications services from resellers. In the case of prepaid calling cards, customers typically purchase the cards from a retail outlet. The cards carry value in themselves. When a card purchaser uses the card for access to telecommunications services, the value represented by the card will be deducted according to the tariffs set by the card issuer. In some cases, when the value of a calling card is used up, it can be replenished and the card can be

⁶ For example by way of offering “SIM cards”. As in the case of calling cards for access to fixed telecommunications services, issuers of SIM cards who themselves do not operate any mobile networks typically obtain bulks of airtime from the mobile network operators (MNOs) or mobile virtual network operators (MVNOs) and re-package the services under their own brand names.

used again. As the card purchaser can directly use the card to obtain services, and the charges are directly deducted from the prepayment, the card purchaser will not be required to open an account with the card issuer.

11. Such mode of operation is in contrast with the resale of postpaid telecommunications services. In the case of postpaid services, the customer is required to register an account with the person who resells the services. The customer is required to settle the account on a postpaid basis and will receive statements periodically showing the service charges due⁷.

Physical cards not necessary

12. The examples cited in the previous paragraphs refer to the resale of prepaid “calling cards” or “SIM cards”. In fact, in some cases, not even the sale of physical cards is necessary. For example, whilst a typical international calling card has all the necessary information (such as access code, access password, dialling instructions, service hot line number) printed onto it to enable the card purchaser to use the services, the same information can equally be provided to the customers through electronic means, such as email or Internet. If a customer simply purchases a telecommunications service and effects payment on line, there will be no physical card issued to the customer for the services already paid for.

Regulatory concerns

13. The TA has regulatory concerns where telecommunications services are resold on a prepaid basis, as service charges are paid before services are obtained. If the person who offers service absconds after collecting the prepayment, the customer will suffer immediate financial loss. At present, persons who resell telecommunications services without operating any means of telecommunications are not subject to licensing control. This makes the tracing of these absconders virtually impossible.

14. In fact, there have been a number of incidents over the past few years

⁷ In some cases, a customer is required to pay a deposit before an account is opened. The deposit will not be used to settle the charges due but is regarded as a form of security held by the person who resells services. It is only when a customer defaults in payment will the deposit be applied to settle the outstanding charges. When the customer terminates the service, he will receive a refund of the deposit. This is still a form of postpaid services.

where consumers have not been able to obtain proper services through prepaid calling cards issued by persons who do not themselves operate any means of telecommunications. Typical cases are that the issuers of prepaid international calling cards simply abscond with the prepayment. Other cases involve problems in relation to tariffs.

15. Similar problems also exist in cases where the prepaid calling cards are issued by licensed network or service operators. In the past few years, the Office of the Telecommunications Authority (OFTA) received many consumers complaints on billing, advertisement, promotion tactics, refund, service interruption, service quality, discontinuation of business, trade practice etc in relation to international direct dialing (IDD) services provided via international prepaid calling cards. The followings are the complaint figures⁸:

2001	37 cases
2002	139 cases
2003	54 cases ⁹

16. For complaints involving prepaid cards issued by licensed network and service operators, the TA is in a position to make further investigation and if appropriate, impose regulatory sanctions pursuant to the relevant licence conditions or provisions under the Ordinance. On the other hand, the TA cannot take any action against prepaid card issuers who do not operate any means of telecommunications as they are not subject to the existing licensing regime. For the time being, they simply fall outside the regulatory control of the TA and are not traceable.

17. The TA therefore proposes to commence section 8(1)(aa) to the extent, inter alia, of bringing resellers of prepaid telecommunications services within the licensing regime. Licensing control on this kind of business operation is necessary in order to subject the resellers to licence terms and conditions aimed at protecting consumer interest, as well as the provisions against anti-competitive conduct, misleading or deceptive conduct and other provisions applicable to licensees under the Ordinance.

⁸ OFTA's records make no distinction between calling cards issued by licensed operators and by those who do not operate any means of telecommunications (and hence are at present not subject to licensing requirement).

⁹ The drop in number of cases for 2003 was due to more active enforcement action taken against licensed and illegal operators.

18. The TA considers that a person should meet the following qualities before he can be regarded as reseller of prepaid telecommunications services:

- (a) offers a telecommunications service in the manner as described in section 8(1A) of the Ordinance;
- (b) resells, with or without repackaging, the telecommunications services operated by other persons for the purposes of offering the telecommunications services under a brand name different from that of or designated by the person with whom he makes an arrangement for the provision of the telecommunications services;
- (c) controls the tariffs for the telecommunications services offered (i.e. the tariffs are set by the person who offers the services rather than by the service providers); and
- (d) receives prepayment for the telecommunications services offered.

These qualities will be incorporated as definition for “resale of telecommunications services on a prepaid basis” for the purpose of partial commencement of section 8(1)(aa).

19. Upon the partial commencement of section 8(1)(aa), the TA will create a class licence to regulate the resellers of prepaid services. Details of the TA’s proposal on the class licence are provided in paragraphs 28 – 49 below.

Associated Corporation of a Carrier or Dominant Licensee

20. The TA also proposes to commence section 8(1)(aa) to the extent that a company which is an associated corporation of a carrier or a telecommunications licensee in a dominant position and which resells the services of the associated carrier or dominant licensee is brought into the regulatory regime.

21. The TA notices an emerging trend that some carriers would diversify

their operation and set up associated corporations to run the non-network related aspects of the telecommunications services. A licensee in a dominant position in a telecommunications market, who may be a network or service operator, may also choose to spin off some of its operations to an associated corporation. A typical arrangement is that a carrier or dominant licensee will wholesale its services to its associated corporation, which in turn resells the services to the end customers on a retail basis. While it is the carrier or the dominant licensee which establishes and maintains the means of telecommunications for the provision of the services, the associated company is involved in activities such as promoting and offering the services to end customers, billing, marketing and customer support. Since the associated corporation does not operate any means of telecommunications, it is, but for section 8(1)(aa), not subject to licensing requirement.

22. As a network operator, a carrier owns access to the end customers and generally has a greater presence in the market than a service-based operator with no affiliated relationship with any carriers. The licence conditions imposed on a carrier licensee are therefore more elaborate than those imposed on a service-based operator to ensure that the network and services are operated properly in the interest of the consumers. As for the licensee in a dominant position, given its market power in the telecommunications market concerned, it is subject to additional obligations under the licensing regime to prevent any possible abuse of dominant position¹⁰.

23. In view of such regulatory concerns on the operations of carriers and dominant licensees, the TA considers it undesirable that these carriers and dominant licensees are able to spin off their operations to associated corporations which are not subject to any regulatory control at all. For example, where a carrier is subject to licence obligation to implement more stringent accounting practices, or to publish its tariffs, its associated corporation, not being a licensee at all, has no such obligation. In fact, not being a licensee, it is not subject to any provisions in the Ordinance applicable to telecommunications licensees in general, including provisions regulating anti-competitive and misleading or deceptive conduct. In the case of a dominant operator, the Ordinance provides that a dominant operator shall not

¹⁰ For example, section 7L of the Ordinance provides that a licensee in a dominant position in a telecommunications market shall not abuse its position. Section 7N further provides that a licensee in a dominant position shall not discriminate between persons who acquire the services in the market on charges or the conditions of supply.

abuse its position. Conduct that may be regarded as abuse includes predatory pricing, price discrimination, bundling of services etc. The associated corporation can be reselling the whole range of the dominant operator's services but is not subject to such regulation. There is therefore a need to bring corporations which resell the services operated by the associated carriers or dominant licensees into the licensing regime. And the TA proposes to partially commence section 8(1)(aa) for, inter alia, this purpose.

24. Since the activities and operation of the associated corporations are closely related to those of the associated carriers or the dominant licensees, the TA considers that it is more appropriate to regulate the activities of the associated corporations by individual licences, as opposed to the class licence regime, so that appropriate licensing conditions can be applied to the individual associated corporations depending the nature of their operations. Once Section 8(1)(aa) is partially commenced to cover the associated corporations, the TA will issue guidelines under section 6D(2)(a) of the Ordinance setting out the licensing criteria for applying for the individual licence.

Section 8(1A)

25. Section 8(1A) is the provision which defines what constitutes "offering a telecommunications service" under section 8(1)(aa). When section 8(1)(aa) is partially commenced, section 8(1A) will also be in operation.

Summary of proposal

26. In summary, the TA makes the following proposal with regard to the commencement of section 8(1)(aa):

- (a) to commence section 8(1)(aa) to the extent that it covers
 - (i) resale of telecommunications services on a prepaid basis; and
 - (ii) resale of telecommunications services by an associated corporation of a carrier or a telecommunications licensee in a dominant position, when the services being resold by the associated corporation are operated by the associated carrier

or dominant operator; and

(b) consequentially to commence section 8(1A).

27. As for the business operations that fall within section 8(1)(aa) but are not covered in the TA's proposed partial commencement, the TA will keep these operations in view and consider subjecting some or all of them to licensing requirement in future if such a regulatory need arises. The TA invites all interested parties to comment on his proposal.

CLASS LICENCE ON RESALE OF TELECOMMUNICATIONS SERVICES ON A PREPAID BASIS

28. When section 8(1)(aa) partially commences operation, persons who resell telecommunications services on a prepaid basis are required to obtain a licence before their business operations can continue. As mentioned in paragraph 19 above, the TA proposes to create a class licence to regulate these resellers (the "Class Licence"). Class licence is a simple and low cost approach to regulate telecommunications services or operations. A person is licensed if he meets the qualifications specified in the class licence. There is no need to undergo a licence application / approval process. The TA considers that class licence is the appropriate regulatory vehicle to regulate the resale of telecommunications on a prepaid basis.

29. The need to regulate resellers of prepaid telecommunications services mainly stems from the risks that some resellers would abscond after receiving customer prepayment, and leaving the customers with no recourse to trace the resellers for refund. To reduce such risks, the TA proposes that the resellers be made subject to, inter alia, the following licensing requirements and conditions:

(a) registration with the TA before qualifying as a class licensee; and

(b) providing or making available specified information to the customers when the services are offered.

30. To further reduce the risks of resellers absconding with the prepaid

proceeds, the TA would like to explore the feasibility of requiring the class licensees to either maintain at all times a net asset value relative or equivalent to the amount of prepaid proceeds collected, or to procure a bank guarantee in favour of the TA before they are allowed to offer prepaid services. Details of the TA's preliminary thoughts are discussed in paragraphs 45 – 49.

31. A draft of the proposed Class Licence is attached to this Paper in the **Annex**.

Proposed Licence Conditions

The Class Licensee (Condition 2)

32. The TA proposes that any person who is:

- (a) incorporated or registered in Hong Kong under the Companies Ordinance (Cap 32); and
- (b) registered with the TA pursuant to Condition 5 of the Class Licence (see paragraphs 36 – 39 for details)

will be granted class licensee status to resell telecommunications services on a prepaid basis.

33. A person is regarded as reselling telecommunications services on a prepaid basis if it offers the telecommunications services without establishing or maintaining any means of telecommunications, and is involved in:

- (a) offering a telecommunications service in the manner as described in section 8(1A) of the Ordinance;
- (b) reselling, with or without repackaging, the telecommunications services operated by other persons for the purposes of offering the telecommunications services under a brand name different from that of or designated by the person with whom he makes an arrangement for the provision of the telecommunications services;

(c) controlling the tariffs for the telecommunications service offered (i.e. the tariffs are set by the person who offers the services rather than by the service providers); and

(d) receiving prepayment for the telecommunications service offered.

It should be noted that, for the reasons given in paragraph 24 above, an associated corporation of a carrier or a telecommunications licensee in a dominant position in a telecommunications market will not be licensed under the Class Licence to resell the services provided by the associated carrier or dominant licensee. An individual licence will be required to offer these services on a prepaid basis.

34. A person licensed under Condition 2 will be subject to the terms and conditions of the Class Licence, as well as the provisions of the Ordinance applicable to licensees in general.

35. A person who is not licensed under Condition 2 and is not covered by an individual licence referred to in paragraph 24 will be in breach of section 8(1)(aa) and liable to prosecution for an offence under section 20 of the Ordinance if it resells telecommunications services on a prepaid basis.

Registration (Condition 5)

36. To effectively monitor the resale of prepaid services, the TA considers that persons incorporated or registered under the Companies Ordinance (Cap. 32) and intending to resell prepaid services should be required to register with the TA before it will be granted licensee status. The information or documents that should be supplied for registration include:

- (a) Company name and contact details;
- (b) the name(s) of the person(s) and / or operator(s) involved in the arrangement to provide the services being resold;
- (c) the access code(s) or number(s) used for obtaining prepaid services;
- (d) the nature and the brand name(s) of services being offered;
- (e) a copy of the Business Registration Certificate; and
- (f) a copy of the Certificate of Incorporation or Certificate of

Registration of Oversea Company

37. The person will become a class licensee after registration. The class licensee will be required to update the information provided to the TA before any changes to the information are put into effect. It shall also notify the TA three months before it ceases to operate any business under the Class Licence. A transitional arrangement will be provided to those who have been reselling prepaid telecommunications services before the partial commencement of section 8(1)(aa). They are required to register with the TA within two months of the commencement of the Class Licence¹¹.

38. Where a class licensee contravenes any provisions in the Ordinance or any conditions specified in the Class Licence on Prepaid Services, the TA may cancel, withdraw or suspend its registration under Condition 5.

39. In view of the expected low administrative cost, the TA does not propose to levy any licence or registration fee for the Class Licence for the time being. He will review the fee issue on a regular basis.

Scope of Services (Condition 2)

40. The Class Licence licenses a person to resell telecommunications services on a prepaid basis. There is no restriction on the kind of telecommunications services that can be resold. The services may include voice or data services, local or external services, fixed or mobile services. It should also be noted that whilst the “offer” of services has to be made in Hong Kong to fall within the licensing regime, the “consumption” of the services may be outside Hong Kong (as in the case of offer in Hong Kong of prepaid calling cards which are to be used in the Mainland).

41. The proposed Class Licence will not cover sales agents or sales representatives of licensed telecommunications operators (such as FTNS operators, ETS operators, MNOs or MVNOs), who sometimes engage sales representatives to market their services by setting up stalls in the streets or engaging in door-to-door sales activities. The TA regards these agents or representatives as employees, agents or contractors of the relevant licensees and the licensees are fully responsible for the compliance with the relevant

¹¹ The Class Licence will be created by the TA on the same day section 8(1)(aa) commences operation.

licence conditions by their employees, agents or contractors.

Provision of Information to Customers (Condition 6)

42. The TA proposes that the class licensee should provide the following information to the consumers when the telecommunications services are offered:

- name of the class licensee
- registration number of the class licensee under the Class Licence
- customer service hotline numbers
- the access code(s) or number(s) (including any access password if required) used for obtaining prepaid telecommunications services
- instructions on how to access the services
- tariffs for the services offered
- expiry date or validity period of the prepaid services
- expiry date or validity period of the prepaid services after replenishment of value

For example, if physical cards are sold, the information should be printed on the prepaid calling cards or supplementary leaflets. If the prepaid services are sold by electronic means, the information should be made available to the customers, say, by fax, email or through Internet. The TA considers that the transparency of information will facilitate consumers to make informed purchasing decision. It also helps the consumers and the TA to identify and trace the resellers of the telecommunications services.

43. At present, public telecommunications service licensees who offer prepaid services under a PNETS licence are not subject to a similar licence obligation to provide information to the customers. If this proposed licence condition is adopted for the Class Licence, the TA will extend this licence obligation to the public telecommunications services licensees.

Other licence conditions

44. Whilst the Class Licence does not set the boundary of the kind of telecommunications services that can be resold under the Class Licence, the TA considers that the major kinds of services that will be resold are likely to

include external telecommunications services, mobile services and Internet access services. The TA considers that certain licence conditions currently applicable to the other public telecommunications network or services licences should be included in the Class Licence:

- general compliance requirement (Condition 4)
- offer of satisfactory service (Condition 7)
- inspection (Condition 8)
- requirement to furnish information (Condition 9)
- confidentiality of customer information (Condition 10)
- billing accuracy (Condition 11)¹²
- tariffs (Condition 12)
- unsolicited advertisements (Condition 13)
- numbering plan (Condition 14)¹³

On the other hand, although the class licensees may be involved in reselling external telecommunications services (essentially IDD services), which are subject to payment of universal service contribution (USC) and local access charge (LAC)¹⁴, the TA considers that the class licensees should not be imposed with the obligation to make such payment and, as an associated duty, to file monthly traffic reports and yearly audited reports to the TA. The TA considers that the obligation of making USC / LAC payment and filing the necessary traffic reports should, as at present, remain vested with the ETS operators and other network or services operators who “operate” (rather than simply “resell”) external telecommunications services. The TA welcomes comments from interested parties on the proposed draft Class Licence.

Maintenance of Net Asset Value or Procurement of Bank Guarantee

¹² In respect of other public telecommunications licences, the licence obligation is one relating to “metering” accuracy. The use of meters to measure traffic minutes is an establishment of a means of telecommunications subject to licensing under section 8(1)(a) of the Ordinance. Resellers of telecommunications services, who do not maintain or establish any means of telecommunications, will only operate billing equipment.

¹³ The class licensees will not be entitled to allocation or assignment of any numbers or codes under the numbering plan but as they may be providing resale of ETS or data services (such as Internet access services), they are required to comply with the numbering plan in the same way as the ETS operators and Internet services providers.

¹⁴ For details of the regime of universal service arrangements, please refer to the relevant TA statements in OFTA website: <http://www.ofta.gov.hk/tas/tas-usc.html> and <http://www.ofta.gov.hk/tas/tas-interconnect.html>.

45. As mentioned in paragraph 30 above, the TA would also like to explore the feasibility of imposing a net asset value maintenance requirement or bank guarantee requirement on the class licensees. We recognise that regulating persons who resell telecommunications services on a prepaid basis by way of a class licence will be a proactive step in introducing minimum but necessary regulation to this type of popular telecommunications services. This will help protect consumer interests by obliging the resellers to register with the TA and provide information to customers. The TA further considers that it is necessary to introduce further regulation in respect of the resale of prepaid telecommunications services. Against the background of incidents of issuers of prepaid calling cards absconding with prepayment, the TA invites views from the industry and the public on imposing a licence obligation on a reseller of prepaid telecommunications services to maintain a net asset value at all times during the operation of business, or procure a bank guarantee before it is permitted to register as a class licensee.

Maintenance of net asset value

46. The net asset value maintenance requirement is an accounting requirement obliging the class licensees to maintain at all times a net asset value relative to the total amount of prepaid proceeds collected. The class licensees have to maintain proper books of accounts and updated records of customer prepaid proceeds at all times, and submit upon request by the TA data and audited financial reports to show compliance with the requirement. In order to avoid unnecessary burden on the class licensees, the licensees are not required to furnish the financial reports to the TA unless requested to do so.

47. This licence obligation will ensure that the class licensees will always maintain a certain level of asset to satisfy outstanding claims of customers who have purchased the prepaid services. The aim is to reduce the chance that the class licensees resell more services than they can afford to offer, thus causing financial loss to the customers if it turns out that the class licensees have no sufficient means to support the services.

Procurement of bank guarantee

48. The TA has also considered the alternative of requiring the resellers of prepaid services to procure a bank guarantee of a certain amount in favour of

the TA before they are entitled to be registered as class licensees¹⁵. The guaranteed amount will be forfeited by the TA if the class licensees fail to make available to the customers services which have been resold on a prepaid basis. The aim is to ensure that resellers without a minimum level of financial resources to support the provision of services will be barred from offering prepaid services.

Discussion

49. The TA considers that, by imposing a licence obligation to maintain net asset value or to procure a bank's guarantee will help reduce the risks of resellers absconding with the prepaid proceeds. On the other hand, the TA is aware that this requirement will, inevitably, increase the operating costs of the resellers. Further, if the requirement is indeed adopted, the Class Licence will become the first among all public telecommunications licences currently issued under the Ordinance to carry a requirement on asset level. The TA will also explore whether the obligation should be extended to the other public telecommunications network and services licensees who offer prepaid services (such as FTNS and PNETS licensees). The TA would like to invite interested parties to comment on the feasibility and desirability of imposing the obligation¹⁶.

TIMING

50. The consultation will last until **14 December 2004**. After consideration of the comments received, the TA will finalise his proposal on the partial commencement of section 8(1)(aa) and his decision on the creation of the Class Licence.

INVITATION OF COMMENTS

51. Views and comments on this Consultation Paper should reach the

¹⁵ In Singapore, if a service-based operator intends to collect money deposits and/or issue prepaid cards for collection of payments from their customers (other than credit cards), the operator is required to procure a banker's guarantee of S\$100,000 to be provided to and made in favour of the Info-communications Development Authority of Singapore (IDA). For details, see IDA's website: www.ida.gov.sg.

Office of the Telecommunications Authority on or before **14 December 2004**. Any person who submits views and comments to us should be aware that the TA may publish all or any part of the views and comments received and to disclose the identity of the source in such manner as the TA sees fit. Any part of the submission which is considered commercially confidential should be marked. The TA would take such markings into account in making his decision as to whether or not to disclose such information. Submissions should be addressed to

Office of the Telecommunications Authority
29/F Wu Chung House
213 Queen's Road Central
Wanchai
Hong Kong
Attention: Senior Regulatory Affairs Manager (Economic
Regulation) 3
Fax: 2803 5110
E-mail: section81aa@ofta.gov.hk

An electronic copy of the submission should be provided by e-mail to the address indicated above.

Office of the Telecommunications Authority
15 October 2004

¹⁶ See sample licence conditions in the Annex.

**TELECOMMUNICATIONS ORDINANCE
(Chapter 106)**

CLASS LICENCE

Section 8(1)(aa) of the Telecommunications Ordinance

**RESALE OF TELECOMMUNICATIONS SERVICES
ON A PREPAID BASIS**

The Telecommunications Authority, in exercise of the powers conferred on him by sections 7(5) and 7B(2) of the Telecommunications Ordinance (Cap 106), issues this Licence on this [] day of [], 200[].

1. Interpretation

1.1 In this Licence

“Authority” means the Telecommunications Authority appointed under section 5 of the Ordinance;

“Licensee” means a person licensed under Condition 2.1 of this Licence;

“Prepayment” means a payment that:

- (a) is made to the Licensee in advance of the delivery of the telecommunications services concerned; and
- (b) will be debited upon after the telecommunications services concerned are consumed.

For the avoidance of doubt, “prepaid” shall be construed accordingly;

“Resell telecommunications services on a prepaid basis” is more particularly defined in the Schedule. For the avoidance of doubt, “resale of telecommunications services on a prepaid basis” shall be construed accordingly;

“the Ordinance” means the Telecommunications Ordinance (Cap 106).

- 1.2 Any word or expression used in this Licence shall, unless otherwise provided, have the same meaning as it has in the Ordinance or regulations made under the Ordinance.
- 1.3 For the purposes of interpreting this Licence, headings and titles shall be disregarded.

2. Grant of Licence

2.1 Subject to Condition 2.2 and the terms and conditions of this Licence, a person who is

- (a) incorporated or registered under the Companies Ordinance (Cap 32);
and
- (b) registered under Condition 5 (provided that such registration has not been cancelled, withdrawn or suspended pursuant to Condition 5.6 below)

is licensed to resell telecommunications services on a prepaid basis.

2.2 A person referred to in Condition 2.1 is not licensed to:

- (a) establish or maintain any means of telecommunications for the purpose of providing or offering telecommunications services under this Licence; and
- (b) resell telecommunications services that are operated by
 - (i) a fixed carrier licensee;
 - (ii) a mobile carrier licensee;
 - (iii) a fixed telecommunications network services licensee;
 - (iv) a public radiocommunications service licensee (for services other than land mobile services), other than a licensee under a licence listed in Schedule 1 to the Ordinance; or

- (v) a licensee under the Ordinance who is in a dominant position in a telecommunications market,

when the person referred to in Condition 2.1 is an associated corporation of a licensee referred to in Condition 2.2(b) operating telecommunications services which are or are intended to be resold by the person referred to in Condition 2.1.

3. General

- 3.1 This Licence shall not be construed as granting an exclusive right to the Licensee.
- 3.2 The grant of this Licence does not authorize the Licensee to do anything which infringes any exclusive right to provide telecommunications circuits or services granted under the Ordinance or other Ordinance.
- 3.3 This Licence shall remain in full force unless expressly revoked by the Authority.

4. Compliance

- 4.1 The Licensee shall comply with the Ordinance, regulations made under the Ordinance, licence conditions or any other instruments which may be issued by the Authority under the Ordinance and such guidelines or codes of practices which may be issued by the Authority as in his opinion are suitable for the purpose of providing practical guidance on any particular aspect of any conditions of the Licence.
- 4.2 If the Licensee employs any person under contract for the purpose of the offering a telecommunications service under this Licence (a “contractor”), the Licensee shall continue to be responsible for compliance with the conditions of this Licence, and the performance thereof, by the contractor.

5. Registration

- 5.1 Subject to Condition 5.5, where a person who is incorporated or registered under the Companies Ordinance (Cap 32) intends to resell

telecommunications services on a prepaid basis, it shall register the following information with the Authority before it will be licensed pursuant to Condition 2.1:

- (a) the name and contact details of that person;
- (b) the name(s) of person(s) and / or operator(s) involved in the arrangement to provide the telecommunications services offered by the that person under Condition 2.1;
- (c) the access code(s) or number(s) used for obtaining prepaid telecommunications services;
- (d) the nature and the brand name(s) of the services being offered;
- (e) a copy of the Business Registration Certificate of that person; and
- (f) a copy of the Certificate of Incorporation or Certificate of Registration of Oversea Company of that person.

5.2 The Licensee shall update the information provided under Condition 5.1 before changes to the information are put into effect.

5.3 The Authority shall keep a register containing the information provided by the Licensee and may publish all or part of the information contained in the said register.

5.4 The Licensee shall notify the Authority three months before it ceases to offer the services under the Class Licence.

5.5 Where a service within the description of Condition 2.1 was being offered before the commencement of this Licence, the information referred to in Condition 5.1 shall be registered within two months of the commencement of this Licence.

5.6 The Authority may cancel, withdraw or suspend for such period as may be appropriate the registration of the Licensee under Condition 5.1 in the event of any contravention of the Ordinance or of any conditions in this

Licence by the Licensee.

6. Provision of Information to the Customers

6.1 Without prejudice to the other terms and conditions of this Licence, the Licensee shall provide or make available the following information to the customers when the services are offered:

- (a) Name of the Licensee;
- (b) Registration number of the Licensee under this Licence;
- (c) Customer service hotline number(s);
- (d) Where applicable, the access code(s) or number(s) (including any access password) used for obtaining prepaid telecommunications services;
- (e) Instructions on how to access the services;
- (f) the tariffs under which the services are offered;
- (g) Expiry date or validity period of the prepaid services; and
- (h) Expiry date or validity period of the prepaid services after replenishment of the prepayment.

7. Offer of Satisfactory Service

7.1 The Licensee shall at all times and from time to time during the subsistence of this Licence offers the services within the description of Condition 2.1 in a manner satisfactory to the Authority.

7.2 The Authority may issue such guidelines or codes of practices which in his reasonable opinion are suitable for the purpose of providing practical guidance on Condition 7.1.

8. Inspection

- 8.1. On receiving reasonable prior written notice from the Authority, the Licensee shall allow the Authority and any person authorized in writing by him for the Authority's own purposes to enter and inspect the offices, places and premises in Hong Kong where the Licensee has used in relation to the offer of telecommunications services under this Licence, to verify that the Licensee is in compliance with the conditions of this Licence and the Ordinance.
- 8.2. The Licensee shall permit the Authority or any person authorized by him in writing for the Authority's own purpose to inspect and if required to make copies of records, documents and accounts relating to the Licensee's business for the purpose of enabling the Authority to perform his functions under the Ordinance and this Licence and to ensure the Licensee's compliance with the conditions of this Licence and the Ordinance.

9. Requirement to Furnish Information to the Authority

- 9.1 The Licensee shall furnish to the Authority, in such manner and at such times as the Authority may request in writing, such information related to the business, including financial information, accounts, traffic information, technical configuration, circuit routing and other records or information as the Authority may reasonably require in order to perform his functions under the Ordinance and this Licence and to ensure the Licensee's compliance with the conditions of this Licence and the Ordinance.
- 9.2 Where the Authority proposes to disclose information obtained and the Authority considers that the disclosure would result in the release of information concerning the business or commercial or financial affairs of the Licensee which disclosure would or could reasonably be expected to adversely affect the Licensee's lawful business or commercial or financial affairs, the Authority will give the Licensee a reasonable opportunity to make representations on the proposed disclosure before the Authority makes a final decision whether to disclose the information.

9.3 Without limiting the generality of Condition 9.1, the Licensee shall, upon request by the Authority, supply to the Authority, at such intervals and on/before such deadlines as may be specified by him in the request, copies of agreements, contracts, invoices, statements and other relevant documents as may be specified by the Authority to show the arrangements that the Licensee has entered into with such person(s) and / or operators in relation to the operation or provision of the telecommunications services offered by the Licensee under this Licence.

10. Confidentiality of Customer Information

10.1 The Licensee shall not disclose information of a customer except with the consent of the customer, which form of consent shall be approved by the Authority, except for the prevention or detection of crime or the apprehension or prosecution of offenders or except as may be authorised by or under any law.

10.2 The Licensee shall not use information provided by its customers or obtained in the course of offer of services to its customers other than for and in relation to the offer by the Licensee of the services under this Licence.

11. Billing Accuracy

11.1 The Licensee shall take all reasonable steps to ensure that any billing equipment used in connection with the services offered under this Licence is accurate and reliable. The Licensee shall, in relation to the billing system used for the offer of the services, keep such records and make them available for inspection by the Authority.

11.2 Upon written request of the Authority, the licensee shall conduct or take all practicable steps to procure the tests on billing equipment to assess its accuracy, reliability and conformity to the technical standards, if any, specified by the Authority. The Licensee shall submit the test result to the Authority within 14 days after the date of the test or such other longer period as the Authority may determine.

12. Tariffs

12.1 The licensee shall publish and charge no more than the tariffs for the services offered under this Licence. Publication may be effected by electronics means or by providing a copy to any person who may request it. The tariffs shall include the relevant terms and conditions for the offer of the services.

13. Unsolicited Advertisements

13.1 The Licensee shall not use the services, and shall endeavour to prevent the services from being used by any user, for the transmission of unsolicited advertising information or unsolicited promotional information and shall comply with all codes of practice which may be issued by the Authority from time to time concerning unsolicited advertising information or unsolicited promotional information.

14. Numbering Plan

14.1 The Licensee shall conform to any numbering plan made or approved by the Authority and any code of practice or direction given by the Authority in respect of the numbering plan.

SCHEDULE

Resell Telecommunications Services on a Prepaid Basis

1. A person “resells telecommunications services on a prepaid basis” if it:
 - (a) offers a telecommunications service in the manner as described in section 8(1A) of the Ordinance;
 - (b) resells, with or without repackaging, the telecommunications services operated by other persons for the purposes of offering the telecommunications services under a brand name different from that of or designated by the person with whom he makes an arrangement for the provision of the telecommunications service;
 - (c) controls the tariffs for the telecommunications service offered; and
 - (d) receives prepayment for the telecommunications service offered.

2. For the avoidance of doubt, “brand names” includes the incorporated name, trading name or business name of a person.

[Sample licence condition for maintenance of net asset value]

15. Maintenance of Net Asset Value

15.1 The Licensee shall maintain at all times a net asset value not less than [ratio/ %] of the total amount of customer prepayment.

15.2 The Licensee shall maintain proper books of accounts in accordance with the generally accepted accounting principles in Hong Kong and updated records of customer prepayment at all times. Without prejudice to the generality of Condition 9, where directed by the Authority the Licensee shall submit information on the customer prepayment and net asset value and audited financial reports (with a breakdown on the accounts for customer prepayment) for the purpose of establishing compliance of Condition 15.1.

15.3 Without prejudice to the generality of Condition 8, the Licensee shall facilitate the inspection of records, books or any other relevant document of the Licensee by the Authority or auditors appointed by the Authority for the purpose of determining whether Condition 15.1 has been complied with.

15.4 For the purpose of this Licence,

“Customer prepayment” means the liability account on the balance sheet of the Licensee that accounts for the total amount of cash payment received from customers in advance for the services that have not yet been delivered to such customers.

“Net asset value” means the balance of total assets after deduction of total liabilities and intangible assets, provided always that the assets and liabilities should be recognised and accounted for in accordance with the generally accepted accounting principles in Hong Kong.

[Sample licence condition for bank guarantee]

15. Bank Guarantee

15.1 Before a person is entitled to register under Condition 5, it shall submit a bank guarantee of [HK\$xxx] procured in favour of the Authority. The bank guarantee shall be in the form appearing [below] issued by a bank in Hong Kong.

15.2 The Authority is entitled to demand full payment of [HK\$xxx] or any part thereof under the bank guarantee if the Licensee fails to make available to a customer the services resold by the Licensee to the customer.

15.3 For the purpose of Condition 15.1, a “bank” means “an authorized institution” as defined in the Banking Ordinance (Cap 155).

[Form of Bank Guarantee]

[The bank’s letterhead]

[Date]

To: The Telecommunications Authority of Hong Kong
29/F Wu Chung House
213 Queen’s Road East
Wan Chai
Hong Kong

WHEREAS

(a) The Class Licence on Resale of Telecommunications Services on a Prepaid Basis created by the Telecommunications Authority (the

“Authority”) on [xxx] (the “Class Licence”) provides that a person shall submit a bank guarantee of [HK\$xxx] procured in favour of the Authority before that person is entitled to register as a licensee under the Class Licence;

- (b) [Company name] whose registered office is at [address] intends to register as a licensee under the Class Licence and requests us to procure a bank guarantee of [HK\$xxx] in favour of the Authority pursuant to the requirement of the Class Licence;
- (c) We, [name of the bank] of [address in Hong Kong] (the “Guarantor”) agree to issue a bank guarantee of [HK\$xxx] (the “Bank Guarantee”) in favour of the Authority at the request of [company name] subject to the terms and conditions herein.

IT IS HEREBY AGREED THAT:

1. In consideration of the Authority registering [company name] as a licensee under the Class Licence [the “Licensee], the Guarantor irrevocably and unconditionally agrees to provide the Bank Guarantee to the Authority.
2. In the event that the Licensee fails to make available to a customer the telecommunications services resold by the Licensee to the customer under the Class Licence, the Guarantor shall upon demand made by the Authority in writing and without proof or conditions pay to the Authority the sum of [HK\$xxx] or any other sum or sums demanded by the Authority (such sum or sums not exceeding [HK\$xxx] in aggregate) under the Bank Guarantee. Upon payment by the Guarantor of the sum of [HK\$xxx] or such sums equal to [HK\$xxx] in aggregate, the liability of the Guarantor to the Authority under the Bank Guarantee shall be discharged.
3. Subject to paragraph 2, and save where the Licensee’s registration under the Class Licence is cancelled, withdrawn or suspended pursuant to Condition 5.6 of the Class Licence, the liability of the Guarantor to the Authority under the Bank Guarantee shall be discharged if the

Licensee is no longer registered as a class licensee under the Class Licence.

4. Subject to paragraphs 2 and 3, the liability of the Guarantor under the Bank Guarantee shall not be affected or discharged in any way by (and the Guarantor hereby waives any requirement to give notice in respect of): -
 - (a) any suspension of the Licensee's registration under the Class Licence, variation to or amendment of the Class Licence or any concession or waiver by the Authority in the respect of the Licensee's obligations under the Class Licence;
 - (b) any cancellation, withdrawal or suspension of the Licensee's registration under the Class Licence;
 - (c) any forbearance or waiver of any right or remedy the Authority, the Government of the Hong Kong Special Administrative Region, the Chief Executive in Council or the Chief Executive may have against the Licensee; and
 - (d) any act or omission of the Licensee pursuant to any other arrangement with the Authority or with the Guarantor.
5. The Authority shall be entitled to assign the benefit of the Bank Guarantee at any time without the consent of the Guarantor or the Licensee being required. Without prejudice to the foregoing and purely on a "for information basis", the Guarantor will be notified by the Authority after any such assignment from time to time.
6. All documents arising out of or in connection with the Bank Guarantee shall be served:
 - (a) upon the Authority, at 29th Floor, Wu Chung House, 213 Queen's Road East, Wanchai, Hong Kong marked for the attention of Assistant Director (Regulatory);
 - (b) upon the Guarantor, at [address in Hong Kong].

7. The Authority and the Guarantor may change their respective nominated addresses for service of documents to another address in Hong Kong but only by prior written notice to each other. All demands and notices must be in writing.
8. Where applicable, words and expressions used in the Bank Guarantee shall have the meaning assigned to them in the Class Licence.
9. The Bank Guarantee shall be governed by and construed according to the laws for the time being in force in Hong Kong and the Guarantor agrees to submit to the non-exclusive jurisdiction of the courts of Hong Kong.

For and on behalf of [name of the Guarantor]

[signed by authorised officer of the Guarantor with name and position of the officer provided]