



LC Paper No. CB(1)2923/09-10(02)  
(English version only)

**BY POST AND BY FAX TO 2978 7569**

27 September 2010

Bills Committee on Communications Authority Bill  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Dear Sirs

**COMMUNICATIONS AUTHORITY BILL (Your reference: CB1/BC/10/09)**

Further to your facsimile dated 17 August 2010, we are pleased to submit our comments on the Communications Authority Bill (the "Bill") for your consideration.

**I. Delegation of the powers and functions of the CA**

Pursuant to Clause 17 of the Bill, it is proposed that the Communications Authority (the "CA") has a wide delegation power, with the option to delegate its functions to (i) any committee appointed under Clause 16; (ii) the Director-General of Communications ("DGC"); and (iii) any public officer.

Apart from Clause 17(3), the Bill does not contain any provisions on the circumstances in which the CA can or cannot delegate its powers and functions, the considerations that it should take into account in exercising its power to delegate, and to which of (i) to (iii) above that it should delegate a specific power or function to.

The Bill also does not contain any guideline on the type of "public officer" that would qualify for delegation.

While the Bill states that the DGC will be supported and assisted by OFCA, it lacks any indication as to whether the DGC, in exercising the delegated authority of the CA under Clause 17 or in implementing the decisions of the CA under Clause 14, is required to involve OFCA at all, and if so, under what circumstances.

Clause 17 lacks the safeguard necessary to prevent functions that should be performed by, and the decisions that should be made by, the CA from being delegated to the DGC, or a public officer who is not familiar with the telecommunications and broadcasting industries. The Bill also lacks the safeguard required to prevent a concentration of power in the hands of the DGC or a public officer.

Clearer provisions should be put in place to ensure that all the functions of the CA are performed by, and the decisions are made by, the CA pursuant to a proper decision-making process such as that proposed in Clause 10 of the CA Bill with the relevant details to be worked out. For example, it would be inappropriate for the Authority to delegate to the DGC, any other public officer or any committee, a blanket power to make decisions or determinations.



The role of the DGC should be to implement measures agreed by the CA, but not to perform the functions of the CA. While Clause 14 recognises this, this also needs to be clarified in Clause 17 by limiting the power to delegate accordingly.

## II. Confidentiality obligations

We welcome the provisions in the Bill that propose to set out the obligations of the CA and its authorised personnel in handling the confidential information that it/he/she receives.

It is important to protect the confidential information of an individual and a business undertaking from being misused and abused. To that end, it is essential to put in place, after careful consideration, a detailed set of obligations which enable the CA and its authorised personnel to perform its/his/her functions without compromising the protection that is required to be provided to confidential information.

We would appreciate it if the Bills Committee can carefully consider our comments below.

### A. General comments

1. The scope of information which the CA and the persons mentioned under Clause 21 are required to keep in confidence is far too limited. It does not give sufficient protection against disclosure of confidential information.

As in the UK, and pursuant to the provisions of the Hong Kong Competition Bill, all information in relation to the identity and affairs of an individual and the business of an undertaking should be considered as confidential and be protected as such (whether or not it is stated to be confidential) and protection should not be merely limited to those classified as confidential by the Hong Kong Government or those expressly stated to be confidential as proposed under Clause 21(5).

2. The CA should have regard to certain overriding considerations before it discloses any confidential information of an individual or a business undertaking in order to ensure that the legitimate interests of all parties are considered and that that circumstances does warrant the disclosure.

Similar to the position under the Competition Bill and that in the UK, the Authority should have regard to:

- (i) whether the disclosure is in the public interest;
- (ii) in far as the information relates to a business undertaking, whether disclosure of the information might harm the legitimate business interest of the undertaking concerned;
- (iii) in so far as the information relates to an individual, whether the disclosure might harm the individual's interest; and
- (iv) the extent to which the disclosure is necessary for the purpose for which the CA intends to make the disclosure.

3. Save for the disclosures permitted under the proposed Clause 21 (a) to (f), (h) and (k) (subject to our comments on those provisions as set out herein), before disclosing any information of an individual or a business undertaking, the CA should give the individual or the business undertaking concerned a reasonable opportunity to make representations on the proposed disclosure (or the extent thereof) before it makes its final decision to disclose.
4. For all disclosures proposed to be permitted under Clause 21(2), the Bill should require the recipients to use the disclosed information only for the purpose for which it is disclosed, and to prohibit them from further disclosing the information.



5. Clause 21 leaves the decision on whether information can be disclosed under the circumstances mentioned under Clause 21(2) to the subjective interpretation of the CA (or its authorised personnel mentioned under Clause 21(1)). This creates room for disputes and manipulation. Instead, information should only be disclosed if it is reasonably required, objectively speaking, for the purposes mentioned under Clause 21.

**B. Specific comments**

1. Clause 21(2)(b)(c)

The current Clause 21(2)(b) and (c) should be amended as they create room for dispute, and may be subject to manipulation. We propose to amend Clause 21(2)(b) and (c) in the following manner, in addition to our comments below.

"21(2)(b) the giving or disclosure of information ~~with a view to the institution of, or otherwise~~ which is reasonably required for the purpose of, any criminal proceedings or any investigation carried out in Hong Kong and under the laws of Hong Kong"

"21(2)(c) the giving or disclosure of information ~~in connection~~ which is reasonably required for with any civil or other regulatory proceedings carried out in Hong Kong and under Hong Kong laws to which the Authority is a party ~~or with a view to bringing any proceedings of this kind~~".

Proposed permitted disclosures under Clause 21(2)(b) and (c) should be limited to proceedings in Hong Kong. In the event that disclosure under Clause 21(2)(b) and (c) involves an overseas proceeding or requires the Authority pass the information to an overseas authority, disclosure should only be permitted after careful considerations such as:

- (i) whether it is more appropriate for the proceedings to be brought in a court in Hong Kong;
- (ii) whether the laws of that country would provide appropriate protection no less than that being provided in Hong Kong such as protection against self incrimination in criminal proceedings; and
- (iii) whether the law of that country provides appropriate protection in relation to storage and disclosure of information being disclosed.

Besides, the permitted extent of disclosure for the purposes of civil and criminal proceedings should not be the same. As in the case of UK, while there is no specific limitation on the types of information that a UK public authority can disclose for the purpose of criminal proceedings, certain types of information (as mentioned in 241A(2) of the Enterprise Act, such as information that comes to a public authority in connection with section 11 of the Competition Act 1980) should be protected from disclosure for the purpose of civil proceedings.

2. Clause 21(2)(d)

Similar to the position under the Competition Bill, the disclosure proposed under this Clause 21(2)(d) should be limited to disclosure which is reasonably required for seeking professional advice regarding the civil or criminal proceedings specified under Clause 21(2)(b) and (c).

3. Clause 21(2)(k)

The scope of disclosure under Clause (2)(k) is too wide. Disclosure should be limited to the personnel within the CA on a strictly need to know basis and only for the purpose of the performance of the obligations of CA or the officer concerned under the ordinances specified in Clause 21(2)(j).



4. Clause 21(2)(l)

The difference in the tests to be applied by the CA under Clause 21(2)(j) and a public officer under Clause 21(2)(l) as to when they can disclose information for the discharge of its/his/her statutory duties is not warranted.

Information should not be disclosed only based on a public officer's subjective belief (which is not required to be reasonable or with basis) that disclosure is required to perform his/her statutory function. Disclosure should only be permitted if it is reasonably required for the discharge of an officer's statutory functions.

We propose that Clause 21(2)(j) be revised to apply to both the CA and its officers and that Clause 21(2)(l) should be deleted.

Should you have any queries, please do not hesitate to contact me on 2128 3002 or Winnie Ma on 2128 2202.

Yours sincerely,  
For and on behalf of  
Hutchison Telecommunications (Hong Kong) Limited

Oswald Kwok  
Legal & Regulatory Affairs Director