

HONG KONG SOCIETY OF ACCOUNTANTS

(Incorporated by the Professional Accountants Ordinance, Cap. 50)

CB(1)1976/98-99

香港會計師公會

香港金鐘道八十九號力寶中心四樓

**BY FAX AND BY POST**
(2827 5086)

Our Ref.: C/COG, M6543

23 September 1999

Mr. Eric K.C. Li,
Li, Tang, Chen & Co.,
Room 1021, 10/F,
Sun Hung Kai Centre,
30 Harbour Road,
Hong Kong.

Dear Eric,

Telecommunication (Amendment) Bill 1999

I mentioned earlier that members of the Legal Committee had comments to make on the above Bill. I understand that a Bills Committee has now been set up to consider it, but I do not have any information on whether or not it has had held any meetings.

The Committee's comments are as follows:

--- *Clause 4 new section 7H (copy attached at Appendix A)*

The term "accounting practices" in the first line should be replaced by "accounting policies" and the same term in the second line should be replaced by "accounting principles". The proposed terminology will be more readily understood by practising accountants.

--- *Clause 18, new section 35A (copy attached at Appendix B)*

It is assumed that this provision, which allows the Telecommunications Authority (TA) to enter the premises of a licensee and to inspect and make copies of documents, etc, is not intended to override legal privilege. This should be confirmed. However, even if it is confirmed, we believe that this provision is too broad. Under the proposed section 35A(1), there are no qualifications or restrictions on the Authority's power to enter the premises of a licensee and make copies of document, nor does the Authority have to give any reason for requiring entry. This can be contrasted with comparable provisions in other legislation which are more clearly circumscribed; for example sections 65D and 95 of the Securities Ordinance (Cap. 333) and section 29A of the Securities and Futures Commission Ordinance (Cap. 24) (copies attached), which require only that books, etc. be produced on demand. While section 45 of the Television Ordinance (copy also attached) allows the Broadcasting Authority to enter the premises of a licensee, this provision is qualified to a greater extent than section 35A and, under subsection (3) contains proper safeguards in relation to the preservation of confidentiality.

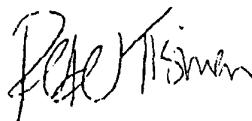
The proposed section 35A should be reviewed in the light of the above and its effect should be narrowed down appropriately.

Clause 23, new section 36D

Members of the Committee were concerned about the extensive grounds for the TA to be able to obtain information from third parties under this clause. Although there is a requirement for a magistrate's warrant to be obtained, the magistrate need only be satisfied that the information sought by the TA is relevant to its functions. This is very open-ended and does not afford much protection to third parties. One suggestion is that this power should be specifically limited to situations where significant breaches of the Telecommunication Ordinance, are suspected to have occurred, particularly those related to anti-competitive conduct, as suggested at paragraph 14 of the Legislative Council Brief (relevant extracts attached at Appendix C).

We would be grateful if you would make these views known to the Bills Committee.

Yours sincerely,



PETER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

PMT/ay
Encls.

c.c. Clerk to the Bills Committee on the Telecommunication (Amendment) Bill 1999
(Attn: Ms. P. Yeung) (Fax: 2121 0420)

(2) 局長可發出附有條件的許可證，而該等條件是為根據本條例規管電訊而需要或適宜的。

(2) The Authority may issue a permit subject to conditions necessary or desirable for the regulation of telecommunications under this Ordinance.

7F. 收費

7F. Tariffs

- (1) 持牌人須按照牌照規定或局長以書面發出的指示公布其收費。
- (2) 持牌人須在所公布的收費內包括提供有關電訊服務的條款，該等條款須包括—
 - (a) 服務說明；
 - (b) 在提供服務時給予或容許的折扣、折價、回佣或信貸；
 - (c) 與該服務有關的貨品或其他服務的提供；
 - (d) 與該服務有關的貨品或其他服務的費用支付；及
 - (e) 局長認為需要作為有關條款及條件的一部分的任何其他有關資料。
- (3) 傳送者牌照持牌人如沒有局長的事先書面同意，不得在沒有向其顧客要約提供各自收費的獨立電訊服務的情況下，將多項電訊服務合併在單一收費之內。
- (4) 局長可規定傳送者牌照持牌人將其包括在合併收費內的多項電訊服務的其中一項，按指定的單一收費獨立提供。

- (1) A licensee shall publish its tariffs in accordance with the requirements of its licence or directions issued in writing by the Authority.
- (2) A licensee shall include in the published tariffs the terms on which the telecommunications service is provided including—
 - (a) a description of the service;
 - (b) discounts, allowances, rebates or credits given or allowed on the supply of the service;
 - (c) the supply of goods or other services related to the service;
 - (d) the payment for goods or other services related to the service; and
 - (e) any other relevant information that the Authority considers necessary as a part of the terms and conditions.
- (3) A carrier licensee shall not, without the Authority's prior written consent, combine a number of telecommunications services into a single tariff without offering to its customers the services separately at individual tariffs.
- (4) The Authority may require a carrier licensee to provide a telecommunications service, which the licensee includes in a tariff for a combination of a number of telecommunications services, separately at a specified single tariff.

7G. 價格管制

7G. Price control

政策局局長可藉規則規定—

The Secretary may by regulations provide—

- (a) 在電訊市場處於優勢的任何固定傳送者牌照持牌人，須受政策局局長根據局長的意見而決定的價格管制措施所規限；及
- (b) 局長為施行收費管制而指明的在電訊市場處於優勢的傳送者牌照持牌人，不得收取高於或低於該持牌人所公布的收費的費用。

- (a) for a fixed carrier licensee who is in a dominant position in a telecommunications market to be subject to the price control measures that the Secretary determines on the advice of the Authority; and
- (b) for a carrier licensee who is in a dominant position in a telecommunications market specified by the Authority for the purposes of tariff control not to charge more or less than its published tariffs.

7H. 會計常規

7H. Accounting practices

持牌人須採納局長所指明的與一般接納的會計常規相符的會計常規。

A licensee shall adopt the accounting practices, consistent with accounting practices generally accepted, that the Authority specifies.

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"35A. 查閱紀錄、文件及帳目

"35A. Inspection of records, documents
and accounts

- (1) 局長或獲局長以書面授權的人，可在任何合理時間進入持牌人的處所，查閱與持牌人所經營的電訊網絡、電訊系統、電訊裝置或電訊服務有關的文件或帳目，並抄印該等文件或帳目或從該等文件或帳目作出或取得摘錄或稿紙。
- (2) 局長或獲授權的人根據本條行使其權力時，可要求持牌人向他交出文件或帳目。
- (3) 為使局長或獲授權的人能根據本條行使其權力，持牌人須讓局長或獲授權的人取閱局長或獲授權的人合理地要求查閱的文件或帳目，持牌人並須向局長或獲授權的人交出該等文件或帳目。
- (4) 文件或帳目包括藉電子或其他方法記錄的資料，而要求持牌人讓局長或獲授權的人取閱文件及帳目，亦包括要求持牌人提供適當的設施，以供閱讀資料以及將資料轉為紙張上的書面形式。
- (5) 凡——
 - (a) 任何人根據本條提供任何文件或帳目的文本；或
 - (b) 根據本條製作任何文件或帳目的文本，而該文本是用局長以外的人的設施製作的，
 則局長須償付其認為該人製作該文本所合理地招致的開支。
- (6) 任何人無合理辯解而違反第(3)款，即屬犯罪，一經定罪，可處第6級罰款及監禁6個月。
- (7) 任何人無合理辯解而交出他明知在要項上是虛假或具誤導性的文件或帳目，或提供他明知在要項上是虛假或具誤導性的資料，以充作或從根據本條提出的要求，即屬犯罪，一經循簡易程序定罪，可處第6級罰款及監禁6個月。

- (1) The Authority or a person whom he authorizes in writing may at all reasonable times enter the premises of a licensee and inspect and make copies of, or make or take an abstract of or extract from, a document or an account relating to a telecommunications network, system, installation or service conducted by the licensee.
- (2) The Authority or an authorized person in exercising his powers under this section may require a licensee to produce to him the document or account.
- (3) To enable the Authority or an authorized person to exercise his powers under this section, a licensee shall give the Authority or authorized person access to the documents or accounts the Authority or authorized person may reasonably require for inspection, and shall produce to the Authority or authorized person the documents or accounts as he may reasonably require.
- (4) A document or account includes information recorded by electronic or other means and the licensee's requirement to provide access to documents and accounts includes a requirement to provide the appropriate system for reading and reducing the information into a written form on paper.
- (5) Where—
 - (a) a copy of a document or an account is supplied by a person under this section; or
 - (b) a copy of a document or an account is made under this section, and a facility of a person other than the Authority is used to make the copy,
 the Authority shall reimburse the expenses which, in the opinion of the Authority, have been reasonably incurred by the person in making the copy.
- (6) A person who, without reasonable excuse, contravenes subsection (3) commits an offence and shall be liable on conviction to a fine at level 6 and to imprisonment for 6 months.
- (7) A person who, without reasonable excuse, in purported compliance with a requirement made under this section, produces a document or an account, or gives information, which he knows to be false or misleading in a material particular commits an offence and shall be liable on summary conviction to a fine at level 6 and to imprisonment for 6 months.

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Section of Enactment

▼	Chapter:	333	Title:	SECURITIES ORDINANCE	Gazette Number:
	Section:	65D	Heading:	*Books, accounts and records to be produced on demand	Version Date: 30/06/1997

(1) For the purposes of ascertaining whether or not a registered dealer or registered dealing partnership complies with section 65B the Commission and any person who produces written authority in that behalf signed by the Commission, shall have the powers of an auditor under section 95(1).

(2) For the purposes of section 95(3) a request made under section 95(1) by the Commission, or by any person authorized by it, in pursuance of the powers vested in it or him, as the case may be, by subsection (1) shall be deemed to have been made under section 95(1).

(Added 58 of 1985 s. 51. Amended 10 of 1989 s. 65; L.N. 259 of 1989)
(Part VIA added 58 of 1985 s. 19)

* The operation of this section is affected by s. 28(4) of the Securities and Futures Commission Ordinance (Cap 24). For convenience, s. 28(4) is reproduced at the end of this Ordinance.

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Section of Enactment

▼

Chapter:	333	Title:	SECURITIES ORDINANCE	Gazette Number:
Section:	95	Heading:	Books, accounts, and records to be produced on demand	Version Date: 30/06/1997

(1) On request by an auditor appointed under this Part a person who produces a written authority in that behalf under section 93(c)-

(a) a dealer and, where the dealer is a corporation or carries on business in partnership, the directors of the corporation or the other members of the partnership, and the dealer's servants and agents, shall produce any books, accounts, and records of any securities held by the dealer relating to the dealer's business; and

(b) an auditor appointed by a dealer shall produce any books, accounts, and records held by him relating to the business of the dealer.

(2) A dealer and, where the dealer is a corporation or carries on business in partnership, the directors of the corporation or the other members of the partnership, as the case may be, and the dealer's servants and agents and any auditor appointed by the dealer shall answer all questions relevant to an examination and audit which are put to him by an auditor appointed under this Part or a person who produces a written authority in that behalf given under section 93(c).

(3) Any person mentioned in subsection (1) who, without reasonable excuse, fails to comply with any request made to him under that subsection, or any person mentioned in subsection (2) who, without reasonable excuse, refuses or fails to answer any question put to him under that subsection, shall be guilty of an offence and shall be liable on conviction to a fine of \$10000 and to imprisonment for 2 years.

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Section of Enactment

Chapter: 24 Title: SECURITIES AND FUTURES COMMISSION ORDINANCE Gazette Number:

Section: 29A Heading: Power to require production of records and documents Version Date: 30/06/1997

PART V**REGULATION OF REGISTERED PERSONS' BUSINESS, ETC.****(1) Where-**

- (a) it appears to the Commission that there are circumstances suggesting that the business of a company which is or was at the relevant time a listed company has been or is being conducted with intent to defraud its creditors, or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any part of its members, or that it was formed for any fraudulent or unlawful purpose; or
- (b) it appears to the Commission that there are circumstances suggesting that persons concerned with the formation of the company or the management of its affairs have in relation to the formation or management been guilty of fraud, misfeasance or other misconduct towards it or its members; or
- (c) it appears to the Commission that there are circumstances suggesting that its members have not been given all the information with respect to its affairs that they might reasonably expect; or
- (d) if the Commission decides to provide assistance to investigate a matter relating to the company under section 59A, the circumstances giving rise or pertaining to the matter are, in the opinion of the Commission, of a nature similar to the circumstances giving rise or pertaining to a matter referred to in paragraph (a), (b) or (c), (Added 7 of 1995 s. 2)

the Commission may give directions to the company or to a subsidiary of the company or to a company substantially under the control of the same person as the company, requiring it, at the time and place specified in the directions, to produce the records and documents specified in the directions. (Amended 7 of 1995 s. 2)

- (2) The Commission may, when acting under subsection (1), instead of giving directions itself, authorize any person, on producing (if required to do so) evidence of his authority, to require any company referred to in subsection (1) to produce to him records and documents specified by him.
- (3) Where by virtue of subsection (1) or (2) the Commission or authorized person may require production of records and documents from any company, the Commission or authorized person may also require production of those records and documents from any person who appears to the Commission or authorized person to be in possession of them; but where the person in possession of the records and documents claims a lien on those that are produced by him, the production shall be without prejudice to the lien.

(4) A power under this section to require a company or other person to produce records and documents includes the power-

(a) if the records and documents are produced-

(i) to take copies of them or extracts from them; and

(ii) to require that person, or any other person who is a present or past officer of the company, or is or was at any time employed by the company, to provide an explanation of any of them; or

(b) if the records and documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(5) If a requirement to produce records or documents or provide an explanation or make a statement which is imposed by virtue of this section is not complied with, the company or other person on whom the requirement was so imposed commits an offence; but where a person is charged with an offence under this subsection in respect of a requirement to produce records and documents, it is a defence to prove that they were not in his possession or under his control and that it was not reasonably practicable for him to comply with the requirement.

(6) A person is obliged to provide an explanation or make a statement under this section but if the explanation or statement might tend to incriminate him, and he so claims before providing the explanation or making the statement, neither the requirement to provide the explanation or make the statement nor the explanation or statement is admissible in evidence against him in criminal proceedings other than proceedings for an offence under subsection (9) or section 36 of the Crimes Ordinance (Cap 200), or for perjury, in respect of the explanation or statement but is admissible for all purposes of the Securities (Insider Dealing) Ordinance (Cap 395).

(7) The Commission or authorized person shall, before requiring a person to provide an explanation or make a statement under this section, inform him of the limitation imposed by subsection (6) in respect of the admissibility in evidence of the requirement and of any explanation provided or statement made.

(8) Where an explanation is provided or statement is made under this section, the Commission or authorized person may further require, in writing, the person providing the explanation or making the statement to verify the explanation or statement by statutory declaration (which may be taken by the Commission or authorized person) and where a requirement under this subsection is made, the person to whom it is made shall comply with the requirement within a reasonable period as specified in the requirement.

(9) A person who, without reasonable excuse,-

(a) in purported compliance with a requirement under this section, produces records or documents or provides or makes an explanation or statement which he knows to be false or misleading in a material particular or recklessly produces records or documents or provides or makes an explanation or statement which is false or misleading in a material particular; or
(b) fails to comply with a requirement under subsection (8) or fails to do so within the period specified,

commits an offence.

(10) The Commission's power under subsection (1) to give directions to any company which is an authorized institution as defined in section 2 of the Banking Ordinance (Cap 155) may only be exercised in respect of-

(a) subsection (1)(c); or

(b) subsection (1)(d), if, and only if, the circumstances giving rise or pertaining to the matter for which assistance is to be provided under section 59A are of a nature similar to the circumstances giving rise or pertaining to the matter referred to in subsection (1)(c). (Amended 7 of 1995 s. 2)

(11) The Commission shall not under this section require or authorize any person to require the production by a person carrying on the business of banking of a record or document relating to the affairs of a customer of his unless either it appears to the Commission that it is necessary to do so for the purpose of investigating the affairs of the person carrying on the business of banking or the customer is a person on whom a requirement has been imposed by virtue of this section.

(12) Before giving directions under subsection (1)-

Cap 24 s 29A Power to require production of ...

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(a) to any company which is an authorized institution as defined in section 2 of the Banking Ordinance (Cap 155) or to any company which, to the knowledge of the Commission, is the controller of an authorized institution, has as its controller an authorized institution or has the same controller as an authorized institution, the Commission shall consult with the Monetary Authority; or

(b) to any company that is an insurer authorized under the Insurance Companies Ordinance (Cap 41), the Commission shall consult with the Insurance Authority.

(13) In subsection (12)(a), "controller" (±±"±±) means a person who is an indirect controller or a majority shareholder controller as defined in section 2(1) of the Banking Ordinance (Cap 155).

(Added 73 of 1994 s. 3)

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Section of Enactment

Chapter: 52 Title: TELEVISION Gazette
 ORDINANCE Number:
 Section: 45 Heading: Investigation of licensees' business Version Date: 30/06/1997

(1) Where the Broadcasting Authority is of opinion that it is necessary for the proper performance of any of its functions under this Ordinance, it may authorize any person at all reasonable times to-

(a) enter any building or other premises in which a company to which this section applies carries on business;

(b) require any person whom he reasonably believes to be employed in connection with such business to produce for examination any book, account, voucher, record, or receipt or other document which relates to such business and which is in his possession or under his control;

(c) examine and, if he thinks fit, take copies of, or copies of any entry in, any book, record or other document produced in pursuance of a requirement under this section;

(d) remove any such document for further examination; and

(e) question any director, principal officer or other employee of such company in relation to such business. (Replaced 72 of 1988 s. 23. Amended 22 of 1993 s. 46)

(2) A person who is a director, principal officer or other employee of a company to which this section applies shall assist and shall not obstruct a person exercising a power under this section. (Replaced 72 of 1988 s. 23. Amended 22 of 1993 s. 46)

(3) All documents and copies thereof and all other information obtained under this section shall be treated as confidential and used only for the purpose of this Ordinance which shall include any inquiry conducted by the Broadcasting Authority or any committee appointed thereby. (Amended 49 of 1987 s. 17)

(4) Any document removed in exercise of a power under this section shall be returned as soon as is reasonably practicable. (Added 72 of 1988 s. 23)

(5) Every person authorized by the Broadcasting Authority under subsection (1) shall be furnished with a copy of the authorization and when exercising a power under this Ordinance shall, if requested by any person thereby affected, produce such copy for inspection by the person. (Added 72 of 1988 s. 23)

(6) This section applies to any company to which section 42 applies. (Added 72 of 1988 s. 23)

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- (e) 在第(4)款中——
- 刪除兩度出現的“罰款”而代以“懲罰”；
 - 刪除“如此”而代以“根據第(3)或(3A)款”；
 - 在“關乎的”之後加入“任何牌照條件、本條例的條文或根據本條例訂立的規例的條文或”；
- (f) 在第(5)款中，刪除“可於區域法院追討”而代以“如罰款不超過 \$120,000，可於區域法院追討，如罰款超過 \$120,000，則可於原訟法庭追討”。

23. 加入條文

現加入——

“36D. 局長可獲取資料

(1) 裁判官如基於經宣誓所作的告發信而有合理理由相信任何人(持牌人除外)是管有或相當可能管有與執行局長任何職能或行使局長任何權力有關的資料或文件的，則他可發出命令，規定該人須在該項命令所規定的時間內，以書面向局長提供該資料或文件或向局長交出該文件(視情況而定)。

(2) 任何人——

- 沒有遵從根據第(1)款發出的命令；或
- 提供虛假或具誤導性的資料，以充作遵從根據該款發出的命令。

該人即屬犯罪，一經定罪，可處第5級罰款及監禁2年。”。

24. 刪削

第37(1)(f)及(i)條現予廢除。

25. 加入條文

現加入——

- (e) in subsection (4)—
- by repealing “financial”;
 - by repealing “so imposed” and substituting “imposed under subsection (3) or (3A)”;
 - by adding “any licence condition, provision of this Ordinance or regulation made thereunder or” after “requirement of”;
- (f) in subsection (5), by adding “up to \$120,000 and the Court of First Instance for penalty above \$120,000” after “District Court”.

23. Section added

The following is added—

“36D. Authority may obtain information

(1) If a magistrate is satisfied by information on oath that there are reasonable grounds for believing that a person, other than a licensee, is, or is likely to be, in possession of information or a document that is relevant to the performance of any of the Authority's functions or the exercise of any of the Authority's powers, he may issue an order that the person shall, within the time specified in the order, give the information or document to the Authority in writing or to produce the document to the Authority, as the case requires.

(2) A person commits an offence if he—

- fails to comply with an order issued under subsection (1); or
- in purported compliance with the order issued under that subsection, knowingly gives information that is false or misleading.

and shall be liable on conviction to a fine at level 5 and to imprisonment for 2 years.”.

24. Regulations

Section 37(1)(f) and (i) is repealed.

25. Section added

The following is added—

Appendix C

Extract from Legislative Council Brief on the Telecommunication (Amendment) Bill 1999

Competition Safeguards

D 12. Our proposals on the principles for competition safeguards were announced through the Legislative Council brief issued on 8 February 1999 (at Annex D). Paragraphs 4 to 21 of that Brief refer to our proposals on competition safeguards. Our principal concerns are to consolidate the powers for the promotion of fair competition and to extend these across the whole telecommunications market through incorporating powers now provided in the General Conditions of the FTNS licences into the Telecommunication Ordinance.

13. We propose to raise the financial penalties for anti-competitive conduct as set out in paragraph 7 of the brief at Annex D), provide for remedial publicity action and permit the suspension of licences or parts thereof relating to the services that are the subject of the breach. On the additional civil remedies, we propose that the remedy be available to all persons who suffer damage arising from the breaches of the provisions prohibiting anti-competitive practice and misleading or deceptive conduct, or licence conditions or directions relating to matters in these provisions. Action must commence within three years after the commencement of the breach or the imposition of penalty by the TA or the court as the case may be, whichever is the later.

14. We have consulted further on the measures to assist the TA in his investigations of breaches of the Telecommunication Ordinance or licence conditions, particularly related to anti-competitive conduct (paragraph 6 of the brief at Annex D). Operational experience has shown that it is necessary to obtain information from customers to determine whether a breach has or has not occurred. Sometimes, this information is provided voluntarily. But where this is not the case, we propose that the TA should be able to apply to a magistrate for an order to require the information relevant to the alleged breach to be provided by the non-licensee concerned. This is to provide a safeguard for the non-licensee to ensure that there is independent assessment of the TA's requirement for the requested information. The information obtained would be treated in confidence and would not be released without the consent of the non-licensees.

Interconnection

15. The principles for our proposals on interconnection are set out in paragraphs 22 and 23 of the brief at Annex D). The clarity provided by the proposals will facilitate interconnection agreements on a commercial basis and thus improve competition, particularly in the local fixed telecommunications market.