



**HUTCHISON GLOBAL
COMMUNICATIONS LIMITED**

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**HUTCHISON TELEPHONE
COMPANY LIMITED
HUTCHISON 3G HK LIMITED**

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Date: 17 April 2003

Your Ref: CB1/BC/11/01

By Hand (Fax No. :2121 0420) and By Email (dyau@legco.gov.hk)

Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Attn: Ms Debbie Yau

Clerk to the Bills Committee

Dear Ms Yau

Telecommunications (Amendment) Bill 2002

We refer to the Administration's paper setting out the proposed Committee Stage Amendments (CSAs) and other improvements to the Bill.

We and other operators have all previously made lengthy and detailed submissions of our views and we do not propose to restate these views at this time. We do however believe that if the Government continues with its plans to pass the Bill, there remain several very substantial issues that have not been dealt with in the CSAs and which must be addressed to meet the concerns of industry.

For this purpose and for the ease of reference of the Bills Committee members, we enclose certain mark-ups of the Bill (which include the CSAs made by the Administration), together with a table of explanatory notes.

We request that the Bills Committee consider and adopt these changes in order that the proposed merger control regime works with the least uncertainty and burdens to investors and operators, whilst also ensuring that the larger universe of pro-competitive or competitively neutral mergers are not in any way deterred, delayed or affected.

Yours sincerely
For and on behalf of
Hutchison Global Communications Limited

For and on behalf of
Hutchison Telephone Company Limited
Hutchison 3G HK Limited

[Signed]

[Signed]

Agnes Miu
Director of Legal and Regulatory

Oswald Kwok
Senior Legal Counsel

Telecommunications (Amendment) Bill 2002

Explanatory Note on Operators' Requested Amendments

Item	Issue	Government Proposal	Our Comments/Requested Amendments
1.	Powers created by the proposed Section 7P – checks and balance	Powers to be exercised by the TA alone subject to appeal to the Appeal Board.	<p>[Note 1] – International best practice is that powers to regulate of the structure of an industry are vested in a panel of decision-makers, not an individual.</p> <p>If Hong Kong should decide not to have an independent body set up for reviewing Telecom M&A but to make use of OFTA's existing resources, the TA should only be empowered to make investigations and grant approvals to M&A. If the TA believes that an M&A will or will likely result in substantially lessening competition in the market, the M&A case should be referred to the Appeal Board for more investigation and decision-making. The Appeal Board consisting of members from various disciplines should be the only body empowered to make a formal ruling to object to an M&A or to impose conditions, thereby lessening the risk of human error by a single person.</p> <p>If this approach is adopted, sections 7P(1)(b) and 7P(6)(b) would require amendments, as well as other consequential changes to section 32 and throughout. A person aggrieved by the TA's decision to approve an M&A can appeal to the Appeal Board. A person aggrieved by the Appeal Board's decision to disapprove an M&A can appeal to the Court of Appeal.</p> <p>(Amendments to the Bill not provided)</p>
2.	Guidelines	Guidelines to be published and consultation with industry to occur after the Bill is passed. The substantive provisions of the Bill will take effect on a date appointed by the TA (Section 2(b) of Bill).	<p>[Note 2] - Given the importance of the guidelines, it is critical that they are subject to independent review. This review should be conducted by the Legislative Council and accordingly the substantive provisions should not come into force until such a review has taken place.</p>

3.	Triggers for exercise of the powers	<p>Where there is a <u>change</u> in</p> <p>a) the control exercised over a carrier licensee</p> <p>b) the beneficial ownership of any voting share in a carrier licensee; or</p> <p>c) the voting control of any of the voting shares in a carrier licensee.</p> <p>(Section 3 of the Bill – 7P(1))</p>	<p>[Note 3] - Power to be exercised only where there is a “change of control” over a carrier licensee i.e. a true structural change in the licensee. It is a waste of public resource and an unnecessary burden to carriers and investors if changes in directors and nominal transfer of shares in a licensee with no real change to the “control” of the company are subject to review by OFTA. Items b and c should therefore be deleted. It is also important to note that most mergers are pro-competitive or neutral in competition terms. Legco should not give powers to the TA to review such mergers. It will be a waste of public resource to do so and will also unduly deter or delay positive mergers.</p>
4.	TA’s discretionary power	<p>The TA’s powers are expressed to be applied subjectively “in the opinion of the Authority”/where “Authority forms the opinion</p> <p>(Section 3 of the Bill – 7P(1))</p>	<p>[Note 4] – The TA’s powers in section 7P(1) should be exercised on an objective basis (that is, whether or not a change in control occurs or whether there is a substantially lessening of competition should not be determined on the basis of the TA’s opinion).</p> <p>Further, the TA may direct a licensee to take “any action...as [he] considers necessary”. The TA’s actions must be proportionate to what is necessary to prevent the substantial lessening of competition.</p>
5.	Standard of proof	<p>The substantive test to be applied in the evaluation is whether a merger “has, or is likely to have, a substantial lessening of competition” (the SLC test).</p> <p>(Section 3 of the Bill – 7P(1)(a) & (b))</p>	<p>[Note 5] - “Likely” is an imprecise formulation and leaves the TA with discretionary powers as to how to interpret what “likely” means. The relevant test should be whether a merger “has a substantial lessening of competition” and not whether such effect is likely.</p> <p>If, however, the SLC test goes forward in its current form and the TA is permitted to take action where an SLC is likely to occur, then it is essential for this to be expressed in terms of “more likely than not” or “on the balance of probabilities”. In its draft merger reference guidelines the Competition Commission in the United Kingdom has stated that it will normally consider that a merger "may be expected" to result in a SLC (the test under the Enterprises Act 2002) if it is "more likely than not" that a SLC will result.</p>
6.	Time Limits	<p>The TA has 3 months from the time the change occurs or 3 months from the time the TA knows of or should</p>	<p>[Note 6] -- We welcome the inclusion of a statutory back-stop date, but believe that 2 weeks instead of 3 months is more appropriate, and the period should start to count from whichever is the earlier of the occurrence of the change or the TA’s knowledge of the</p>

		<p>know of the change to decide whether to start an investigation.</p> <p>Phase 1 investigation – 1 month.</p> <p>Phase 2 investigation – 4 months.</p>	<p>change.</p> <p>There should also be time limits within which the TA (and the Appeal Board) must reach decisions, e.g.</p> <p>Phase 1 investigation – 2 weeks.</p> <p>Phase 2 investigation – 10 weeks.</p> <p>Hong Kong has a smaller economy and market place and the Bill is only intended to apply to a finite number of carrier licensees. There is no reason why an investigation should require several months to initiate or complete.</p>
7.	Costs for approvals of mergers and acquisitions	The amount of any costs or expenses incurred by the Authority to be recovered fully from the licensee or the applicant for approval (Section 3 of Bill - 7P(11)).	[Note 7] - In deciding whether to allow an M&A to proceed, OFTA is only performing its obligations as a regulator in regulating the market, it is not conferring rights and benefits on the applicant or licensee for which a fee should be charged. Even if the Bills Committee should allow OFTA to impose a charge, it is inappropriate that the TA may incur and recover his costs without any limitations. A schedule of fees to be charged should be set out as a schedule to the Bill.
8.	Definition of change of control	<p>Change of control includes: -</p> <p>a) a change in a director or principal officer of the licensee; and</p> <p>b) a change in the beneficial owner or voting controller of more than 15% of the voting shares in the licensee.</p> <p>(Section 3 of the Bill – 7P(12))</p>	<p>[Note 8A] - Change of director or principal officer of the licensee may come about without any change in control of a licensee. Such event should not be included in the definition of change of control.</p> <p>[Note 8B] 15% is low. We propose 50%. In the 3G Information Memorandum, the threshold of 50% is used to define “control” in a body corporate.</p>
9.	Definition of	A person who either alone or with	[Note 9] – This is a drafting issue, a person should only be regarded as a “voting

	“voting controller”	one more other persons holds voting control	controller” if he alone or with his <u>related</u> person (to be defined by reference to concepts in existing legislations) hold voting control. Otherwise, the current drafting would make any shareholder a “voting controller” since such holder with other shareholders, albeit unrelated, will inevitably holds voting control.
10.	List of matters to be considered by the TA	The list is to be set out as a schedule to the Telecommunications Ordinance	[Note 10] – We observe also that this list appears to have been taken from section 50 of the Australian Trade Practices Act 1974 (which is a generic, non-industry specific merger and acquisition regulation). However an item that is omitted is “the extent to which substitutes are available in the market” or likely to be available to the market. In our view this item should also be included in the list of matters to be taken into account under section 7P.
11.	Conflict with licence conditions	Not dealt with.	The Bill should expressly set out that the provisions of the Bill regarding change of ownership or control of a licensee shall override licence conditions on the same subject. [e.g. in the current 3G licence, there is a licence condition requiring a licensee to seek the consent of the TA on any change of control or ownership structure from that stated in its application for licence]. (Amendments to the Bill not provided)

A BILL

To

Amend the Telecommunications Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Telecommunications (Amendment) Ordinance 2002.

(2) Subject to subsection (3), this Ordinance shall come into operation on the day on which it is published in the Gazette.

(3) Sections 3, 4, 5, 6 and 7 shall come into operation on a day to be appointed by the Telecommunications Authority by notice published in the Gazette **and only after the guidelines in relation to the operation of Section 7P have been reviewed and approved by the Legislative Council in accordance with Section 6(D)(2A) [NOTE 2].**

1A. Interpretation

Section 2(1) of the Telecommunications Ordinance (Cap. 106) is amended, in the definition of "carrier licence", by repealing "the Schedule" and substituting "Schedule 1".

2. Guidelines

Section 6D is amended –

- (a) in subsection (2) –
- (i) by repealing "就以下事項發出指引|" and substituting "發出";
 - (ii) in paragraph (a), by repealing everything after "方式" and substituting "(包括發牌準則以及他擬慮的其他有關事宜)的指引|";
 - (iii) by adding –
 - "(aa) subject to subsection (2A), specifying the matters, including but not limited to those listed in Schedule 2, that he shall take into account before forming any opinion under section 7P(1) or(6)(a) or (b);";
 - (iv) in paragraph (b) –
 - (A) by adding "關於" before " 14(6)(a) ";
 - (B) by repealing everything after "問題" and substituting "
" 指引，但該指引的發出須受第(3)款的規限 ";
- (b) by adding –
- "(2A) Without prejudice to the generality of section 6C, the Authority shall, before issuing guidelines under subsection (2)(aa), carry out such consultation as is reasonable in all the circumstances of the case with persons who may be affected by the operation of section 7P. **Such**

guidelines shall be reviewed and approved by the Legislative Council before it comes into effect [NOTE 2]".

2A. Issue of licenses

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

3. Section added

The following is added –

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

(1) Where, after the commencement of this section, there is a change in–

~~(a)~~ the control exercised over a carrier ~~licensee;~~licensee [NOTE 3];

~~(b)~~ the beneficial ownership of any of the voting shares in a carrier licensee; or

~~(c)~~ the voting control of any of the voting shares in a carrier licensee;

the Authority may –

(d) subject to subsection (1A), conduct such investigation as the Authority considers reasonably necessary to ~~enable him to form an opinion as to~~establish [NOTE 4] whether or not the change has, or is likely to have/[is more likely than not to have] [NOTE 5] the effect of substantially lessening competition in a telecommunications market; and

(e) (where the Authority, after conducting such investigation, ~~forms an opinion~~ establishes [NOTE 4] that the change has, or is likely to have/[is more likely than not to have] [NOTE 5] the effect of substantially lessening competition in a telecommunications market) by notice in writing served on the licensee, direct the licensee to take such action specified in the notice as the Authority considers necessary to eliminate or avoid any such anti-competitive effect.

(1A) An investigation under subsection (1)(d) may only be begun within ~~3 months~~ 2 weeks [NOTE 6] after the change occurs or within ~~3 months~~ 2 weeks [NOTE 5] after the Authority knows, or ought reasonably to have known of, the change, ~~as the case may be, whichever is the earlier.~~

(2) The Authority shall, before ~~forming any opinion or~~ [NOTE 4] issuing any direction under subsection (1) –

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

(3) Without limiting the general nature of the action that the Authority may direct a carrier licensee to take under subsection (1)(e), the action may include the procuring of modifications to–

~~(a)~~ the control exercised over the licensee [NOTE 3];

~~(b) the beneficial ownership of any of the voting shares in the licensee; or~~

~~(c) the voting control of any of the voting shares in the licensee.~~

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

(5) Where there is a proposed change in—

~~(a) the control exercised over a carrier licensee [NOTE 3];~~

~~(b) the beneficial ownership of any of the voting shares in a carrier licensee; or~~

~~(c) the voting control of any of the voting shares in a carrier licensee,~~

the licensee or any interested person may apply in writing to the Authority for consent to the proposed change.

(6) Where the Authority, on receiving an application under subsection

(5) —

(a) ~~forms an opinion cannot establish [NOTE 4] that the proposed change would not have/[is more likely than not to have], or not be likely to have,~~ the effect of substantially lessening competition in a telecommunications market, the Authority ~~may decide to shall~~ give consent; or

(b) ~~forms an opinion establishes [NOTE 3] that the proposed change would have/[is more likely than not to have], or be~~

~~likely to have~~, the effect of substantially lessening competition in a telecommunications market, the Authority may decide to –

- (i) refuse to give consent; or
- (ii) give consent subject to the direction that the carrier licensee concerned takes the action that the Authority considers necessary to eliminate or avoid any such anti-competitive effect. **[NOTE 1]**

(7) The Authority shall, before forming any opinion, making any decision or issuing any direction under subsection (6) –

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

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

- (a) the decision made under subsection (6)(a) or (b)(i) or (ii);
- (b) where a decision is made under subsection (6)(b)(ii), the action that the Authority directs the licensee to take.

(9) Without limiting the general nature of the action that the Authority may direct a carrier licensee to take under subsection (6)(b)(ii), the action may include the procuring of modifications to—

- ~~(a) the control exercised over the licensee; licensee [NOTE 3].~~
- ~~(b) the beneficial ownership of any of the voting shares in the licensee; or~~
- ~~(c) the voting control of any of the voting shares in the licensee.~~

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

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

the Authority shall not issue a direction under subsection (1)(e) in respect of the change.

(11) ~~[NOTE 7]The amount of any costs or expenses incurred by the Authority—~~

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

~~is recoverable as a debt due to the Authority from the carrier licensee, or the interested person, who makes the application under subsection (5).~~

(11A) The Authority shall publish –

- (a) where he forms any opinion or issues any direction under subsection (1), the opinion or direction; or
- (b) where he forms any opinion, makes any decision or issues any direction under subsection (6), the opinion, decision or direction,

in such manner as he considers appropriate.

(12) For the purposes of subsections (1)(a) and (5)(a), there is a change in the control exercised over a carrier licensee if ~~–[NOTE 8A] –~~

~~(a) — a person becomes a director or principal officer of the licensee;~~

~~———— (b)(a) — a person becomes the beneficial owner of more than 15% [50%] [NOTE 8B] of the voting shares in the licensee;~~

~~(e)(b) a person becomes a voting controller of more than 15% [50%] [NOTE 8B] of the voting shares in the licensee; or~~

~~(d)(c) a person otherwise acquires the power, by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person.~~

(13) In this section –

"interested person" (有利害關係的人) means –

- (a) in relation to a change referred to in subsection (1), a person who –

- (i) does any of the acts referred to in subsection (12)(a), (b), (c) or (d) in relation to the carrier licensee concerned;
 - (ii) becomes the beneficial owner of the voting shares concerned; or
 - (iii) becomes the voting controller of the voting shares concerned;
- (b) in relation to a proposed change referred to in subsection (5), a person who proposes to –
- (i) do any of the acts referred to in subsection (12)(a), (b), ~~(e)~~ or ~~(d)~~(c) in relation to the carrier licensee concerned;
 - (ii) become the beneficial owner of the voting shares concerned; or
 - (iii) become the voting controller of the voting shares concerned.

~~"principal officer" (主要高級人員), in relation to a carrier licensee, means—~~

- ~~(a) the managing director of the licensee;~~
- ~~(b) the chief executive officer of the licensee;~~
- ~~(c) the chairman of the board of directors of the licensee; or~~

~~(d) any other person who, in respect of the licensee, performs functions similar to those performed by a person referred to in paragraph (a), (b) or (c);~~

["related person" – definition] [NOTE 9];

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

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

"voting controller"(表決控權人) means a person who either alone or with one or more other **related [NOTE 9]** persons holds voting control;

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

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

4. Part heading amended

The heading to Part VC is amended by repealing "AND 7N" and substituting "7N AND 7P".

5. Interpretation [NOTE 1]

Section 32L is amended –

- (a) in the definition of "appeal", by adding, "(1A), (1B) or (1C)" after "32N(1)";
- (b) by repealing the definition of "appeal subject matter" and substituting –

""appeal subject matter"(標的事項) –

- (a) in relation to an appeal under section 32N(1), means the opinion, determination,

direction, decision, sanction or remedy referred to in section 32N(1) –

- (i) to the extent to which it relates to section 7K, 7L, 7M or 7N or any licence condition relating to any such section; and
 - (ii) which is the subject of the appeal;
- (b) in relation to an appeal under section 32N(1A), (1B) or (1C), means an opinion, direction or decision of the Authority published under section 7P(11A);".

6. Appeals to Appeal Board

Section 32N is amended –

- (a) by adding –

"(1A) Any carrier licensee aggrieved by an opinion, direction or decision of the Authority published under section 7P(11A) may appeal to the Appeal Board against the opinion, direction or decision (and whether or not the opinion, direction or decision was formed, issued or made in respect of the licensee).

- (1B) Any person who –

(a) is, in relation to a change referred to in section 7P(1), an interested person within the meaning of paragraph (a) of the definition of "interested person" in section 7P(13); and

(b) is aggrieved by an opinion or direction of the Authority published under section 7P(11A)(a) in respect of the change,

may appeal to the Appeal Board against the opinion or direction.

(1C) Any person who –

(a) is, in relation to a proposed change referred to in section 7P(5), an interested person within the meaning of paragraph(b) of the definition of "interested person" in section 7P(13); and

(b) is aggrieved by an opinion, decision or direction of the Authority published under section 7P(11A)(b) in respect of the proposed change,

may appeal to the Appeal Board against the opinion, decision or direction.";

(b) in subsection (3), by adding "subsection (1A), (1B) or (1C) or" before "section 36C".

7. Procedure and powers of Appeal Board, etc.

Section 32O(2) is amended by repealing the full stop and substituting ", or before the opinion, direction or decision referred to in section 32N(1A),(1B) or(1C) was formed, issued or made, as the case may be."

**8. Licences which are not carrier licences
within the meaning of section 2**

The Schedule is renumbered as Schedule 1.

9. Schedule 2 added

The following is added –

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

MATTERS TO BE TAKEN INTO ACCOUNT BY AUTHORITY

1. The height of barriers to entry to a telecommunications market.
2. The level of market concentration in a telecommunications market.
3. The degree of countervailing power in a telecommunications market.
4. The likelihood that the change would result in the carrier licensee or interested person being able to significantly and substantially increase prices or profit margins.
5. The dynamic characteristics of a telecommunications market, including growth, innovation and product differentiation.
6. The likelihood that the change would result in the removal from a telecommunications market of a vigorous and effective competitor.
7. The extent to which effective competition remains or would remain in a telecommunications market after the change.

8. The nature and extent of vertical integration in a telecommunications market.
9. The actual and potential level of import competition in a telecommunications market."
10. The extent to which substitutes are available in the market [**NOTE 10**].