

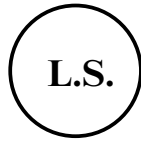
TELECOMMUNICATIONS (AMENDMENT) ORDINANCE 2003

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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 30 OF 2003



TUNG Chee-hwa
Chief Executive
17 July 2003

An Ordinance to amend the Telecommunications Ordinance.

[18 July 2003]

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Telecommunications (Amendment) Ordinance 2003.

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

(3) Sections 5, 6, 7, 8, 9 and 12 shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette.

2. 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”.

3. Guidelines

Section 6D is amended—

(a) in subsection (2)—

(i) in paragraph (a), by repealing everything after “方式” and substituting “(包括發牌準則以及他擬考慮的其他有關事宜) 的指引 ;”;

- (ii) 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 (7)(a) or (b);”;
 - (iii) in paragraph (b)—
 - (A) by adding “關於” before “第 14(6)(a) 條”;
 - (B) by repealing everything after “問題” and substituting “的指引，但該指引的發出須受第 (3) 款的規限。”;
 - (iv) by repealing “就以下事項發出指引” and substituting “發出”;
- (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.”.

4. Issue of licences

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

5. Section added

The following is added—

“7P. Authority may regulate changes in relation to carrier licensees

- (1) Where, after the commencement of this section, there is a change in relation to a carrier licensee—
- (a) subject to subsection (2), the Authority may conduct such investigation as he considers necessary to enable him to form an opinion as to whether or not the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market; and
 - (b) (where the Authority, after conducting such investigation, forms an opinion that the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market) the Authority may, 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 effect,

but the Authority may not issue such direction if the Authority is satisfied that the change has, or is likely to have, a benefit to the public and that the benefit outweighs any detriment to the public that is, or is likely to be, constituted by any such effect.

(2) An investigation under subsection (1)(a) may only be commenced within 2 weeks after the Authority knows or ought reasonably to have known (whichever is the earlier) that the change has occurred.

(3) The Authority shall, before forming any opinion or 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).

(4) Without limiting the general nature of the action that the Authority may direct a carrier licensee to take under subsection (1)(b), the action may include the procuring of modifications to the change.

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

(6) Where there is a proposed change in relation to a carrier licensee, the licensee or any interested person may apply in writing to the Authority for consent to the proposed change.

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

(a) forms an opinion that the proposed change would not have, or not be likely to have, the effect of substantially lessening competition in a telecommunications market, the Authority shall decide to give consent; or

(b) forms an opinion that the proposed change would 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;

(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 effect; or

(iii) give consent without issuing a direction under subparagraph (ii) if the Authority is satisfied that the proposed change would have, or be likely to have, a benefit to the public and that the benefit would outweigh any detriment to the public that would be, or would likely to be, constituted by any such effect.

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

(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).

(9) The Authority shall, by notice in writing served on the carrier licensee referred to in subsection (6) 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 (7)(a) or (b)(i), (ii) or (iii);

(b) where a decision is made under subsection (7)(b)(ii), the action that the Authority directs the licensee to take.

(10) Without limiting the general nature of the action that the Authority may direct a carrier licensee to take under subsection (7)(b)(ii), the action may include the procuring of modifications to the proposed change.

(11) Where a proposed change referred to in subsection (6) takes effect—

(a) pursuant to the consent given by the Authority under subsection (7)(a) or (b)(iii); or

(b) pursuant to the consent given, and in compliance with the direction issued, by the Authority under subsection (7)(b)(ii),

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

(12) Subject to subsection (13), the amount of any costs or expenses incurred by the Authority—

(a) in making a decision under subsection (7)(a) or (b)(i), (ii) or (iii); or

(b) in relation to the processing of an application made under subsection (6),

is recoverable as a debt due to the Authority from the carrier licensee, or the interested person, who makes the application under subsection (6).

(13) The amount recoverable under subsection (12) shall not exceed the amount specified in Schedule 3.

(14) 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 (7), the opinion, decision or direction,

in such manner as he considers appropriate.

(15) The Secretary may by order published in the Gazette amend Schedule 3.

(16) For the purposes of subsections (1) and (6), there is a change in relation to a carrier licensee if—

- (a) subject to subsection (17), a person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 15% of the voting shares in the licensee;
- (b) a person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 30% of the voting shares in the licensee; or
- (c) a person, either alone or with any associated person—
 - (i) becomes the beneficial owner or voting controller of more than 50% of the voting shares in the licensee; or
 - (ii) acquires the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation or otherwise, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person.

(17) Subsection (16)(a) does not apply if the person referred to in that subsection, when becoming the beneficial owner or voting controller of more than 15%, but not more than 30%, of the voting shares in the carrier licensee concerned—

- (a) either alone or with any associated person, is not, or does not concurrently become, the beneficial owner or voting controller of more than 5% of the voting shares in any other carrier licensee; and
- (b) either alone or with any associated person, does not have the power (including by the holding of voting shares), or does not concurrently acquire the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or

other instrument regulating any other carrier licensee or any other corporation or otherwise, to ensure that the affairs of such other carrier licensee are conducted in accordance with the wishes of that person.

(18) In this section—

“associated person” (相聯人士), in relation to a person, has the meaning assigned in the definition of “associated person” in section 2(1), but—

- (a) the references to “the licensee” in that definition shall be construed as references to the person; and
- (b) where the person is a corporation, the references to “associated corporation” in that definition shall be construed as references to a corporation over which the person has control, a corporation which has control over the person or a corporation which is under the same control as is the person;

“interested person” (有利害關係的人) means—

- (a) in relation to a change referred to in subsection (1), a person who does any of the acts referred to in subsection (16)(a), (b) or (c) in relation to the carrier licensee concerned;
- (b) in relation to a proposed change referred to in subsection (6), a person who proposes to do any of the acts referred to in subsection (16)(a), (b) or (c) in relation to the carrier licensee concerned;

“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 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.

(19) 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.”.

6. Part heading amended

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

7. Interpretation

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(14);”.

8. 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(14) may appeal to the Appeal Board against the opinion, direction or decision (but the licensee may so appeal only if 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(18); and

(b) is aggrieved by an opinion or direction of the Authority published under section 7P(14)(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(6), an interested person within the meaning of paragraph (b) of the definition of “interested person” in section 7P(18); and

(b) is aggrieved by an opinion, decision or direction of the Authority published under section 7P(14)(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”.

9. 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.”.

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

The Schedule is renumbered as Schedule 1.

11. 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 a telecommunications market.”.

12. Schedule 3 added

The following is added—

“SCHEDULE 3

[s. 7P]

SPECIFIED AMOUNT

\$200,000.”.