

立法會
Legislative Council

LC Paper No. LS122/20-21

**Further Report by Legal Service Division on
Telecommunications (Amendment) Bill 2021**

Members may recall from LC Paper No. LS95/20-21 dated 15 July 2021 that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of the Bill. While the House Committee ("HC") had decided at its meeting on 16 July 2021 to form a Bills Committee ("BC") to study the Bill, the decision was rescinded by HC at its meeting on 10 September 2021 after the cancellation of the first BC meeting scheduled for 7 September 2021 due to insufficient Members having signified their intention to join BC.

2. To recap, the Bill mainly seeks to amend the Telecommunications Ordinance (Cap. 106) to provide for non-carrier licences ("NCLs"), requirements relating to work near underground telecommunications lines and related offences; and to cover new appeal subject matters.

3. LSD has made certain enquiries on the legal aspects of the Bill with the Administration. Copies of LSD's letter dated 30 August 2021 and the Administration's reply dated 6 September 2021 are at **Annex**. LSD's enquiries and the Administration's response are summarized in the ensuing paragraphs.

The nature of non-carrier licences

4. LSD has sought clarification on any substantial difference between NCLs and licences specified in Schedule 1 to Cap. 106 which are not carrier licences within the meaning of section 2 of Cap. 106 ("Schedule 1 licences"), and how the two types of licences would be handled if the Bill is passed. In response, the Administration has explained that:

- (a) while Schedule 1 licences are issued for a variety of services utilizing existing technology (e.g. paging and trunked radio services etc.), NCLs are additional licences to be created under the Bill in response to the latest technological and market development (such as 5G, Internet of Things and beyond) but are generally smaller in scale, applicable to specific geographical settings and serve a specific group of users; and

- (b) NCLs and Schedule 1 licences would not overlap, and the existing regulatory regime for Schedule 1 licences would continue to apply if the Bill is passed.

Procedures relating to the specification of and application for non-carrier licences

5. In response to LSD's enquiry about the responsible authority in respect of NCLs which would be specified by the Secretary for Commerce and Economic Development ("SCED") under the proposed new section 7AB(1) of Cap. 106, the Administration has explained that under section 7 and the proposed section 7AB of Cap. 106:

- (a) the Communications Authority ("CA") would create the type(s) of NCL(s), specify the relevant conditions (including the validity period and fees payable) and publish such NCL and its conditions in the Gazette;
- (b) SCED would specify such NCL; and
- (c) CA would then issue the NCL to a successful applicant, publish in the Gazette the form of NCLs issued together with the general conditions to be imposed under such licences, and maintain a register thereof.

6. As for NCL application, the Administration has further elaborated that:

- (a) the procedures for handling NCL applications would follow the existing practice of CA for handling various licence applications under Cap. 106. Detailed means of making an NCL application, the relevant licensing criteria and matters to be considered by CA in deciding whether to approve an NCL application would be prescribed in the relevant application guidelines after the Bill is passed;
- (b) the applicable fees determined by CA would be available on CA's website; and
- (c) if CA refuses an NCL application, the aggrieved applicant would be able to appeal to the Telecommunications Appeal Board under section 32N of Cap. 106 as proposed to be amended by the Bill.

Prohibition applicable to a person who is not an NCL licensee

7. Upon LSD's enquiry, the Administration has clarified that the prohibitions under section 8(1) of Cap. 106 against, among others, establishing or maintaining any means of telecommunications without a licence would also apply to a person purporting to establish or maintain the relevant means of telecommunications without an NCL.

Consultation on operative guidelines to be issued by CA

8. Under the proposed new section 22A(3) to (6) of Cap. 106, it would be a defence for a person charged with an offence under the proposed new section 18A of Cap. 106 to show that the person has complied with the operative guideline(s) relating to taking reasonable steps or measures in relation to works carried out near underground telecommunications lines issued by CA under section 6D of Cap. 106. Upon LSD's enquiry as to why CA would not be *required* to consult relevant stakeholders before issuing such guidelines, the Administration has explained that since the operative guidelines would not concern powers conferred on CA to grant authorization for radiocommunication installation etc., mandatory consultation would not be applicable or relevant. That said, the Administration *may* consult the relevant stakeholders (e.g. telecommunications operators and engineering contractors installing or carrying out works for underground telecommunications lines) before promulgating such operative guidelines.

Concluding observations

9. LSD has completed its scrutiny of the Bill. No difficulties relating to the legal and drafting aspects of the Bill have been identified. Subject to Members' views on the above matters, the Bill is ready for resumption of Second Reading debate.

Encl.

Prepared by

LEE Hoi-see, Evelyn
Assistant Legal Adviser
Legislative Council Secretariat
16 September 2021



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : ACCT/2/1/2C
本函檔號 OUR REF : LS/B/41/20-21
電 話 TELEPHONE : 3919 3513
電 郵 EMAIL : elee@legco.gov.hk

By Email (tksyip@cedb.gov.hk)

30 August 2021

Mr Tony YIP
Prin AS for Commerce & Econ Dev (Communications
& Creative Industries) (Special Support)
Commerce and Economic Development Bureau
21/F, West Wing, Central Government Offices
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Mr YIP,

Telecommunications (Amendment) Bill 2021

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the issues set out at the **Annex**.

We would appreciate it if you would let us have the Administration's response in bilingual form as soon as practicable.

Yours sincerely,

(Evelyn LEE)
Assistant Legal Adviser

Encl.

c.c. Department of Justice
(Attn: Ms. Elaine NG, SGC (Email: elaineng@doj.gov.hk))
LA
SALA3
Clerk to the Bills Committee

Non-carrier licences

The nature of non-carrier licence

1. Clause 4 of the Bill seeks to, among others, introduce a new type of licence known as "non-carrier licence" ("NCL") which, according to the proposed new section 7AB(1) of the Telecommunications Ordinance (Cap. 106), may be specified by notice published in the Gazette by the Secretary for Commerce and Economic Development ("Secretary"). While NCL is proposed to be defined in the Bill (see the proposed section 7AB(3) of Cap. 106), please:

- (a) elaborate on the difference in substance between NCLs and licences specified in Schedule 1 to Cap. 106 which are not carrier licences within the meaning of section 2 of Cap. 106 ("Schedule 1 licences");
- (b) clarify whether a Schedule 1 licence may also be a type of NCL or *vice versa*, and if yes:
 - (i) the parameters for determining whether a licence is a Schedule 1 licence or an NCL, and whether such licence would remain in Schedule 1 or be removed therefrom and specified in accordance with the proposed new section 7AB(1) of Cap. 106; and
 - (ii) how an application for renewal of a Schedule 1 licence which also falls within the definition of NCL would be handled.

Whether and how an application for NCL may be made

2. Please clarify, in relation to an NCL, :
- (a) whether a person may apply for an NCL;
 - (b) if the answer to (a) is in the affirmative, the means of making the application (such as to whom the application must be made, the application fees payable (if any), the matters that the responsible authority would consider in deciding whether to approve the application, etc.), including any appeal or review mechanism in case the application is refused, and consider providing for these matters in the Bill; and
 - (c) if the answer to (a) is in the negative, the reason for not allowing such application to be made, given the Administration's avowed intent to facilitate the timely introduction of innovative services and

to simplify the existing requirements as mentioned in paragraphs 9 and 10 of the Legislative Council Brief (File Ref.: CCIB/SD 605-10/1) issued by your Bureau on 9 July 2021.

The responsible authority in respect of NCLs

3. Please clarify:

- (a) whether an NCL may be "a licence other than an exclusive licence" which may be issued by the Communications Authority ("CA") under section 7(5) of Cap. 106;
- (b) if the answer to (a) is in the affirmative:
 - (i) the means of deciding whether an NCL should be "issued by [CA]" pursuant to section 7(5) of Cap. 106 or "specified by the Secretary" in accordance with the proposed new section 7AB(1) of Cap. 106;
 - (ii) whether it would be for CA or the Secretary to determine the matters specified in section 7(6) and (7) of Cap. 106 in respect of an NCL, if such matters and conditions are also applicable to an NCL;
 - (iii) if it is for the Secretary to determine the matters and/or conditions mentioned in (b)(ii) above, the legal basis upon which the Secretary would be able to do so if the Bill is passed; and
- (c) if the answer to (a) is in the negative, please clarify:
 - (i) the authority responsible for prescribing the conditions (if any) in respect of a specified NCL; and
 - (ii) the legal basis upon which the conditions mentioned in (c)(i) above may be prescribed.

Please also consider whether it is necessary for the Bill to provide expressly for these matters.

Duty to maintain a register of NCL

4. Unlike section 7(8) and (9) of Cap. 106, which requires CA to publish in the Gazette the form of a licence it issues together with the general conditions to be imposed under the licence, and to maintain a register of such

licences and conditions so published, no similar duty is proposed to be imposed in respect of NCLs sought to be specified by the Secretary under clause 4 of the Bill. Please:

- (a) clarify whether NCLs would be issued to any persons and, if so, whether a register of such NCLs would be maintained and (if so) by whom; and
- (b) consider providing for these matters in the Bill.

Regulatory regime applicable to NCLs

5. Section 8(1) of Cap. 106 prohibits the establishment or maintenance of any means of telecommunications except under a licence "granted by the Governor in Council" or "granted or created by [CA]". Cap. 106 and the Bill are silent on whether the prohibition is also applicable to a person who does not hold an NCL, which would be "specified by the Secretary" instead of being granted by the Chief Executive in Council or granted or created by CA. Please:

- (a) clarify whether the prohibition under section 8(1) of Cap. 106 is applicable to a person who is not a licensee of a specified NCL and, if so, consider providing in the Bill for the application of section 8 of Cap. 106 to such person; and
- (b) if not, explain why the prohibition does not apply to such a person.

Guidelines issued in respect of the proposed new offences

6. Under the proposed new section 22A(3) to (6) of Cap. 106, it would be a defence for a person charged with an offence under the proposed new section 18A to show that the person complied with the operative guideline(s) relating to taking reasonable steps or measures in relation to works carried out near underground telecommunications lines issued by CA under section 6D of Cap. 106 ("Guidelines"). While CA *may*, under section 6C of Cap. 106, consult with members of the public or persons who may be directly affected before, among others, issuing guidelines under section 6D of Cap. 106, the Bill does not seek to *mandate* CA to consult anyone (unlike, for example, section 6D(3) and (4) of Cap. 106) before issuing the Guidelines. Please:

- (a) confirm whether CA would be *required* to conduct a consultation prior to issuing the Guidelines and, if so, consider providing for such requirement in the Bill; and
- (b) if not, the reason for not requiring such consultation.

商務及經濟發展局
通訊及創意產業科

香港添馬添美道二號
政府總部西翼二十一樓



COMMUNICATIONS AND
CREATIVE INDUSTRIES BRANCH
COMMERCE AND ECONOMIC
DEVELOPMENT BUREAU

21/F, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

本函檔號 OUR REF : CCIB/SD 605-10/1

來函檔號 YOUR REF :

電話 TEL. NO. : 2810 2141

傳真 FAXLINE : 2351 2791

電子郵件 E-mail Address :

By Email

6 September 2021

Miss Evelyn Lee
Assistant Legal Adviser 10
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex,
1 Legislative Council Road, Hong Kong

Dear Miss Lee,

Telecommunications (Amendment) Bill 2021

I refer to your letter dated 30 August 2021 requesting clarification on a number of issues of the Telecommunications (Amendment) Bill 2021 (the Amendment Bill). In consultation with the Office of the Communications Authority and the Department of Justice, our response to the various issues raised are set out as follows.

The nature of non-carrier licence

To facilitate the industry to introduce innovative services promptly in the 5G era and noting the fast evolving nature and forms of such services amid technology advancement, we need a more flexible licensing framework to regulate emerging innovative applications more

expeditiously and effectively. The new section 7AB(1) of the Telecommunications Ordinance (Cap. 106) (TO) will empower the Secretary for Commerce and Economic Development (SCED) to specify certain licences as non-carrier licenses (NCLs) so as to facilitate the introduction of innovative services and enable more effective regulation of such services by the Communications Authority (CA).

From the regulatory perspective, those licences listed in Schedule 1 to TO (Schedule 1 licences) are not carrier licences by nature and they were excluded from the definition of “carrier licence” in section 2 of TO when the amendment was made to TO in 2000. The Schedule 1 licences are essentially for a variety of services utilizing technology available at the time (e.g. paging, trunked radio services and satellite antenna television, etc.). Unlike those Schedule 1 licences, NCLs will be additional licences created by the CA in response to the latest technological and market development (such as 5G, Internet of Things and beyond). NCLs will comprise the updated licence conditions which are appropriate for regulating the provision of new services utilizing new technologies but are generally smaller in scale, applicable to specific geographical settings and serve a specific group of users (i.e. NOT carrier licence services). In short, the Schedule 1 licences and NCLs to be specified by SCED under section 7AB would not overlap.

Given the different nature of Schedule 1 licences and those to be specified as NCLs, when the new section 7AB takes effect, the list in Schedule 1 to TO will remain intact. Application for and renewal of Schedule 1 licences will continue to be handled according to the existing procedures adopted by the CA, i.e. the same type of Schedule 1 licences will be issued upon application for and renewal of such licences.

Whether and how an application for NCL may be made

The procedures for handling applications for NCLs created by the CA and specified by the SCED under the new section 7AB will follow the existing practice of the CA for handling various licence applications. For a particular licence specified as an NCL, any party who meets the licensing criteria prescribed in the relevant licence application guidelines to be issued by the CA under section 6D(2) of TO may be granted the licence

upon application. At present, a party applying for a licence for provision of services would generally be required to be an incorporated company (the same criteria are generally applicable to carrier licences and Schedule 1 licences). As to whether a natural person holding a valid business registration certificate may apply for an NCL, it will depend on the licensing criteria to be prescribed for the particular licence specified as an NCL. Together with details of the means of making applications for a particular licence specified as an NCL, such licensing criteria as well as matters that will be considered by the CA in approving the applications will be prescribed in the relevant licence application guidelines after the Amendment Bill is passed.

According to the existing arrangement for carrier licences and/or Schedule 1 licences, any application may be made by submission of duly completed application form (in hardcopy or electronic form) to the CA. The applicable fees for licences other than exclusive licences and carrier licences determined by the CA pursuant to section 7(6)(e) are published on the CA's website.

Under the new section 32N(1D) introduced by Clause 12 of the Amendment Bill, refusal to issue any licence (including NCLs) other than an exclusive licence is one of the matters that are subject to appeal to the Telecommunications Appeal Board established under section 32M of TO to be amended by the Amendment Bill.

The responsible authority in respect of NCLs

Like other licences covered under the TO, NCL will be a “type of licence” created by the CA but to be specified by SCED under the new section 7AB. Hence, it is generally governed by TO. The procedures involved for the creation and issuance of NCLs will include the following steps –

Step 1: creating the type of licence of NCL by the CA under section 7(6) of TO (including determination of licence form, conditions (as well as those related conditions, as the case may be, under section 7(7)), validity period and fees payable) and under 7(8) of TO (including gazettal of licence form and general conditions);

Step 2: specifying particular licences as NCLs by SCED under the new section 7AB of TO; and

Step 3: issuing the particular licence as an NCL by the CA to individual applicants under section 7(5) of TO.

As far as any NCL is concerned, the matters under sections 7(5), 7(6), 7(7) and 7(8) of TO are all applicable and are within the power of the CA. There is no need to make any amendment to these provisions or add any provisions to TO for implementing the new mechanism relating to the regulation of licences specified as NCLs under the new section 7AB.

Duty to maintain a register of NCLs

NCL is a type of licence governed by TO. Therefore, sections 7(8) and 7(9) of TO are applicable to NCLs. Currently, registers of licences are maintained by the CA and the gazetted forms and general conditions of licences are published on the CA's website. Same arrangements will be made for NCLs.

Regulatory regime applicable to NCLs

Similar to the above, given that NCL is a type of licence governed by the TO, the prohibition under section 8(1) of TO is applicable to any person who, without holding the relevant licence that has been specified as an NCL (or any other relevant licence), establishes and maintains any means of telecommunications for provision of a telecommunications service which is licensable under that licence that has been specified as an NCL.

Guidelines issued in respect of the proposed new offences

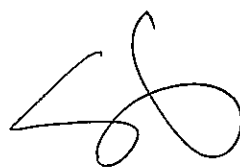
The concerned operative guidelines mentioned in the new section 22A will be issued under section 6D(1) of TO. As the operative guidelines are not of the same nature as those mentioned in section 6D(3) (for instance, the guidelines relating to section 14(1A) which confers power on the CA to grant authorization for radiocommunications installation) and 6D(4) (for instance, the guidelines relating to section 36A which confers power on the

CA to make determination on interconnection), the mandatory consultation requirements thereunder are not applicable or relevant.

Notwithstanding the fact that under section 6C of TO, the CA may, but is not obliged to, conduct consultation before performing functions or exercising powers under TO, as regards the current case of the operative guidelines to be issued under the new section 22A, the CA will still consult the relevant stakeholders (including telecommunications operators installing underground telecommunications lines and engineering contractors carrying out works for underground telecommunications lines) and promulgate the operative guidelines upon commencement of the relevant sections under the Amendment Bill. We have also committed such arrangement in the past (e.g. see paragraph 8 of the LegCo Brief of the Amendment Bill (c.f. CCIB/SD 605-10/1)). We do not see a need to include a specific provision in TO to mandate consultation on the operative guidelines.

I hope the above has clarified the issues raised in the letter.

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized 'Y' followed by a loop and a horizontal stroke.

(Tony YIP)

for Secretary for Commerce and Economic Development

c.c.

Secretary for Justice (Attn: Miss Elaine Ng)

Director-General of Communications (Attn: Miss Elaine Hui)

Legislative Council Secretariat (Attn: Mr Daniel Sin)