

**FINAL DECISION OF THE
COMMUNICATIONS AUTHORITY**

**BREACH BY FIXED NETWORK OPERATORS
OF THE CONDITIONS UNDER THEIR CARRIER LICENCES
CONCERNING MINIMUM DEPTH REQUIREMENT**

Licensees Concerned:	Hong Kong Broadband Network Limited (“HKBN”), Hong Kong Cable Television Limited (“HKCTV”), Hutchison Global Communications Limited (“HGC”), New World Telecommunications Limited (“NWT”), TraxComm Limited (“TraxComm”) and Wharf T&T Limited (“WTT”) (hereinafter collectively referred to as “the Concerned Operators”).
Issue:	<p>The Director of Highways (“DHy”) has determined that the Concerned Operators have failed to comply with the Minimum Depth Requirement (“MDR”) stipulated in the excavation permits issued under the Land (Miscellaneous Provisions) Ordinance (Chapter 28) (“LMPO”) in a total of 126 cases.</p> <p>DHy has referred his determination in these 126 cases to the Communications Authority (“CA”) for consideration whether there is a possible breach by the Concerned Operators of the relevant condition under their Fixed Telecommunications Network Services (“FTNS”) Licence, Fixed Carrier Licence (“FCL”) or Unified Carrier Licence (“UCL”), as the case may be.</p>
Relevant Instruments:	General Condition (“GC”) 32(1) of FTNS Licence, Special Condition (“SC”) 18.1 of FCL or SC 17.1 of UCL
Decision:	Breach of GC 32(1) of FTNS Licence, SC 18.1 of FCL or SC 17.1 of UCL held by the Concerned Operators
Sanction:	Advice
Case Reference:	LM T 108/11 in OFCA/R/R276 C

BACKGROUND

During October 2011 to October 2012, the Highways Department (“HyD”) received over 500 complaint cases relating to breach of MDR by various fixed network operators under the LMPO. It has taken HyD some time to complete its investigation and the due process of inviting representations from the operators concerned before DHy making his determination on the non-compliance cases. Given the time and process involved, HyD has decided to refer by phases DHy’s determination on the non-compliance cases to the Office of the Communications Authority (“OFCA”) for possible regulatory action by the CA.

2. Between February and June 2012, HyD referred to OFCA 77 cases of DHy’s determination on failure of HKBN to comply with the MDR specified in GC 32(1) of its FTNS Licence.¹ The CA dealt with this first batch of non-compliance cases collectively and decided to issue a warning to HKBN, in the form of the Final Decision² for it to comply with the MDR as determined by the DHy.³

3. Regarding the remaining complaint cases received, HyD completed its investigation and the due process in the period from May 2012 to September 2014 and referred to OFCA a total of 126 cases of DHy’s determination on failure of the Concerned Operators to comply with the MDR specified in the relevant condition⁴ of their respective FTNS Licence, FCL or UCL (“the 126 Non-compliance Cases”). The distribution of this second batch of non-compliance cases is: HKBN (85 cases), HKCTV (six cases), HGC (26 cases), NWT (four cases), TraxComm (four cases) and WTT (one case).

¹ HKBN’s FTNS Licence had expired on 2 February 2015 and a UCL with the same licence condition governing the MDR was issued to HKBN for its provision of fixed services effective from 3 February 2015.

² The CA’s Final Decision can be downloaded at http://www.coms-auth.hk/filemanager/common/policies_regulations/ca_decisions/in201206.pdf.

³ HKBN has been working with HyD to rectify the non-compliance of the 77 cases. In addition, HKBN had offered to DHy to inspect all its underground facilities including all its manholes/joint boxes and promised to rectify any non-compliance found. According to HKBN, as at end October 2014, HKBN completed inspection of about 93% of its manholes/joint boxes concerned. HKBN will continue to inspect all its other underground facilities and rectify any non-compliance found during the inspections. HKBN has been providing regular updates on the progress of the rectification and inspection work to HyD and OFCA.

⁴ The relevant conditions are GC 32(1) of the FTNS Licence of HKBN, SC 18.1 of the FCLs of HKCTV and TraxComm, and SC 17.1 of the UCLs of HGC, NWT and WTT. Similar to HKBN (see footnote 1 above), HKCTV’s FCL had expired on 17 January 2015 and a UCL with the same licence condition governing the MDR was issued to HKCTV for its provision of fixed services effective from 18 January 2015.

4. HyD notified the Concerned Operators of DHy’s determination and requested them to rectify the non-compliance. Relevant correspondence between HyD and the Concerned Operators, which was copied to OFCA, showed that the Concerned Operators were cooperative in working with HyD to rectify the non-compliance. Some of the 126 Non-compliance Cases were already rectified. According to HyD, there is no outstanding complaint relating to breach of MDR by fixed network operators.

THE CA’S CONSIDERATIONS AND DECISION

5. GC 32(1) of FTNS Licence, SC 18.1 of FCL and SC 17.1 of UCL set out the requirement of installation of telecommunications lines or cables –

GC 32(1) of FTNS Licence

“The Network, or any part of it, if installed under, in, over or upon any public street or other unleased Crown land, shall be at such depth, course, route and position as may be determined by the Director of Lands or the Director of Highways.”

SC 18.1 of FCL or SC 17.1 of UCL

“The network, or any part of it, if installed under, in, over or upon any public street or other unleased Government land, shall be at such depth, course, route and position as may be determined by the Director of Lands or the Director of Highways.”

6. Having considered the determination made by DHy, and having been satisfied that the Concerned Operators were notified vide inter alia HyD’s letters issued between May 2012 and June 2014 and were afforded reasonable opportunity to make representations to DHy as well as noting their subsequent replies/rectification actions to DHy’s determination, and having considered their representations on the CA’s Provisional Decision, the CA is of the view that the Concerned Operators have failed to comply with the relevant licence condition under their respective FTNS Licence, FCL or UCL in respect of the MDR in the 126 Non-compliance Cases.

7. In considering the sanction to be imposed in respect of the 126 Non-compliance Cases, the CA notes that –

- (a) under GC 32(1) of FTNS Licence, SC 18.1 of FCL or SC 17.1 of UCL and the LMPO, DHy is the statutory authority to determine compliance with the MDR and HyD is the enforcement agency to conduct the investigation into the non-compliance with the MDR;
- (b) a warning was issued to HKBN on 15 October 2012 in respect of the 77 non-compliance cases, for it to comply with the MDR as determined by DHy (see paragraph 2 above) and the 85 more non-compliance cases involving HKBN were not new cases that emerged after the issue of the CA's warning, but were rather cases pending HyD's investigation following the first phase of referrals to OFCA of DHy's determination;
- (c) the numbers of non-compliance cases of HKCTV, HGC, NWT, TraxComm and WTT are small relative to that of HKBN (please refer to paragraph 3 above);
- (d) the present exercise would conclude HyD's investigation into all the complaint cases relating to breach of MDR by various fixed network operators it received between October 2011 and October 2012 and there is no more outstanding complaint case; and
- (e) all the Concerned Operators have taken remedial measures to prevent recurrence of similar non-compliance cases. They have since mid-2013 followed HyD's requirement to submit inter alia photographs indicating the depth of laid services and showing the compliance with MDR specified in the excavation permits issued to them. According to HyD, the new measure has proved to be effective and no new complaint case about alleged breach of the MDR has been received by HyD since October 2012. The Concerned Operators have been cooperative in working with HyD to rectify their non-compliance cases. Some of the non-compliance cases have already been rectified.

8. Taking into account the full circumstances of the cases, the nature of the breach and the number of non-compliance cases of each of the Concerned Operators as well as the representations of the Concerned Operators, the CA takes the view that, as a sanction for the breach, (a) HKBN should be reminded of the previous warning issued by the CA and be advised to comply with the MDR as determined by DHy; and (b) HKCTV, HGC, NWT, TraxComm and WTT should be advised to comply with the MDR as determined by DHy.

9. The CA has further decided that, should any one of the Concerned Operators fail to rectify all its non-compliance cases to the satisfaction of DHy and in accordance with the timeframe as reasonably determined by DHy, the CA would consider taking appropriate regulatory measures including issuance of a direction to that operator compelling it to implement the rectification work to the satisfaction of DHy.

The Communications Authority
March 2015