

Submission from Lands Department

Subject: Review of Licence Conditions in Carrier Licences issued under the Telecommunications Ordinance

I refer to your preceding emails requesting LandsD's comments on the consultation paper by 20.10.2014.

2. The overall provision of the telecommunication services and the operation of the telecommunication operators are regulated by the Telecommunication Authority under the licensing system established in accordance with the Telecommunications Ordinance ("TO").

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4. It is noted that CA's proposed deletion of SCs is based on cross-sectoral controls under other legislation and legal instruments (Annex C refers). However, it appears that not all cross-sectoral controls as stated in your Annex C are relevant. Moreover, some cross-sectoral controls may not achieve the same purpose as originally intended in regulating the telecommunication operators. Please also consult DoJ, HyD and other departments accordingly.

5. The conditions, enforcement power and deterrent effect as provided under TO is specially formulated to regulate the telecommunications operation under telecommunications regime. Further, the level of penalty for the breach imposed under the existing TO, which is quite substantial (say \$200,000 for the first occasion under s36C(3)), should have reflected your policy intention and be commensurate with the wrong doing that CA want to deter. On the other hand, Cap. 28 is intended to regulate occupation and excavation of Government land but not the operation of any particular industries. Some of the SC proposed to be deleted may not be related to the technical aspects of road opening and whether similar control in respect of the operation or malpractice of the telecommunication operator with a carrier licence can be or should be exercised under other ordinances, say Cap. 28, or legal instruments is questionable.

6. LandsD's comments on the relevant Licence Conditions are as follows:

(i) Network Location

- (a) SC 14.1 - The Licensee shall obtain the consent in writing of the Director of Lands (DoL) before the commencement of any installation works for its network under, in, over or upon any unleased Government land

The provision quoted in your Annex C should be s.6(1) of LMPO (i.e.

licence, etc.) instead of s.10(1) of LMPO (XP) as mentioned in Annex C and it is not related to road opening work.

It is also noted that similar provision is included in the TO (i.e. s. 14(1)(a)). Given the purposes of incorporating SCs in UCL and relevant provision under TO are to regulate the telecommunications operations, the licence condition which is not related to the technical aspects of road opening works should be retained to ensure that the Government's overall enforcement power would not be jeopardized.

- (b) **SC 14.3 – The licensee shall record the information referred to under Special Condition 14.2 on route plans drawn on the Ordnance Survey Map background of a scale to be determined by the licensee in consultation with the Director of Highways and the Director of Lands**

SC 14.2 requires the licensee to keep accurate records of the location of the network installed (i.e. as-built plan). Your note 9 at annex C is not relevant as it refers to the drawing/plan attached to an XP application showing the proposed excavation/ installations but not those already installed.

As such SC14.3 should be retained to ensure that the licensee would provide the as-builts route plans of appropriate scale to relevant department if necessary. Please also consider to replace the words "the Director of Highways and the Director of Lands" by the words "the Authority and other government departments" so that other works departments can obtain the appropriate scale plans to facilitate their works in future.

- (c) **SC 14.4 – The licensee, shall, at the request of the Director of Highway (DH), DoL, the Authority or any person who intends to undertake works in the vicinity of the network and who is authorized to do so by DH, DoL or the Authority, provide free of charge information about the location of the network in diagrammatic or other form. The licensee shall make trained staff available on site to indicate the location and nature of the network to DH, DoL, the Authority or any person authorized by DH, DoL, the Authority.**

We note your advice at Note 11 of Annex C that upon deletion of the SC, CA can still rely on other conditions in the UCL to request such information.

However, we are not sure if CA can still rely on other conditions in the UCL to require the licensee to make trained staff available on site to indicate the location and nature of the network. The 2nd part of the SC should therefore be retained unless there are other provisions in the USL or TO achieving the same purpose.

(ii) Requirements of Installation of Lines or Cables

- (a) SC 17.1 – 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 DoL or DHy.

SC17.1 covers both underground and above ground installations. It appears that the XP conditions quoted in Annex C are not relevant.

Moreover, as mentioned in para. 22 of the paper "CA in granting the authorisation mainly focuses on whether the licensee has a genuine need to conduct road opening works." SC17.1 should be retained unless there are other conditions in the UCL or TO achieving the same purpose. LandsD is not in a position to consider if the licensee has a genuine need to conduct road opening works.

- (b) SC 17.2 – Without prejudice and in addition to the provisions of any law or Ordinance, in the course of providing, establishing, operating, adjusting, altering, replacing, removing or maintaining the network for the purposes of this licence, or any part of it, the licensee shall –

- (a) exercise all reasonable care, and cause as little inconvenience as possible to the public and as little damage to property as possible; and
- (b) make good any physical damage caused to **any person having a lawful interest in the land** or being lawfully thereon and reinstate the land within a reasonable time in good and workmanlike manner. When it is not practicable to make good any damage or to reinstate the land to the condition in which it existed prior to the damage, the licensee shall pay, promptly and fully, compensation for any damage caused to any person having an interest of right in the land affected.

SC 17.2 is to protect not only the public but also private properties. However, the reinstatement and safety precaution provisions quoted in your Annex C (i.e. s.10T(1) and s.10(Q) of Cap. 28) appears not to cover any private properties. We would leave it to CA to decide if private properties should be protected under the licence conditions.

(iii) Works in Public Streets

- (a) 18.1 - Where in the course of installing or maintaining the network the licensee needs to open or break up any public street the licensee shall –

- (a) apply to the DHy or DoL for permission to open or break up the public streets;

- (b) complete the works for which the licensee has opened or broken up the public street with all due speed and diligence, fill in the ground and remove all construction related refuse caused by its works;
- (c) maintain the site of the works in a safe manner including the fencing of the site and the installation of adequate warning lighting at night; and
- (d) reinstate the street immediately after the completion of the works to the satisfaction of DHy or DoL.

(b) 18.2 - If the licensee fails, within any period specified by DHy or DoL, to observe any of the requirements of Special Condition 18.1, the DHy or DoL may take action to remedy the failure. The licensee shall reimburse the Government any such sum as may be certified by the DHy or DoL to be reasonable cost for executing any works under the terms of this Special Conditions 18.2.

We have no particular comments on their deletion. Should the SCs be retained, please amend "public streets" to "unleased land" to tally with the wording in Cap. 28.

(iv) Interference with Works of Others (SC 19 of UCL)

(a) SC 19.1 - Where in the course of installing or maintaining the network, the licensee after obtaining the approval of DHy breaks up or opens any public street it shall not remove, displace or interfere with any telecommunications line, any gas pipe or water pipe or main or any drain or sewer or any tube, casing, duct, wire or cable for the carriage of electrical current and ancillary installations installed by any other person without that other person's consent.

This SC is related to the protection of the already installed utilities owned by other UU. It is doubtful if the cross-sectoral controls as mentioned in Annex C can achieve the same purpose and control as provided under this SC. It is noted that other utility installations like gas pipes and electricity supply lines are protected under other relevant Ordinances, you may consider if telecommunications line are subject to similar protection under TO.

(b) SC 19.2 – In the case where the other persons holds a licence under the Land (Miscellaneous Provisions) Ordinance (Cap. 28), any consent referred to in Special Condition 19.1 is refused, or cannot be obtained for any reason, the licensee may request the consent to proceed from the relevant authority in accordance with the terms of any licence issued to such other person under the Land (Miscellaneous Provisions) Ordinance, if any.

We support the deletion of SC 19.2 as licence or Block Licence granted under Cap. 28 is only a private agreement binding both the licensee and the licensor but not any third parties.

(v) Licensee to Alter Network on Notice

- (a) 20.1 - The licensee shall, within such reasonable time and in such manner as may be directed by notice in writing by DHy or the Director of Lands, at its own expense, alter the course, depth, position or mode of attachment of any apparatus forming part of the network.

SC 20.1 is not related to the technical aspects of road opening but to exercise government control under the licence condition to require licensee to alter the alignment and position of any telecommunication installations if required by government. [✕] Please retain the SC to ensure that the overall Government control would not be jeopardized.

7. Please note the above are departmental comments for OFCA's consideration.