

WHARF T&T LIMITED

Submission in response to Consultation Paper on Review of Licence Conditions in Carrier Licences Issued under the Telecommunications Ordinance (Cap 106)

20 October 2014

1. Introduction

Wharf T&T Limited (“WTT”) submits its views on the proposal by OFCA to remove certain licence conditions in carrier licences issued under the Telecommunications Ordinance (Cap 106) (“TO”) as set out in the Consultation Paper issued by OFCA dated 5 September 2014.

2. Scope of OFCA’s review and OFCA’s proposal

2.1 WTT agrees that it is timely to review the carrier licence conditions, given that many of the core provisions are essentially unchanged from the earliest Fixed Telecommunications Network Services (“FTNS”) licence format issued at the inception of market competition in 1995, without ever having been reviewed since.

2.2 WTT notes the scope of OFCA’s review of carrier licences still in force including the Unified Carrier Licence (“UCL”), targeting General Conditions (GC) and Special Conditions (SC) that meet the following criteria -

- “(a) *the policy or operational premise for imposing the licence condition extends beyond or falls outside the purview of the SCED and the CA;*
- “(b) *cross-sectoral legislation or regulation is in place to regulate the same/similar activity/breach, the enforcement authority of which as enshrined in the relevant statute is a competent authority other than the CA;*
- “(c) *there is no justification from the telecommunications policy or operational perspective to subject the carrier licensees to additional controls in the telecommunications licensing regime pertaining to such activity or matter, on top of the cross-sectoral legislation or regulation which applies across the board to all sectors including the telecommunications sector; and*
- “(d) *the CA and OFCA do not have the statutory authority or the necessary expertise to determine compliance or otherwise with the requirements imposed in such licence conditions. Enforcement by the CA of those licence conditions would essentially rely upon other competent authorities with the statutory jurisdiction in determining whether there is a breach or not of the requirements in the relevant licence condition.”*

2.3 To elaborate on criterion (c) above, WTT considers there is no justification from a telecommunications policy perspective to subject carrier licensees to additional financial penalty regime or other sanctions under the TO on top of the penalties under cross-sectoral legislation or regulation which apply generally to members of the public including the carrier licensees.

2.4 WTT therefore supports the removal of licence conditions as proposed by OFCA, namely:

Item	Subject Matter	UCL	FCL	FCRL	MCL	MCRL	FTNS Licence	SSCL
(a)	Network Location	SC 14.1 SC 14.3 SC 14.4	SC 15.1 SC 15.3 SC 15.4	--	--	--	GC 28(1) GC 28(3) GC 28(4)	--
(b)	Requirements of Installation of Lines or Cables	SC 17	SC 18	--	--	--	GC 32	--

(c)	Works in Public Streets	SC 18	SC 19	--	--	--	GC 34	--
(d)	Interference with Works of Others	SC 19	SC 20	--	--	--	GC 35	--
(e)	Licensee to Alter Network on Notice	SC 20	SC 21	--	--	--	GC 37	--
(f)	Restrictions on Attachment to Public Buildings and Trees	GC 10	GC 10	GC 10	GC 10	GC 10	GC 33	GC 10

2.5 We welcome the assurance given by OFCA in the Consultation Paper that the current “Guidelines for Application of Road Opening Authorisation and Procedure for Road Opening Works” issued by OFCA will be unaffected. Those guidelines are a useful means to facilitate efficient road opening works by operators. In addition, we support OFCA maintaining its role as the coordinator/facilitator for the negotiation with various government departments on the installation of telecommunications facilities in major infrastructure such as bridges, tunnel, etc.

3. Need for comprehensive review

3.1 WTT considers that the current review should be regarded as merely a first step. The scope of the review under the Consultation Paper is extremely narrow in its terms. There is good cause to conduct a wholesale review of the licence conditions in the context of the substantial evolution of the telecommunications market and introduction of new legislations over the past 20 years since the launch of market competition.

Regulation should be fit for purpose

3.2 OFCA should work to ensure that the regulations it develops and implements are fit for purpose. The costs to society of poor regulation are considerable. Poor quality regulation increases compliance costs for licensees, the government and the community and leads to unnecessary complexity and associated uncertainty as to regulatory obligations.

3.3 We note the “Be the Smart Regulator” programme that was initiated by the HKSAR government since 2006 (<http://www.gov.hk/en/theme/bf/pdf/pamphlet.pdf>). We expect that OFCA would act in accordance with best practice, such as the principles of the “Be the Smart Regulator” programme. One of the principles is that there should be timetabled reviews, i.e. schedule periodic reviews of regulations, e.g. post-implementation RIA (regulatory impact assessment). Accordingly we believe OFCA should schedule a broader, comprehensive review of the licence conditions.

Criteria for a comprehensive review

3.4 In WTT view, OFCA should re-assess the licence conditions one-by-one. In each case, OFCA should start by asking itself the following questions:

- Is there a problem?
- Is regulation necessary to address the problem?
- Does the regulation achieve the policy objective?
- Is there a duplication of legislation addressing the same problem?

3.5 In the brief time allotted to this consultation, WTT has quickly identified the following licence conditions in its UCL (which list is by no means complete) that warrant further review, under the following categorisations:

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(a) *Unnecessary*

A number of licence conditions do not address any obvious problem, as identified below:

UCL Licence Condition	Unnecessary
GC 4 (Compliance generally)	Superfluous, as compliance with licence conditions is enforced through sanctions under sections 34(4), 36B and 36C of the TO
GC 11 (Compliance)	Superfluous, under the legal principle of agency
SC 24 (Insurance)	Purely an internal commercial issue on the part of the carrier licensee
SC 27 (Provision of service to suspected stolen radiocommunications apparatus)	Never exercised by the TA/CA, due to practical constraints (mobile phone IMEI cannot be guaranteed to be unique, as devices are easily cloned)

(b) *Duplication with existing superior legislative/regulatory instrument*

Some licence conditions duplicate superior legislation or regulation instruments already in place to regulate the same/similar activity/breach by the CA, as identified below:

UCL Licence Condition	Overlapping superior legislative/regulatory instrument
GC 2 (Transfer)	Competition provisions (ss. 7K, 7L and 7P) of the TO and new Competition Ordinance (Cap 619)
GC 14.2 (Safety)	TO, Section 32D (Standards)
SC 2 (Purchase of assets)	TO, Section 13 (Possession of telecommunications stations by Government in emergencies)
SC 3 (Requirements for interconnection)	TO, Section 36A (Authority may determine terms of interconnection) Also competition provisions of the TO and new Competition Ordinance
SC 4 (Numbering plan and number portability)	TO, Section 32F (Power of Authority in relation to numbering plan)
SC 5 (Accounting practices)	TO, Section 7H (Accounting practices)
SC 6 (Requirement to furnish information to the Authority)	TO, Sections 7I (Information) and 35A (Inspection of records, documents and accounts)
SC 13 (Records and plans of the network)	TO, Section 7I(3) (Information)
SC 14.2 (Network location)	GC 8 (Records and plans of network)
SC 22 (Universal service contribution)	TO, Section 35B (Universal service obligation)

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SC 26 (Location services)	GC 7 (Confidentiality of customer information)
SC 29 (Payment of spectrum utilization fee)	TO, Section 32I (Spectrum utilization fee) and corresponding regulations
SC 32 (Disposal of assets)	Competition provisions of the TO and new Competition Ordinance
SC 33.1 (Access to buildings)	Competition provisions of the TO and new Competition Ordinance
SC 33.3 (Access to buildings)	TO, Section 18 (Work affecting telecommunications lines, etc.) GC 9 (Control of interference and obstruction)

(c) *Potential cross-sectorial overlap*

Certain licence conditions overlap with same/similar cross-sectorial regulation applicable to the public in general as identified below:

UCL Licence Condition	Potential cross-sectorial overlap
GC 7 (Confidentiality of customer information)	Personal Data (Privacy) Ordinance (Cap 486)
GC 14.1 (Safety)	General laws on public health & safety, occupational health & safety, building & construction safety, electrical safety
SC 5 (Accounting practices)	Companies Ordinance (Cap 622)
SC 30 (Provision of information to customers)	Trade Descriptions Ordinance (Cap 362)

(d) *Impacted by market developments*

Other licence conditions may be outmoded or obsolete in light of market developments as identified below:

UCL Licence Condition	Impacted by market developments
GC 6 (Customer charter)	The provision of service to customers can be left to be determined by the market
SC 7 (Tariffs) SC 8 (Notification of discounts)	The CA no longer reviews tariff pricing The market does not use tariffs as a resource The provision of information to customers can be left to be determined by the market
SC 10 (Provision of service)	The provision of service to customers can be left to be determined by the market

(e) *Uncertain*

There are licence conditions which constitute poor regulation because they are overly broad, ambiguous, subjective and/or uncertain as identified below:

UCL Licence Condition	Uncertainty
GC 5 (Provision of service)	It is highly uncertain what is a “ <i>good, efficient and continuous service in a manner satisfactory to the Authority</i> ”

(f) *Clarification / amendment of the status of guidelines and codes of practice*

A number of licence condition purport that a licensee “shall comply” with guidelines and codes of practice issued by the CA. WTT queries whether this is correct at law. In normal usage, and as described in section 6D of the TO, guidelines are devised for the purpose of providing practical guidance in respect of the relevant principal provision(s), including compliance with such principal provision(s). In this sense, WTT takes the view that guidelines, and similarly codes of practice, are not in themselves intended to or meant to be mandatory, but merely set out the principles or criteria for assessing compliance with the principal provision(s).

Accordingly, we request OFCA to consider clarifying and/or amending those instances in the UCL which provide, in WTT’s view – erroneously, that a licensee “shall comply” with guidelines or codes of practice, i.e.:

- SC 1.1 and 1.2 (Compliance with codes of practice);
- SC 16.1 (Requirements for road opening);
- SC 25.1 (Use of public facilities for provision of services);
- SC 28.1 (Backup power supply);
- SC 33.2 (Access to buildings);
- SC 34.7 (Channels within in-building coaxial cable distribution systems); and
- SC 36.1 (Service contracts and dispute resolution).

4. Conclusion

While supporting the OFCA proposals, we strongly urge OFCA to conduct a fresh comprehensive review of the licence conditions to re-assess the overall regulatory impact. As we have briefly highlighted, a considerable number of licence conditions are in question and merit a full review.

Submitted by
 Wharf T&T Limited
 20 October 2014