



Overview of Regulatory Regime for the Telecommunications Industry in Hong Kong and the Role of OFTA

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What is “Telecommunications”

- Any transmission, emission or reception of communication by means of guided or unguided electromagnetic energy or both, other than any transmission or emission intended to be received or perceived directly by the human eye (s2)
- communication - intended to catch all types of messages, information or intelligence between persons, between persons and things, and between things

What is “Telecommunications” (2)

- Guided electromagnetic energy - copper cables, optical fibres, waveguides
- Unguided electromagnetic energy - in free space, radio (up to 3,000 GHz), infrared rays, light, laser, etc.
- Exclusion - visual signals
- Broadcasting is a subset of “telecommunications”

Why Regulate?

- To address market imperfection
 - *best outcome by market forces*
 - *regulation as a surrogate to market forces*
 - *regulation to foster development of competition*
 - *as market develops, sector-specific regulation to be reduced*

Why Regulate? (2)

- To protect competition
 - *safeguard against anti-competitive conduct*
 - *safeguard against emergence of market structure not conducive to effective competition*
- To achieve some social objectives
 - *some social objectives (e.g. universal service) not achievable through market forces alone*

Why Regulate? (3)

- To manage scarce resources
 - *radio spectrum*
 - *telecommunications numbers*
 - *space underneath public roads for ducts*
- To ensure compatibility and interoperability between telecommunications systems and to avoid interference and safety hazards
 - *technical standards to be established*

Law and Regulatory Documents

- Primary legislation
 - *Telecommunications Ordinance*
 - *Trading Funds Ordinance*
 - *Broadcasting Ordinance*
- Subsidiary legislation
 - *Regulation by CE in Council*
 - *Regulation by Secretary*
 - *Exemption orders by CE in Council (s39)*
 - *TA's orders (e.g. s321)*

Law and Regulatory Documents (2)

- Licences (s7 - 7E)
- Guidelines (s6D)
- Codes of practice (under licence conditions)
- Specifications (s32D/licence conditions)
- TA Statements (statements of policy)
- TA's decisions
 - *determinations under s36A*
 - *directions under s36B*

Law and Regulatory Documents (3)

- notices under s36C*
- warnings*
- authorizations under s14(1) and s14(1A)*
- tariff decisions (licence conditions)*
- s7K - 7N findings*
- s7P decisions (when s7P enters into effect)*
- Decisions of the Appeal Board (Part VC)
- Judicial decisions

Telecommunications Policies

- Full liberalization
 - *market progressively opened to competition*
 - *full liberalization since 1 January 2003*
- Maximum reliance on market forces
- Full privatization
- No foreign ownership restriction
- Technology neutrality

Licensing

- Prohibition without licence (s8(1))
 - *establish or maintain means of telecommunications (s8(1)(a))*
 - *possess or use radio apparatus (to note two types) (s8(1)(b))*
 - *deal in course of trade radio apparatus or its component parts (s8(1)(c))*
 - *demonstrate, with a view to sale in course of trade, radiocommunications apparatus (s8(1)(d))*

Licensing (2)

- *offer in course of business a telecommunications service (s8(1)(aa) not yet effective)*
- Activities excluded from licensing requirements
 - *broadcast receivers (s8(4)(a) to (d))*
 - *communal antenna systems for TV broadcast reception (s8(4)(e))*
 - *closed circuit television systems for security and information (s8(4)(f))*

Licensing (3)

- Government not bound by licensing requirement (s3)
- CE in Council may issue exemption order (s39)

Licensing (4)

	Form	General Conditions	Special Conditions	Issued by
Exclusive Licence	CE in Council	CE in Council		CE in Council
Carrier Licence	Secretary by regulation	Secretary by regulation	TA	TA
Non-carrier Licence	TA	TA	TA	TA
Class Licence	TA	TA		TA
Permit	TA	TA		TA

Carriers and Non-Carriers

- “Carrier” (s2) - an operator establishing or maintaining a network for carrying communication between locations separated by unleased land (exclusions - Schedule 1)
 - *fixed carriers*
 - *mobile carriers*
- Non-carriers
 - *service providers e.g. PNETS licensees*
 - *in-building facilities operators (class licensees)*

Interconnection (s36A and Licence Conditions)

- Interconnection with, and access to, a system, a network, a service, or elements of systems, networks or services (s36A(3D))
- Interconnection regulation necessary in transition to fully competitive market
- Commercial settlement of terms preferred, but TA has power to determine terms and conditions of interconnection (s36A)
- Determined terms binding on parties (s36A(3C))

Interconnection (2)

- OFTA also involved in mediation of interconnection disputes without resorting to formal determination
- Interconnection charges based on the relevant reasonable cost (s36A(3B))
- Principles and methodology set out by TA in TA Statements
- s36B empowers TA to issue direction to secure interconnection

Sharing of Facilities

- s36AA provides for framework
- TA has power to direct sharing only if it is in public interest to do so (s36AA(1))
 - *whether facility is “bottleneck”*
 - *other factors under s36AA(3), reasonableness for duplication, technical alternatives, whether facility is critical in supply of services, etc.*
- Commercial agreement to be attempted first (s36AA(4))

Access to Land - Wired Networks

- Under s14(1), TA has power to authorize access to “common parts” of a building for placement and maintenance of network and other incidental activities
- Authorized licensee not required to pay rent or access fee
- Minimum damage to be caused and full compensation to be paid for such damage (s14(2))

Access to Land - Wireless Networks

- Under s14(1A), TA has power to authorize access to land for providing a public radiocommunications service to a public place
- Factors in s14(1B)(b) - unlikely to be satisfied for open sites, e.g. rooftop sites
- s14(1A) basically for shielded sites (e.g. tunnels, indoor shielded areas)
- Fair and reasonable access fee to be paid

Access to Land - Wireless Networks

(2)

- What is fair and reasonable access fee
 - *TA to laid down principles (TA issued guidelines under s6D(2)(b))*
 - *to be determined by an arbitrator having regard to TA's guidelines on the principles (s14(6))*

Access to Services of Choice

- Policy - residents and occupiers in multi-storey buildings should have access to telecommunications and broadcasting services of their choice
- s19B - any term in a commercial agreement that unreasonably restricts the right of a resident or occupier to have access to the public telecommunications service of his choice is void to the extent that it imposes such restriction

Tariffs

- Tariffs of telecommunications services not regulated by TA if market is sufficiently competitive
- Where market is not sufficiently competitive, regulation is required
 - *now applied only to local fixed telecommunications network services of the “incumbent” operator*

Tariffs (2)

- Source of power to regulate tariffs
 - *s7F and s7G*
 - *licence conditions (e.g. GC 20 - 23 of FTNS Licences)*
- Dominant operator
 - *approval by TA*
 - *approval criteria is whether proposed tariff is anti-competitive*

Tariffs (3)

- *publication required*
- *“spot pricing” obligation (GC 20(4))*
- Non-dominant operators (waiver under GC 44 on compliance with GC 20(4), GC 21 - 23)
 - *publication only*

Competition and Fair Trading

- s7K - anti-competitive conduct (that has purpose or effect of preventing or substantially restricting competition in the market)
- s7L - abuse of dominance
 - *dominance: ability to act without significant competitive restraint from its competitors and customers (s7L(2))*

Competition and Fair Trading (2)

- *factors to assess dominance (s7L(3))*
 - Market share
 - power to make pricing and other decisions
 - entry barrier
 - product differentiation and sales promotion
 - other factors stipulated by TA in guidelines

Competition and Fair Trading (3)

- s7M - misleading or deceptive conduct
- s7N - discrimination (that has purpose or effect of preventing or substantially restricting competition in the market)

Mergers and Acquisitions

- Telecommunications (Amendment) Ordinance 2003
- Just applicable to “change” of ownership and control of “carriers”
- To enter into force when TA’s guidelines on “Mergers and Acquisitions” have been issued
- TA may intervene (s7P(1) if the “change”
 - *substantially lessens competition*
 - *detriment not offset by public benefits*

Mergers and Acquisitions (2)

- *Ex post*, rather than *ex ante*, regime, but mechanism available for parties to M & A transaction to seek prior consent from the TA (s7P(6))
- Definition of “change” in s7P(16)
 - *>15% (threshold excluded if acquirer has no interest >5% in other carrier)*
 - *>30%*
 - *>50% or control*

Telecommunications (Competition Provisions) Appeal Board (Part VC)

- To consider appeal against TA's decisions under fair competition provisions (s7K to 7N and in future extended to s7P) (s32N)
- Chairman and Deputy Chairman to be appointed by CE and must have qualification to be appointed as High Court judge (s32M)
- Appeal Board to examine not only procedures of TA's decisions, but also the merits

Universal Service

- To cover “basic service” as defined in Fixed Telecommunications Network Services (FTNS) Licence
- Universal service obligation now borne by incumbent FTNS operator
- Universal service cost (USO) to be calculated by TA based on a methodology set out by TA
- USO shared by operators of external telecommunications services in proportion to volume of traffic handled

Quality of Service

- TA may prescribe conditions in licence (s7)
- Licensee has obligations to provide good, efficient and continuous services under licence conditions
- TA may issued code of practice
- TA may request information from licensee and publish information in public interest
- Market to set level of quality of service, but consumers to be adequately informed

Spectrum (and Orbital Positions)

- TA to plan use of radio spectrum (s32H)
- TA to assign spectrum (or frequencies) to users (s32H)
- TA may by order designate bands subjected to payment of “spectrum utilization fee” (s32I)
- Level, or method to determine level, of “spectrum utilization fee” to be prescribed by Secretary by regulation (s32I)
- Power to control radio interference and use by competent personnel (s32J and 32K)

Telecommunications Numbering

- s32F provides for power for TA to manage numbers as a limited community resource
- TA prepares a numbering plan (s32F(3)(a))
- TA to allocate, assign, lease or sell right to use a code, a block of codes, a number or a block of numbers, or delegate power to any persons (s32F(3)(a) and (e))
- Secretary may by regulation provide for fee to be paid for use of codes or numbers (s32F(5))

Standards

- TA may
 - *prescribe standards (s32D)*
 - *test and certify equipment against those standards (s32E(a))*
 - *prescribe label to be affixed to equipment (s32E(d))*
 - *prescribe equipment not for sale unless affixed with prescribed label (s32E(e))*
 - *accredit other test organizations (s32E(g))*

Offences

- Section 20 - 32C
 - *offences for the management of the radio spectrum (e.g.s20, s32A - 32C)*
 - *offences to ensure integrity of telecommunications (e.g. s24 - 27)*
 - *offence to tackle unauthorized access to computers (s27A) (enforced by the Police)*

Enforcement

- Direction under s36B
- Penalty under s36C
 - *financial penalty (s36C(3))*
 - by TA
 - up to \$200,000 on 1st occasion
 - up to \$500,000 on 2nd occasion
 - up to \$1 M on subsequent occasions

Enforcement (2)

- by court
 - up to \$10 M or 10% of turnover in relevant telecom market during period of breach
 - *disclosure of information (s36C(3A)(a))*
 - *corrective advertisement (s36C(3A)(b))*
- Suspension or cancellation of licences under s34
- Prosecution of offences under s20 - 32C

Damages

- Under s39A, a person suffering loss or damage from a breach of any of the fair competition provision may seek damages, injunction or order appropriate remedy, order or brief against the person in breach

Information

- TA may request from licensee under s71 for information reasonably required to perform TA's functions to ensure compliance with law and licence conditions
- TA has power under licence conditions to request licensee for information reasonably required for performance of TA's functions
- Obligations of TA to maintain confidentiality, but disclosure may be made following due process

Information (2)

- TA has power to request information from non-licensee following procedure under s36D
 - *Magistrate order to be served if the person refuses to comply with the request*

Accounting Separation

- To monitor cross-subsidization between services of same licensee
- Accounting separation in accordance with Accounting Manual (licence conditions)
- Obligations on carriers if directed by TA
 - *dominant local fixed carrier*
 - *non-dominant local fixed carriers (less onerous accounting separation requirements)*

Inspection

- Inspection of records, documents and accounts of a licensee (s35A)
- Inspection of offices, premises and places of licensee (s7J(1))
- Testing of telecommunications installations - licensees to provide test apparatus and personnel (s7J(4) and (5))

Office of Telecommunications Authority

- Telecommunications Authority (TA) - a public officer appointed by CE under s5 to administer Telecommunications Ordinance
- OFTA is Government department to support TA in performing his functions
- Director-General of Telecommunications (DG of Tels) is head of OFTA
- Traditionally, DG of Tels is also TA

Office of Telecommunications Authority (2)

- OFTA established on 1 July 1993
- OFTA became trading fund department from 1 June 1995
- Secretary is the Secretary for Commerce, Industry and Technology (SCIT)
- Secretary to formulate telecommunications policy
- TA to implement policy and exercising powers under the Telecommunications Ordinance

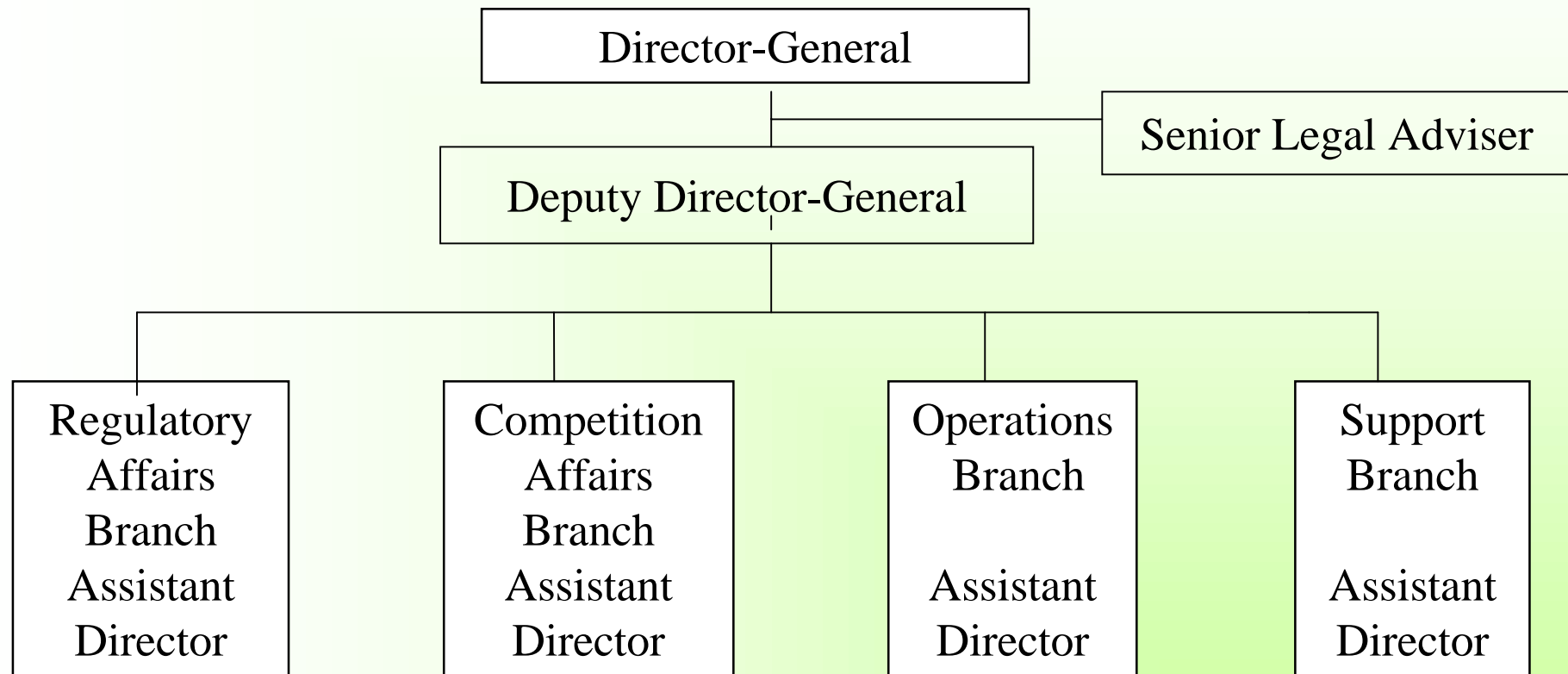
Services under OFTA Trading Fund

- Schedule 1 to LegCo Resolution on 10 May 1995 setting up OFTA Trading Fund
 - *technical standards*
 - *type approval and certification*
 - *economic and technical regulation*
 - *interconnection and shared use*
 - *numbering plan*
 - *promotion of competition*
 - *protecting consumer and user interest*

Services under OFTA Trading Fund (2)

- management of radio spectrum*
- control of radio interference*
- licensing*
- representation of Hong Kong in forums*
- accounting standards, tariffs and price control*
- investigations and enforcement*
- observance of international conventions*
- advice to Government*
- other functions as directed by Secretary*

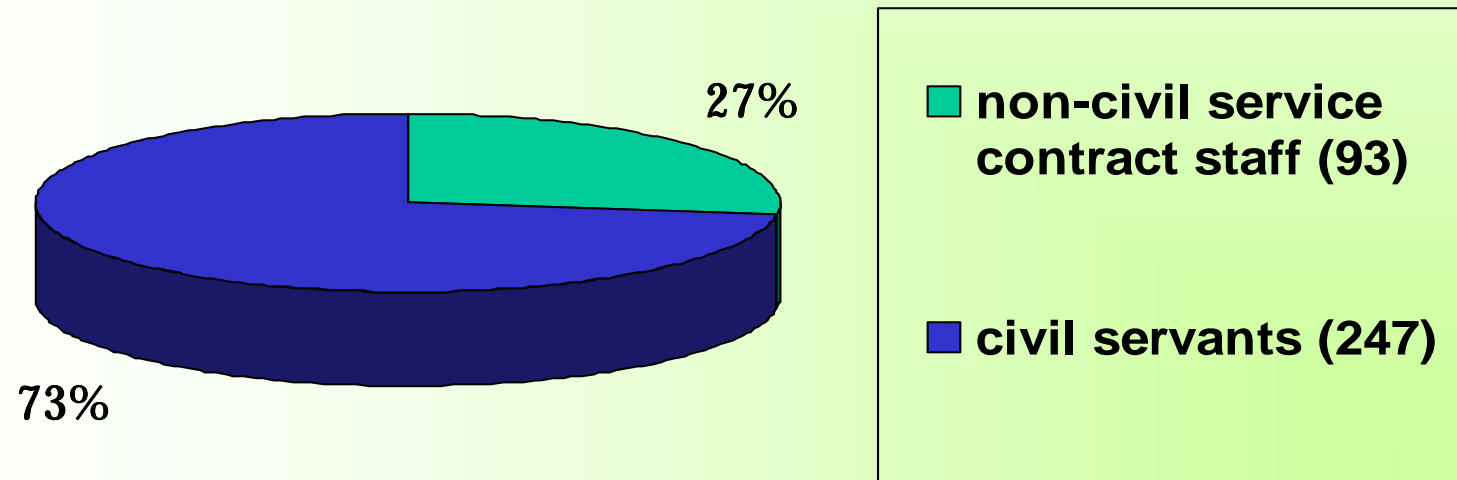
Organization of OFTA



Organization of OFTA(2)

(as at 14.8.2003)

- Staff Establishment: Total 340



Financial position

<u>Overall Position</u>	<u>2001/02</u>	<u>2002/03</u>	Budget
	HK\$'m	HK\$'m	<u>2003/04</u> HK\$'m
Revenue	328.2	317.6	333.1
Expenditure	265.8	269.6	277.3
Pre-tax profit	62.4	48.0	55.8
Return on ANFA	23.8%	17.3%	17.7%

Transparency

- Dissemination of information
 - *Regulator's website*
 - as much information as possible
 - keep updated
 - *Fact sheets*
 - *Annual reports to legislature*
 - *Press releases, press briefings*

Transparency (2)

- Involvement of public and industry in decision-making process
 - *Consultation papers*
 - *Advisory committees*
- Publication of reasons for decisions made
 - *Reports on consultations*
 - *Decisions, determinations, rulings, orders, directions*

Consistency and Predictability

- Minimize “regulatory risk” and give confidence to investors
- Observance of rule of law
- Publication of rules and guidelines
- Strict adherence to published rules and guidelines
- Deviation from published rules and guidelines to be explained

Consistency and Predictability (2)

- Administrative law safeguards
 - *act within legal limits*
 - *consider relevant factors/disregard irrelevant factors*
 - *act in good faith*
 - *act on basis of evidence*
 - *act reasonably and proportionately*
 - *hear both sides of arguments*
 - *avoid bias*

Independence

- Separation of
 - *Policy making*
 - *Implementing policy (regulation)*
 - *Operation of business*
- Independence from players in the market
 - *To enable taking of impartial decisions*

Independence (2)

- Independence from the Government
 - *Not always achievable - depending on legal and political systems of the particular country*
 - *Not so important in a fully privatized industry*
 - *Independence to insulate regulator from political pressure*

Independence (3)

- Clearly defined mandate and powers of the regulator in the law
- Sufficient powers vested in the regulator
- Appeal only to court or independent tribunal - no appeal to executive arm of Government
- Security of tenure
- Adequate resources and expertise

Accountability

- Single regulator
 - *can act more quickly and decisively*
- Collegial body
 - *more checks and balances*
 - *less susceptible to regulatory “capture”*
 - *less cohesion and consistency if regulatory body is too large*
 - *part time members may not be familiar with industry issues*

Accountability (2)

- Supervision by the court/quasi-judicial body
 - *The judicial review process*
 - *Appeal to Appeal Board*
- Supervision by the legislature
 - *LegCo Panel*
 - *Annual report and scrutiny*
- Ombudsman
- Media

Missions and Challenges Ahead

- To cultivate a regulatory environment
 - *serving the long term sustainable interest of consumers in terms of price, quality, choice and innovation*
 - *promoting the development of a telecommunications industry that will underpin the growth of the Hong Kong economy*

Missions and Challenges Ahead (2)

- Building blocks of such an environment
 - *effective competition*
 - *fair competition*
 - *adequate consumer protection*
 - *reasonable return to investors commensurate with risk*

Adjust Regulation as Market Develops

- Review of Type II interconnection policy
- Review of dominance in the market
- Review of Local Access Charge (LAC) and Universal Service Contribution (USC)
- Progressive replacement of *ex ante* tariff regulation with *ex post* enforcement of fair competition provisions

Regulate only Where it is Justified

- Resolution of inter-operator disputes
- Determination of terms and conditions of interconnection when commercial negotiations fail
- Access to land (buildings, tunnels, etc.) for network rollout
- Class licensing where justified
- Industry self-regulation where feasible

Maintain a Level Playing Field

- Effective and timely enforcement of licensing conditions and provisions in the Telecommunications Ordinance
- Monitoring and tackling anti-competitive practices and abuse of dominant position
- Stamping out illegal activities

Maintain Effective Level of Competition

- Implementation of newly enacted provisions in Telecommunications Ordinance for regulation of mergers and acquisitions in telecommunications sector
- Consultation and finalization of mergers and acquisitions guidelines
- Review of guidelines on fair competition provisions

Maintain Environment Conducive to Investment

- No barriers to entry and exit (unless physical constraints, such as spectrum availability, exist)
- Clear, transparent and predictable regulatory framework
- Maintaining a level playing field
- Regulation that gives efficient “build vs buy” signals to the market

Enhance Quality of Service and Consumer Protection

- Tackling misleading or deceptive conduct based on published guidelines
- Handling complaints from consumers not satisfied with operators' actions
- Performance indicators - pledging, reporting and publication
- Code of conduct for customer services and contract practices
- Quality assurance of Billing and Metering

Office of the Telecommunications Authority

<http://www.ofta.gov.hk>



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