

Bills Committee on Telecommunication (Amendment) Bill 1999

**Response to the Submission dated 21 February 2000
from Cable & Wireless HKT Limited**

The Administration provided a detailed response to the legal and constitutional issues raised by Cable & Wireless HKT Limited in January 2000 [L/C Paper No. CB(1) 883/99-00(01)]. At the Bills Committee meeting on 26 January 2000, the Administration together with the adviser of the Office of the Telecommunications Authority, Mr Richard Fowler, QC, explained in detail our response with regard to our policy and the legal issues respectively. In its submission dated 21 February 2000 [LC Paper No. CB(1) 1038/99-00], Cable & Wireless HKT reiterated its position that there should be provisions for an appeal mechanism against decisions of the Telecommunications Authority (TA) in our legislation. It also requested that TA's existing practice should be set out in legislation and that it is discriminatory to single out licensees to be subject to competition provisions as introduced by the Bill.

Fair Hearing Requirement of ICCPR

2. We believe that we have already addressed fully the above issues in our response in January [L/C Paper No. CB(1) 883/99-00(01)] and during the Bills Committee meeting on 26 January 2000. There is no question that the Bill is in contravention of the requirement of fair hearing under the ICCPR. The exercise of powers of the TA under the Telecommunication Ordinance is subject to checks and balances and important safeguards against abuse of powers governed by the statutory procedures to achieve the highest standard of accountability and transparency. Reliance is placed by CWHKT in the UK new appeals mechanism set out in the Telecommunications (Appeal) Regulation 1999, however, it should be pointed out that the "appeal" under the UK Regulations is not intended to be an appeal on the merits of decisions. It is a 'wider appeals mechanism' by widening the grounds on which a person may appeal against a decision beyond the limits of existing judicial review. The Court may not substitute its own decision for that of the regulator or Secretary of State (see New Appeals Mechanism in the

Telecommunications Act 1984 and the Wireless Telegraphy Act 1949, Response to Consultation, paragraphs 2(a) and 4(a)). Under our Bill, TA's decisions must be based on reasonable grounds, having regard to relevant considerations. We are of the view that with these safeguards, coupled with court's supervisory jurisdiction in judicial review, our position is no different from the appeals mechanism provided in the UK Regulations.

3. We have explained that the TA is bound under administrative law to act lawfully, and to observe the rules of natural justice. We have nonetheless taken into account views of the various deputations, including Cable & Wireless HKT Limited's and comments of the Bills Committee to formalise the existing practices of the TA by introducing Committee Stage Amendments (CSAs) on additional procedural safeguards in the following areas that impose on the TA-

- Duty to give reasons for forming an opinion, or making a determination, direction or decision
- Duty to give reasonable opportunities to the affected parties to make representations and to give due regard to the representations
- Requirement to issue guidelines
- Requirement to conduct consultation
- Requirement to set out standards of costing and factors for consideration for interconnection and sharing of facilities

With these procedural safeguards added in the Bill, the TA's decision-making process would become more transparent so that affected parties will be able to challenge the decisions by the TA effectively by judicial review, e.g., on the basis that he has failed to take into account relevant factors in a decision. The court in a judicial review would then be able to consider the facts and considerations taken by the TA and review any error of judgement or error of facts of the TA. This would further put

beyond doubt our position of meeting the ICCPR fair hearing requirement.

Committee Stage Amendments on Procedural Safeguards

4. In our paper “Policy Paper on the Procedural Safeguards” [LC Paper No. CB(1) 873/99-00 (01)], we have set out very clearly our policy to strengthen the statutory checks and balances on TA’s powers. The CSAs on the procedural safeguards are attached to another paper “Committee Stage Amendments”. We believe that the CSAs will make our overall position of the Bill all the more acceptable and reasonable to parties concerned, including the major licensees. These CSAs are summarised below -

- (a) The TA would have a statutory duty to give reasons in writing for forming an opinion under the new section 6A. This would meet the worry of CWHKT that the TA may form an opinion that a licensee has engaged in an anti-competitive behavior without providing reasons.
- (b) We have already imposed into the Bill a duty on the TA to give reasons in writing when making a decision. Specifically, we would reiterate such duty by CSAs on the TA when he makes decisions of significance. The TA has a general duty to issue guidelines to provide guidance in respect of requirements under the Ordinance. We intend to make it clear that the TA shall provide reasons when departing from guidelines issued under the Ordinance by the TA. Moreover, when the TA decides to refuse to grant a licence under the new section 7, or to revoke or suspend a licence under the amended section 34, he shall also provide reasons in writing.
- (c) It has been the existing practice of the TA to invite the affected parties to make representations before making decisions of significance. We intend to make it a statutory duty on the TA to give reasonable opportunities to the affected parties to make representations and to take due regard to the representations before he decides to authorise access of mobile network operators into shielded areas under the new

section 14(1A), revoke or suspend licences under the amended section 34, make determination on interconnection under the amended section 36A, direct sharing of facilities under the new section 36AA and impose penalty under the amended section 36C. This would provide the assurance that views of the affected parties would be considered fully in the decision-making process of the TA.

- (d) In addition to a general power to issue guidelines, a mandatory requirement on the issue of guidelines in respect of certain significant/controversial decisions would likely provide clarity of the considerations and requirements of the TA. We therefore intend to impose a statutory duty on the TA to issue guidelines to provide guidance on the licensing criteria for licence applications under the new section 7, and the charging principles for determination of access fees into shielded areas under the new section 14(5A)(a).
- (e) It has been the established practice of the TA to consult the parties concerned on major guidelines issued. To provide assurance, we would impose a duty on the TA so that if he intends to issue or vary guidelines on the charging principles for determination of access fees into shielded areas under section 14, guidelines on the principles of interconnection under section 36A and sharing of facilities under section 36AA, he shall consult all the concerned parties beforehand.
- (f) There have been concerns from the Cable & Wireless HKT Limited and some Members of the Bills Committee about the considerations of the TA in making determination on interconnection arrangements under section 36A and directing facility sharing under section 36AA. For the sake of clarity, we would set out the considerations of the public interest test under section 36A. We would also make it clear in the Ordinance that the charges determined under both sections **shall** be based on the relevant reasonable costs attributable to interconnection or sharing of facilities, as the case may be. This would meet the concern of Cable & Wireless HKT Limited that the TA may determine a below-cost interconnection charge, which at present is guard against under the guidelines issued by the TA.

- (g) The revocation or suspension of a licence would affect the operation of the business of the licensee concerned. While the TA should act proportionately and reasonably in his exercise of powers, we intend to provide additional checks against the TA's power in respect of licence revocation or suspension. We would make it clear by CSAs that the TA shall not revoke or suspend licences under the amended section 34 unless it is proportionate and reasonable to do so.

Competition Provisions on Licensees

5. Finally, we strongly disagree with any suggestion that it is discriminatory to address the anti-competitive conduct only of licensees. Licensees are manifestly in a position that sets them apart from non-licensees and it would be discriminatory not to recognise that distinction. For the telecommunications market where there was a monopoly in the past and full competition has yet to be achieved in many sectors of the market, we consider it in the public interest to have regulatory measures against anti-competitive behavior of licensees.

6. Recent events such as the concurrent price increases by mobile operators have highlighted the importance of improved regulatory framework in the Bill. In particular, there has been concern from the public for enhanced competition safeguards to protect consumer interests and to ensure a level-playing field across the industry. We believe that the proposed CSAs on procedural safeguards should have addressed the concerns of the depositions including the Cable & Wireless HKT Limited. We hope the Bills Committee would support the Bill and the proposed CSAs, and agree to the early enactment of the Bill.

Information Technology and Broadcasting Bureau

6 March 2000