

Bills Committee on Telecommunication (Amendment) Bill 1999

Committee State Amendments

Having regard to the views expressed by members of the Bills Committee as well as those received from the interested parties who sent deputations to the Bills Committee, the Administration considers that the Bill can be further improved by way of Committee Stage Amendments (CSAs). The CSAs to be introduced can be categorised into the following areas-

- (A) Clarifications on Procedural Safeguards
- (B) Request for and Disclosure of Information, and Protection of Confidentiality
- (C) Establishment of an Arbitration Mechanism for the Determination of the Access Fee Payable by Mobile Network Operators to Landowners in accordance with such Terms and Conditions as specified by the Arbitrator.
- (D) Scope of the TA's Power to Mandate Sharing of Facilities
- (E) Remedies
- (F) Textual and Miscellaneous Amendments

(A) Clarifications on Procedural Safeguards

2. In the "Policy Paper on the Procedural Safeguards" dated 24.1.2000 to Bills Committee, the Administration has already set out its policy to codify certain existing administrative practices of the TA in the Bill to further strengthen the statutory checks and balances of the TA and provide assurance on procedural safeguards.

3. We will add the following requirements on the TA in the Bill -

- (a) Duty to give reasons for forming an opinion under the new section 6A, departing from guidelines issued under the Ordinance by the TA under the new section 6A, refusing to grant a licence under the new section 7, and revoking or suspending a licence under the amended section 34.
- (b) Duty to give reasonable opportunities to the affected parties to make representations and to give due regard to the representations before the TA 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.
- (c) General power to issue guidelines under the new section 6D and duty 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).
- (d) General power to consult the affected parties and the public under the new section 6C and duty to consult the affected parties before issuing 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.
- (e) Stipulation of standards of costing, and factors for consideration for interconnection and sharing of facilities under the amended section 36A and the new section 36AA.
- (f) Requirement for the TA to act proportionately and reasonably in his decisions to revoke or suspend licences

under the amended section 34 and to impose penalty or sanction under section 36C.

(B) Request for and Disclosure of Information, and Protection of Confidentiality

4. Some deputations and members of the Bills Committee have raised concerns over the power of the TA to request for and inspect information under sections 7I, 35A and 36D. While we are of the view that the TA has the administrative duty not to act arbitrarily, we agree that further improvements can be made to those sections to more clearly reflect our policy intent.

5. We propose to make the following amendments -

- (a) to make it explicit that the TA will not, under sections 7I, 35A and 36D, compel production of such information or any documents, which the licensee/non-licensee could not have been compelled to give in evidence, or produce, in civil proceedings before the Court of First Instance;
- (b) to make it explicit that the licensee/non-licensee, in disclosing any information to the TA under sections 7I, 35A or 36D, will be absolved of his civil liability even though such information is subject to certain disclosure regulation as imposed by a confidential agreement signed between the licensee/non-licensee and a third party;
- (c) to require that the TA shall keep in confidence any information produced to him in confidence under sections 35A & 36D, and the information will be disclosed only if it is in the public interest to do so and reasonable opportunities for representation should be given to the person(s) providing the information under specified circumstances;
- (d) to more clearly circumscribe that the TA would only exercise his powers under sections 7I and 35A for the purpose of performing his functions or exercising his powers to ensure

the licensees' compliance with the provisions of this Ordinance, licence conditions, and the determinations and directions of the TA; and under section 36D for the TA's investigation of any suspected breach or breach of a provision of this Ordinance, of a determination or direction of the TA or a licence condition.

(C) Establishment of an Arbitration Mechanism for the Determination of Terms and Conditions and Access Fee Payable by Mobile Network Operators to Landowners

6. Given the growing importance of mobile telecommunications in Hong Kong, we consider that there is sufficient public interest to warrant the setting up of a new mechanism to ensure ubiquitous coverage of mobile networks in shielded areas, if commercial agreement cannot be reached. However, the tunnel and railway operators have expressed concerns over the proposal, in particular the role of the TA in determining the access fee to be paid by the licensee to the person having a lawful interest in the land concerned. Some Members of this Committee have also suggested that the fee should be determined by a third party.

7. We would like to reiterate that -

- (a) the TA is under administrative law to act reasonably and not arbitrarily.
- (b) the primary objective in introducing this provision in the Bill is to ensure ubiquitous coverage for mobile telecommunications.

Having considered the views of members and depositions to the Bills Committee, we would like to put forward improvements that will alleviate their concerns, while meeting our policy intent.

8. We propose that the TA should remain the authority for determining the right of access having regard to the public interest and

relevant factors as provided for in new sections 14(1A) and 14(1B) if the licensee and the person having a lawful interest in the land concerned fail to come to an agreement within a reasonable time, and set out any technical requirements for access. The authority for determining the fee to be paid, including the terms and conditions of its payment, should be determined by submission to arbitration under the Arbitration Ordinance (Cap. 341) by either the licensee or the person having a lawful interest in the land concerned.

9. Under the Bill, the TA may grant authorization under the new section 14(1A), if he is satisfied that there is a public interest and after taking into consideration the factors set out in the new section 14(1B). We propose to make a CSA to require the TA to provide reasons and technical requirements, if any, for granting the authorization. The authorization to be granted by him may contain such technical requirements of the right of access to reflect the factors that he must have taken into consideration e.g. the location, technical arrangement and capacity of the radiocommunication facilities. These are relevant considerations the TA must have taken into account under the new section 14(1B)(b).

10. Under the Bill as currently drafted, in the absence of agreement as to the fee to be paid between the parties, the TA shall determine the fee. We propose to introduce a CSA to replace the TA with an arbitrator for determining the fee under section 14(5)(b). The fee so determined by the arbitrator must be fair and reasonable under section 14(5A)(a) and must be payable in accordance with the terms and conditions of the payment specified by the arbitrator in its determination under section 14(5)(b)

11. To address the further requests raised by the four BOT tunnel operators for an assurance that the access fees to be determined will be fair and reasonable, we propose that the CSAs on the arbitration arrangements should also set out the following -

- (a) apart from stating the over-riding principle that the fee to be paid by the licensee to the person having the lawful interest in the land concerned shall be fair and

reasonable in all the circumstances of the case, the arbitrator should consider-

- (i) factors such as cost, property value and benefits to be derived from the authorization concerned;
 - (ii) the guidelines issued by the TA on the principles on charging access fees after consultation with the interested parties; and
 - (iii) the reasons given by the TA in granting the authorisation and the technical requirements, if any, of the right of access.
- (b) The TA shall issue guidelines on the charging principles after consultation with the parties affected.
- (c) If the arbitrator in an arbitration proceeding finds that there is dispute on matters other than technical requirements relating to the exercise of the authorisation of access, and the arbitrator is of the view that without determining such matters, either
- (i) the two sides still cannot agree on any part of the contract
 - (ii) the fee and terms and conditions of payment cannot be determined,

the arbitrator shall also determine such matters.

(D) Scope of the TA's Power to mandate Sharing of Facilities

12. Section 36AA, as currently drafted, empowers the TA to direct “any licensee or person” to share facilities owned or used by him under specified circumstances. This section is intended to apply to licensees under or deemed to be under the Telecommunication Ordinance

only. We therefore propose to make the amendments to more accurately reflect our intention.

13. We propose to confine the scope of section 36AA on sharing of facilities between licensees as defined under the Bill only.

(E) Remedies

14. The Legal Services Division of the LegCo Secretariat has pointed out that the UK's 1984 Telecommunication Act confers on any person who may be affected by contravention of a licence condition a right of action if the contravention causes that person to sustain loss or damage. We agree with this approach and propose to amend section 39A to clarify this.

15. We propose to model the amendment on the UK's 1984 Telecommunication Act to more clearly define the scope of persons who have a right of action to seek remedies under section 39A. This can be done by confining the scope to persons who may have sustained loss or damage from the breach set out in the section.

(G) Miscellaneous and Textual Amendments

16. We would also like to introduce some technical/textual amendments to the Bill. Details are also set out in the CSAs at Annex.

The CSAs

17. A copy of the CSAs that the Administration is prepared to make is at Annex. The following is a detailed account of the major amendments -

- (a) **CSAs on Clause 2** are textual amendments to some definitions and clarifications of which notices and orders are subsidiary legislation. The definition of "external service" is further improved to avoid ambiguity.

- (b) **CSAs on Clause 3** seek to amend section 6A so that the TA shall give reasons in writing when forming an opinion, or departing from guidelines issued under the Ordinance. They also add a new section 6C to provide the TA with a general power to conduct consultation, as well as a new section 6D to provide the TA with a general power to issue guidelines and a duty to issue guidelines on licence application and the charging principles for access into shielded areas. A statutory duty is also imposed on the TA to carry out such consultation with the concerned parties/telecommunications industry as is reasonable in all the circumstances of the case before he issues guidelines on the charging principles into shielded areas, the principles governing the criteria for interconnection determination or sharing of facilities under section 36A or 36AA, as the case may be.
- (c) **CSAs on Clause 4** seek to amend section 7 so that the TA shall provide reasons in writing when refusing to issue a licence. They also substitute the term “accounting practices” in the second line of section 7H with “accounting principles” as suggested by the Bills Committee. Section 7I relating to request for information by the TA is further improved in the light of Members’ concerns in the previous meetings. Section 7J is amended to provide assurance that the TA should not exercise his power under this section in the manner that will disrupt the operations being carried on by the licensee or any other person in the concerned premises, places, facility, etc., any more than is necessary for the proper exercise of the power in all the circumstances of the case.
- (d) **CSAs on Clause 7** seek to introduce an arbitration mechanism under section 14 so that access fee into shielded areas when commercial negotiations fail would be determined by arbitration under the Arbitration Ordinance instead of by the TA. They also clearly stipulate that compensation on physical damages to land or seabed should also include damages to any fixture or chattels found on the land or seabed.

- (e) **CSA on Clause 8** seeks to add at the end of section 16(1) that the Authority or licensee, as the case may be, shall not unreasonably refuse the requirement to remove line or post where necessary for use of land.

- (f) **CSA on Clause 13** seeks to amend section 19B to the effect that a term in a lease agreement, deed of mutual covenant or commercial contract that in all the circumstances of the case, unreasonably restricts the right of a resident or occupier, or deprives a resident or occupier of the right to have access to the public telecommunications service of his choice, is void on and after the day on which this section comes into operation. This is in response to Members' concern that the original drafting of the provision would be too broad to cover any legitimate restriction of the right of resident or occupier such as prohibition of erecting a resident or occupier's own antennae.

- (g) **CSAs on clause 16** mainly seek to amend section 32G(2) so as to extend the scope of consultation of the TA in respect of spectrum management from within the telecommunications industry to such other persons who may be directly affected by the exercise of the concerned powers as is reasonable in all the circumstances of the case. This is in response to Members' concern that the TA would also manage aeronautical and maritime spectra.

- (h) **CSAs on Clause 17** seek to require that the TA shall not revoke or suspend a licence unless it is proportionate and reasonable in relation to the contravention concerned to do so. Before he decides to revoke or suspend a licence, he should also give the concerned parties a reasonable opportunity to make representations and shall consider all representations. The TA should also provide reasons in writing for his decisions to revoke or suspend a licence.

- (i) **CSAs on clause 18** seek to improve section 35A relating to the inspection of documents and information by the TA by more

clearly circumscribing the exercise of the TA's power under this section, adding a provision on disclosure only when the public interests test is met and the representations of affected parties have been considered under specified circumstances, providing that the licensees would be absolved from any civil liabilities even though such information is subject to disclosure control under a confidential agreement.

- (j) CSAs on clause 19** seek to improve section 36A relating to determination of interconnection by requiring the TA to consider the representations before deciding whether or not to make a determination, and by setting out the consideration of the TA in making the determination.
- (k) CSAs on clause 20** seek to confine the scope of section 36AA on sharing of facilities to licensees only and require the TA to provide a reasonable opportunity for the parties concerned to make representations and consider such representations before making a decision on sharing of facilities. They also set out the considerations of the TA in directing sharing of facilities which include fair and reasonable compensation.
- (l) CSAs on Clause 22** seek to require the TA to give a reasonable opportunity to the affected parties to make representations and consider such representations before imposing a sanction under section 36C. They also seek to require that the TA shall not impose a penalty or sanction unless it is proportionate and reasonable in relation to the breach concerned to do so.
- (m) CSAs on Clause 23** seek to improve section 36D on the TA's power to apply to magistrate for an order to mandate non-licensees to provide information by more clearly circumscribing the exercise of the TA's power, adding a provision on disclosure only when the public interests test is met and the representations of affected parties have been considered, providing that the non-licensees would be absolved from any civil liabilities even though such

information is subject to disclosure control under a confidential agreement.

- (n) **CSA on clause 25** seeks to amend section 39A(1) so that person sustaining loss or damage from (instead of being aggrieved by) a breach in relation to anti-competitive behaviour may seek civil remedy.

- (o) **CSA on clause 26** seeks to include “Hotel Television Services Licence” as one of the licences not within the meaning of “Carrier licences” under section 2.

Information Technology and Broadcasting Bureau

8 March 2000

TELECOMMUNICATION (AMENDMENT) BILL 1999

Amendments to be moved by the Secretary for
Information Technology and Broadcasting

Clause

Amendment Proposed

2

In the proposed section 2 -

(a) in subsection (1) -

(i) by deleting the definition of “external services” and
substituting -

““external services” ()means

telecommunications services between -

- (a) Hong Kong and one or more places
outside Hong Kong; or
- (b) two or more places outside Hong
Kong where the services are routed
through Hong Kong;”;

(ii) in the definition of “numbering plan” (), by adding “for” after “use”;

(iii) in the definition of “public place” (), by adding “to” after “permitted”;

(b) by deleting subsection (2) and substituting -

“(2) For the avoidance of doubt, it is hereby declared that

-

(a) a notice under section 7C(1) and an order under section 32J (4) are not subsidiary legislation;

(b) an order under section 32I(1) or 32K(6) is subsidiary legislation.”.

3

(a) In the proposed section 6A(3), by deleting paragraph (b) and substituting -

“(b) forming an opinion or making a determination, direction or decision -

(i) shall provide reasons in writing for it;

(ii) shall not depart from guidelines issued under section 6D which are applicable to the subject

matter of the opinion, determination, direction or decision, as the case may be, unless he has provided reasons in writing for the departure.”.

(b) In the proposed section 6B, by deleting subsection (3) -

(c) By adding -

“6C. Consultation

Before performing any function or exercising any power under this Ordinance, the Authority may consult with -

- (a) the persons who may be directly affected by the performance of that function or the exercise of that power, as the case may be; or
- (b) members of the public.

6D. Guidelines

(1) Subject to subsection (4), the Authority may, for the purpose of providing practical guidance in respect of any provisions of this Ordinance, issue such guidelines as in his opinion are suitable for that purpose.

(2) Without prejudice to the generality

of subsection (1), the Authority shall, as soon as is practicable, issue guidelines -

- (a) indicating the manner in which he proposes to perform his function of determining applications for licences which may be issued by him, including the licensing criteria and other relevant matters he proposes to consider;
- (b) subject to subsection (3), on the application of the principle referred to in section 14(5A) (a) in any arbitration proceedings.

(3) Without prejudice to the generality of section 6C, the Authority shall, before issuing guidelines under subsection (2) (b), carry out such consultation -

- (a) with the persons who may be affected by the operation of section 14(1A); and
- (b) on the factors to be taken into account for the purposes of subsection (2) (b),

as is reasonable in all the circumstances of

the case.

(4) Without prejudice to the generality of section 6C, the Authority shall, before issuing any guidelines -

- (a) for the purposes of the test of dominance prescribed in section 7L(2), carry out such consultation with the licensees in the relevant telecommunications market as is reasonable in all the circumstances of the case;
- (b) setting out principles governing the criteria for any determination under section 36A(1) and the matters to be considered for the purposes of section 36A(3) and (3B) in the application of section 36A(3) and (3B) to any such determination, carry out such consultation with the telecommunications industry as is reasonable in all the circumstances of the case;
- (c) setting out principles governing the criteria for

making a determination under section 36AA(6),

carry out such consultation with -

(i) the telecommunications industry; and

(ii) such other persons who may be directly affected by such a determination,

as is reasonable in all the circumstances of the case.”.

4 (a) In the proposed section 7, by adding -

“(11) Where the Authority refuses to issue a licence to a person, he shall provide to the person his reasons in writing for the refusal.”.

(b) In the proposed section 7H, by deleting “practices generally” and substituting “principles generally”.

(c) In the proposed section 7I -

(i) in subsection (1), by adding”, or exercise his powers, in order to ensure the person’s compliance with the provisions of this Ordinance, licence conditions, and the determinations and directions of the Authority, applicable

to the person”;

(ii) in subsection (4), by deleting “a person” and substituting
“the person supplying the information”;

(iii) by adding -

“(5) For the avoidance of doubt, it is hereby declared that where a person (“the first- mentioned person”) supplies information reasonably requested under subsection (1) notwithstanding that the information is the subject of a confidentiality agreement with another person (“the second- mentioned person”) that prevents the first- mentioned person from releasing the information, the first-mentioned person shall not be liable in an action for damages at the suit of the second- mentioned person in respect of the supply of that information contrary to that agreement.

(6) Nothing in this section shall require a person to supply information which the person could

not be compelled to give in evidence, or produce, in civil proceedings before the Court of First Instance.”.

(d) In the proposed section 7J, by adding -

“(6) The Authority shall not exercise his power under subsection (1) in respect of any office, premises or place in such a way as to disrupt any operations being carried on therein -

(a) by a licensee or any other person; and

(b) any more than is necessary for the proper exercise of that power in all the circumstances of the case.”.

(e) By deleting the proposed section 7K(4).

(f) In the proposed section 7L(3) (e), by deleting everything after “guidelines” and substituting “referred to in section 6D(4) (a).”.

(g) By deleting the proposed section 7M(2).

5

By deleting paragraph (a) (i) and substituting -

“(i) by adding “or created” after “granted”;

(ia) by adding “or licensed” after “registered”;

7

(a) In paragraph (b), in the proposed section 14(1B) -

(i) in paragraph (a), by deleting “and”;

(ii) in paragraph (b) (iii) and (iv), by deleting “public place”
and substituting “land”;

(iii) in paragraph (b) (v), by deleting “subparagraph (ii).” and
substituting “subparagraph (ii).”;

(iv) by adding -

“(c) unless he has given a reasonable opportunity to
the persons having a lawful interest in the land
concerned and to the licensees concerned to
make representations and has considered all
representations made before he decides whether
or not to grant the authorization; and

(d) unless he -

(i) gives reasons in writing for the grant
of the authorization; and

(ii) specifies in writing the technical
requirements, if any,

of the right of access arising from the
authorization.”.

(b) In paragraph (c), in the proposed section 14(2) -

- (i) in paragraph (i), by adding “to any fixture or chattels found on the land or seabed” after “damage”;
- (ii) in paragraph (ii) (A), by deleting “, in the opinion of the Authority,”.

(c) In paragraph (e) -

- (i) in the proposed section 14(5) -
 - (A) in paragraph (a), by deleting “that subsection” and substituting “subsection (2) (ii)”;
 - (B) by deleting paragraph (b) and substituting -

“(b) in the absence of any such agreement within a reasonable time, the fee, and the terms and conditions in accordance with which it shall be payable, shall be determined by arbitration under the Arbitration Ordinance (Cap. 341).”;
- (ii) by adding after the proposed section

14(5) -

“(5A) In any arbitration proceedings for the purposes of subsection (5) (b), regard shall be given

to -

- (a) the principle that the fee to be paid shall be fair and reasonable in all the circumstances of the case, including, but not limited to, factors relating to cost, property-value and the benefits to be derived from the authorization concerned referred to in subsection (1A);
- (b) the guidelines issued by the Authority under section 6D(2) (b); and
- (c) the reasons and technical

requirements concerned, if any,

referred to in subsection (1B) (d).

(5B) Where in any arbitration proceedings for the purposes of subsection (5) (b) -

(a) there is a dispute on a matter other than the technical requirements concerned, if any, referred to in subsection (1B) (d); and

(b) the arbitrator is of the opinion that, without determining that matter -

(i) the licensee and the person concerned will not reach an agreement

to give effect to the
authorization concerned
referred to in subsection
(1A); or

(ii) the determination referred
to in subsection (5) (b)
cannot be made,

then the arbitrator may determine that matter in any
manner not inconsistent with the authorization
concerned referred to in subsection (1A).”;

(iii) by deleting the proposed section 14 (6) (c);

(iv) by adding after the proposed section

14(7) -

“(8) For the avoidance of doubt, it is hereby declared that compensation is not payable under subsection (2) in relation to any physical damage referred to in that subsection for which full compensation has been paid or is payable under any other provision of this ordinance or under any other law.”.

8 In the proposed section 16(1), by adding “and such requirement shall not be unreasonably refused by the Authority or licensee, as the case may be” after “of the telecommunications line, post or radiocommunications installation”.

13 In the proposed section 19B(1), by adding “, in all the circumstances of the case, unreasonably” after “contract that”.

16 (a) In the proposed section 32D(2), by deleting “consult with the telecommunications industry” and substituting “carry out such consultation with the telecommunications industry as is reasonable in all the circumstances of the case”.

(b) By deleting the proposed section 32G(2) and substituting -

“(2) Before exercising his powers under sections 32H(2)
(a) and (b) and 32I(1), the Authority shall carry out such
consultation with -

(a) the telecommunications industry; and

(b) such other persons who may be directly
affected by the exercise of such powers,

as is reasonable in all the circumstances of the case.”.

17

By deleting paragraph (a) and substituting -

“(a) by repealing subsection (1);

(ab) in subsection (1B), by repealing “subsection (1) or (3)” where
it twice appears and substituting section 7(8) or 7A”;

(ac) by repealing subsections (2) and (3);

(ad) by adding -

“(4A) The Authority shall not exercise a power under
subsection (4) unless the exercise of the power is, in all
the circumstances of the case, proportionate and
reasonable in relation to the contravention concerned
referred

to in that subsection giving rise to the exercise of the power.

(4B) Where the Authority proposes to exercise a power under subsection (4), he shall give the licensee or other person concerned a reasonable opportunity to make representations and shall consider all representations made before he decides whether or not to exercise that power in the case of the licensee or other person, as the case may be.

(4C) Where the Authority exercises a power under subsection (4), he shall provide reasons in writing for it to the licensee or other person concerned.”.”.

18

In the proposed section 35A -

- (a) by adding “for the purposes of the Authority performing his functions, or exercising his powers, under this Ordinance in order to ensure the licensee’s compliance with the provisions of this Ordinance, licence conditions, and the determinations and directions of the Authority, applicable to the licensee” after “the licensee”;
- (b) by adding -

“(8) The Authority shall not disclose

any document or account produced under this section except subject to the requirement in subsection (9) and if the Authority considers that it is in the public interest to disclose that document or account, as the case may be.

(9) The Authority shall give a licensee producing any document or account under this section a reasonable opportunity to make representations on a proposed disclosure of the document or account, as the case may be, and shall consider all representations made before the Authority makes a final decision to disclose the document or account, as the case may be, if the Authority considers that the disclosure -

(a) would result in the release of information concerning the business, commercial or financial affairs of the licensee; and

(b) could reasonably be expected to affect adversely the licensee's lawful business, commercial or financial affairs.

(10) For the avoidance of doubt, it is hereby declared that where a person ("the

first-mentioned person”) produces a document or account under this section notwithstanding that the document or account, as the case may be, is the subject of a confidentiality agreement with another person (“the second-mentioned person”) that prevents the first-mentioned person from releasing the document or account, as the case may be, the first-mentioned person shall not be liable in an action for damages at the suit of the second-mentioned person in respect of the production of that document or account, as the case may be, contrary to that agreement.

(11) Nothing in this section shall require a licensee to produce any document or account which the licensee could not be compelled to produce in civil proceedings before the Court of First Instance.”.

- 19
- (a) In paragraph (a), in the proposed section 36A(3B), by deleting “may be” and substituting “shall be”.
 - (b) By adding -
 - “(ab) in subsection (4) -
 - (i) by repealing “subsection (3)” and substituting “subsection (3D)”;
 - (ii) by adding “and the Authority

has considered representations made before he decides whether or not to make such a determination” after “not be made”;

(c) In paragraph (b), in the proposed section 36A(5D), by repealing “or appeal”.

(d) By adding -

“(ba) by repealing subsection (8);”.

(e) In paragraph (c), by adding immediately after the proposed section 36A(9) -

“(10) In making a determination under subsection (1), the

Authority shall give regard to -

- (a) the Government’s policy objectives for the telecommunications industry;
- (b) consumer interests;
- (c) encouraging efficient investment in telecommunications infrastructure;
- (d) the nature and extent of competition among the parties to the interconnection concerned and their respective abilities to compete with each

other fairly; and

- (e) such other matters as the Authority considers appropriate in the particular circumstances of the case.”.

20

In the proposed section 36AA -

(a) in subsection (1) -

- (i) by deleting “or a person”;

- (ii) by deleting “or another person”;

(b) by deleting subsection (2) and substituting -

“(2) Prior to issuing a direction in the public interest under subsection (1), the Authority shall provide a reasonable opportunity for the licensee, and any other interested party, to make representations on the matter and shall give consideration to all representations made before he decides whether or not to issue the direction.”;

(c) in subsection (3) (d), by deleting “and persons”;

(d) in subsection (4) -

- (i) by deleting “, or another person authorized by the Authority,”;

- (ii) by deleting “or person” where it twice appears;

(e) by deleting subsection (6) and substituting -

“(6) If the parties do not reach an

agreement within a reasonable time, and the Authority requires shared use of the facility, then -

- (a) the Authority may determine the terms and conditions for the shared use of the facility;
- (b) the determination under paragraph (a) shall include terms and conditions providing for fair and reasonable compensation payable in all the circumstances of the case for the shared use of the facility;
- (c) the compensation referred to in paragraph (b) shall include the relevant reasonable costs attributable to the provision, use or sharing of the facility;
- (d) to calculate the costs referred to in paragraph (c), the Authority may select from alternative costing methods what he considers to be a fair and reasonable costing method.”.

22

- (a) In paragraph (b), by deleting subparagraphs (i) and (iii).
- (b) In paragraph (d), in the proposed section 36C(3B), by deleting “a financial penalty under subsection (3) is not” and substituting” if he were to impose a financial penalty under subsection (3) it would not be”.
- (c) By deleting paragraphs (e) and (f) and substituting -

“(e) by repealing subsections (4) and (5) and substituting -

“(4) The Authority shall not impose a financial penalty under this section unless, in all the circumstances of the case, the financial penalty is proportionate and reasonable in relation to the failure or series of failures concerned giving rise to that penalty.

(5) Subsection (1), (2) or (3A) shall not apply in the case of the licensee or person concerned unless the Authority is satisfied that the licensee or person, as the case may be, has been afforded a reasonable opportunity of complying

with the requirement of any licence condition, provision of this Ordinance or regulation made thereunder, or direction, in respect of which that subsection is sought to be applied.

(5A) A financial penalty imposed under this section shall be recoverable as a civil debt due and payable to the Government.”;

(f) by adding -

“(7) The Authority shall, before imposing a sanction under this section on a licensee or person concerned, afford the licensee or person concerned, as the case may be, a reasonable opportunity to make representations and shall consider all representations made before the Authority decides whether or not to impose such sanction.”.

23

In the proposed section 36D -

(a) in subsection (1), by deleting “the performance of any of the Authority’s functions or the exercise of any of the Authority’s powers” and substituting

“the Authority’s investigation of a breach or suspected breach of a provision of this Ordinance, or of a determination or direction of the Authority or a licence condition”;

(b) by adding -

“(3) The Authority shall not disclose any information or document given or produced to him under this section except subject to the requirement in subsection (4) and if the Authority considers that it is in the public interest to disclose that information or document, as the case may be.

(4) The Authority shall give a person giving or producing any information or document under this section a reasonable opportunity to make representations on a proposed disclosure of the information or document, as the case may be, and shall consider all representations made before the Authority makes a final decision to disclose the information or document, as the case may be.

(5) For the avoidance of doubt, it is hereby declared that where a person (“the first-mentioned person”) gives or produces any information or document under this section notwithstanding that the information

or document, as the case may be, is the subject of a confidentiality agreement with another person (“the second-mentioned person”) that prevents the first-mentioned person from releasing the information or document, as the case may be, the first-mentioned person shall not be liable in an action for damages at the suit of the second-mentioned person in respect of the giving or production of that information or document, as the case may be, contrary to that agreement.

(6) Nothing in this section shall require a person to give any information or document, or to produce any document, which the person could not be compelled to give in evidence, or produce, in civil proceedings before the Court of First Instance.”.

25 In the proposed section 39A(1), by deleting “who is aggrieved by” and substituting “sustaining loss or damage from”.

26 In the proposed Schedule, by adding -

“8. Hotel Television Services Licence.”.