

Bills Committee on Telecommunication (Amendment) Bill 1999

Committee Stage Amendments On An Appeal Mechanism For Competition Issues

Introduction

This paper introduces the appeal mechanism for competition issues proposed by the Administration under the Telecommunication (Amendment) Bill 1999.

Pro-Competition Policy and Regulatory Regime in Telecommunications

2. Our policy objective is to develop Hong Kong into a regional telecommunications and Internet hub. We are committed to providing a pro-competition and pro-consumer regulatory framework which is essential to induce private investment in a level playing field in the telecommunications industry.

3. To this end, the Telecommunication (Amendment) Bill strengthens competition safeguards under the new sections 7K to 7N regarding anti-competitive practices, abuse of dominant position, misleading or deceptive conduct and non-discrimination. They serve to codify the TA's powers for the promotion of fair competition now provided in the Fixed Telecommunication Network Services (FTNS) Licenses in law and to clarify and strengthen those powers in the primary legislation. The Bill also increases the financial penalty that the TA may impose on breaches of the licence conditions, the provisions of the Ordinance and the TA's determinations and directions. The penalty will be increased ten-fold to \$200,000 on the first occasion of breach, \$500,000 on the second occasion and \$1,000,000 on any subsequent occasion. In addition, the Bill provides for a new class of right to persons aggrieved by the licensees' breach of the competition safeguards

provisions for them to seek remedies through the court. The Bill therefore substantially strengthens the pro-competition elements of our regulatory regime.

4. We believe that we have fully addressed the legal and constitutional issues raised by the Bills Committee and depositions made by Cable & Wireless HKT (CWHKT). Our Bill meets the requirement of fair hearing under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). Taking into account the further procedural safeguards introduced as Committee Stage Amendments (CSAs) in the Bill^{Note 1}, coupled with the court's supervisory jurisdiction in judicial review, our position is no different from the appeal mechanism provided for under the telecommunications legislation in the UK.^{Note 2}

5. While the Bill meets the fair hearing requirement under the ICCPR, we consider it desirable from the policy perspective to introduce an appeal board to review the merits of TA's decision on competition matters, taking into account the strengthened regulatory regime under the Telecommunication (Amendment) Bill as explained in paragraph 3 above. The key policy considerations are as follows :

- (a) The history of anti-competition laws and measures are relatively short not only in Hong Kong but also in other developed economies. Coupled with the rapid liberalisation of our telecommunications market and intensification of the already keen competition, controversial cases involving anti-

^{Note 1} See the "Policy Paper on the Procedural Safeguards" on the statutory checks and balances and the procedural safeguards to be introduced by CSAs in LC paper No. CB(1)873/99-00(01) issued in January 2000, the text of the CSAs in LC paper No. CB(1)1138/99-00(01) in March 2000 and in LC paper No. CB(1)1378/99-00(01) in April 2000.

^{Note 2} See our response to CWHKT with regard to the fair hearing requirement under the ICCPR and the Telecommunications (Appeal) Regulation 1999 in LC paper No. CB(1)883/99-00(01) issued in January 2000 and LC Paper No. CB(1)1122/99-00(01) issued in March 2000 respectively. The "appeal" under the UK is not an appeal with full jurisdiction to review on merits of the decisions made by the UK telecommunications regulator. The grounds of appeal are restricted to material error of law, fact or procedure or illegality subject to the grant of leave by the court.. The Court may not substitute its own decisions for that of the telecommunications regulator in the UK or Secretary of State.

competitive behaviour in the telecommunications market are likely to arise.

For example, in the recent case where the TA investigated the concurrent and almost identical fee increases of the six mobile companies, he established that there was a breach of the anti-competition provisions in the respective licences on circumstantial evidence. Upon the enactment of the Bill, the TA would have enhanced powers to facilitate his investigation and possibly obtain more substantive evidence on the anti-competitive breach. A similar anti-competitive conduct that occurs after enactment of the Bill may be considered a breach of the competition safeguard provisions in the Bill or the licence, and may lead to financial penalty as well as civil law suits for damages. These cases may involve significant commercial interests and arouse substantial concerns in the community.

- (b) In deciding whether there is an anti-competitive behaviour or abuse of a dominant position in certain sectors of the market, the TA will need to make an assessment of market conditions such as market share, ability to impose price changes without regard to competitors, barriers to entry, etc., involving wider economic issues.

6. The proposed introduction of an appeal board to deal with competition matters only would be in line with the arrangement in the UK where decisions in relation to competition safeguard provisions are subject to appeal on merits under the Competition Act 1998 in the UK by an appeal board with full jurisdiction to review the decisions on merits, whereas other decisions of the Director-General of Telecommunications of the UK are not subject to appeal on merits.

7. In considering the setting up of the Board, the Administration is firmly of the view that any model of regulation and appeal must enable the telecommunications regulator to perform his powers and functions effectively and expeditiously, particularly when the telecommunications industry in Hong Kong is undergoing rapid developments and focusing on driving forward competition. The proposal now put forward must strike a balance in ensuring that the appeal board mechanism meets our policy objective and that the appeal channel will not be susceptible to abuse. Therefore, while we propose to empower the Board to review the merits of TA's decisions, the opinion, decision, direction and determination which is being appealed against should not be subject to suspension by the Appeal Board as an interim relief, with the exception for the penalties and remedies which the TA may impose under the new section 36C. Main features of the Appeal Board are set out in paragraphs 8 to 10 below.

Main Features Of The Appeal Board

8. We will introduce CSAs to the Bill to establish a Telecommunications Appeal Board (the "Appeal Board") so that any person aggrieved by the TA's opinion, decision, direction or determination in relation to the new section 7K, 7L, 7M or 7N (i.e. the competition safeguard provisions under the Bill) or a licence condition in relation to those sections, may appeal to the Appeal Board against the TA's opinion / decision / determination / direction under those sections. The issues for appeal include the TA's opinion that such a breach has not been committed, and the financial penalties/remedies that the TA imposes under the amended section 36C. A copy of the CSAs is at Annex.

9. We propose to establish the Appeal Board along the following lines –

- (a) It will have a Chairman and at least one Deputy Chairman, and a panel of members who are not public officers, but with

a background in the protection of consumer interests and others who have economics or accounting background. Appointments to the Appeal Board will be made by the Chief Executive (CE).

- (b) The Chairman and Deputy Chairmen will be persons qualified for appointment as a High Court Judge under section 9 of the High Court Ordinance (Cap. 4).
- (c) The Appeal Board may uphold, vary or quash the opinion, decision, direction or determination by the TA and make consequential orders as may be necessary.
- (d) Except for the penalties and remedies which the TA may impose under section 36C, any opinion, decision, determination or direction, that is being appealed against should not be subject to suspension by the Appeal Board as an interim relief.
- (e) The decisions of the Appeal Board will be final except on questions of law which will be appealable to the Courts.
- (f) Each hearing of the Appeal Board should comprise three members. The Chairman or Deputy Chairman shall preside at any hearing, and should be supported by two more members drawn from the panel.
- (g) There should be a simple majority to form a decision, except on a question of law which should be decided by the Chairman or the Deputy Chairman.
- (h) When hearing an appeal, the Appeal Board may administer oaths and affirmations, require evidence on oath or affirmation, summon witnesses, and order the recovery of

costs incurred by the Board from any party to the appeal.

- (i) The Appeal Board will be required to state in writing the reasons for its decisions.

10. Procedures of the Board's proceedings will be made by regulation (that is, subsidiary legislation) by the Secretary for Information Technology and Broadcasting. To enable the Board to start functioning before the passage of the regulation, the Chairman may determine any matter of practice or procedure relating to the hearing of appeals where no provision governing such matter is made in the Ordinance or the regulations.

Conclusion

11. The regulatory regime for the telecommunications sector has been at the forefront in setting sector-specific competition safeguards. Upon passage by the Legislative Council, the Telecommunication (Amendment) Bill will provide for the first set of legislative provisions on pro-competition measures. The proposed Telecommunications Appeal Board is a further advancement in the regulatory regime we are putting forward. We believe that the arrangement will provide for a balanced and open environment that encourages competition, whilst the TA can continue to perform his powers and functions effectively and expeditiously, with a regulatory system that will not be susceptible to abuse.

Information Technology and Broadcasting Bureau
20 April 2000

CSAs for TELECOMMUNICATIONS APPEAL BOARD ONLY

TELECOMMUNICATION (AMENDMENT) BILL 1999

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

Clause

Amendment Proposed

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By adding -

“PART VC
APPEALS RELATING TO SECTIONS 7K,
7L, 7M AND 7N”

32L.Interpretation

In this Part -

“appeal” () means an appeal under section 32N(1);

“Appeal Board” () means the Telecommunications
Appeal Board established under section 32M(1);

“appeal subject matter” (), in relation to an
appeal, means the opinion, determination, direction, decision,
sanction or remedy referred to in section

32N(1) -

(a) to the extent to which it relates to section 7K, 7L, 7M or 7N or any licence condition relating to any such section; and

(b) which is the subject of the appeal;

“Chairman” () means the Chairman of the Appeal Board appointed under section 32M(2);

“Deputy Chairman” () means a Deputy Chairman of the Appeal Board appointed under section 32M(2);

“panel member” () means a member of the panel of persons appointed under section 32M(5).

32M.Establishment and membership of Appeal Board

(1) There is hereby established an appeal board called in English the “Telecommunications Appeal Board” and in Chinese the “[]”.

(2) Subject to subsections (3) and (4), the Chief Executive shall appoint a person to be the Chairman of the Appeal Board and such

other persons as he thinks fit to be Deputy Chairmen of the Appeal Board.

(3) A person shall not be appointed under subsection (2) unless the person is eligible to be appointed a judge of the High Court under section 9 of the High Court Ordinance (Cap. 4).

(4) Subject to subsections (7) and (8), the Chairman and a Deputy Chairman shall each be appointed for a term of not more than 2 years but may be reappointed.

(5) The Chief Executive shall appoint a panel of persons not being public officers whom he considers suitable for appointment under section 32O(1) (a) (ii) as members of the Appeal Board.

(6) An appointment under subsection (2) or (5) shall be notified in the Gazette.

(7) The Chairman, a Deputy Chairman or a panel member may at any time resign by notice in writing to the Chief Executive.

(8) The Chief Executive may revoke the appointment of the Chairman, a Deputy Chairman or a panel member on the ground of incapacity, bankruptcy, neglect of duty or misconduct proved to the satisfaction of the Chief Executive.

(9) the remuneration, if any, of the Chairman, a Deputy Chairman and a panel member shall be paid at a rate that the Financial Secretary determines.

32N. Appeals to Appeal Board

(1) Any person aggrieved by -

(a) an opinion, determination, direction or decision of the Authority relating to -

(i) section 7K, 7L, 7M or 7N; or

(ii) any licence condition relating to any such section; or

(b) any sanction or remedy imposed or to be imposed under this Ordinance by the Authority in consequence of a breach of any such section or any such licence condition,

may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be.

(2) Subject to subsection (3), an appeal shall not suspend the operation of the appeal subject matter.

(3) Where an appeal is made and the appeal subject matter falls within section 36C, then the appeal subject matter shall be suspended in its operation from the day on which the appeal is made until the appeal is determined, withdrawn or abandoned.

(4) A person who wishes to make an appeal shall, not later than 14 days after he knows, or ought reasonably to have known, of the proposed appeal subject matter, lodge a notice of appeal with the Appeal Board.

32O.Procedure and powers of Appeal Board

(1) In the hearing of an appeal -

(a) the Appeal Board shall consist of -

(i) the Chairman or a Deputy Chairman who shall preside at the hearing; and

(ii) 2 panel members appointed by the Chairman or Deputy

Chairman;

- (b) every question before the Appeal Board shall be determined by the opinion of the majority of the members hearing the appeal except a question of law which shall be determined by the Chairman or Deputy Chairman and in the case of an equality of votes the Chairman or Deputy Chairman shall have a casting vote;
- (c) any party shall be entitled to be heard either in person or through a counsel or solicitor, and if any party is a company, through any of its directors or other officers, or if a partnership, through any of its partners;
- (d) the Appeal Board may -
 - (i) subject to subsection (2), receive and consider any material, whether by way of oral evidence, written statements,

documents or otherwise, and whether or not it would be admissible in a court of law;

(ii) by notice in writing signed by the Chairman or Deputy Chairman, summon any person -

(A) to produce to it any document that is relevant to the appeal and is in his custody or under his control;

(B) to appear before it and to give evidence relevant to the appeal;

(iii) administer oaths and affirmations;

(iv) require evidence to be given on oath or affirmation;

(v) make an award of such sum, if any, in respect of the costs involved in the appeal as is just and equitable in all the circumstances of the case;

(vi) where the Appeal Board is satisfied that it is just and equitable in all the circumstances of the case to do so, require a party to the appeal to pay the costs of the Appeal Board in hearing the appeal;

(vii) make an order prohibiting a person from publishing or otherwise disclosing any material the Appeal Board receives;

(viii) make an order prohibiting the

publication or other disclosure of any material the Appeal Board receives at a sitting, or part of a sitting, which is held in private.

(2) Subsection (1) (d) (i) shall not entitle a person to require the Appeal Board to receive and consider any material which had not been submitted to or made available to the Authority at any time before the opinion, determination, direction, decision, sanction or remedy referred to in section 32N(1) was formed, made, imposed or to be imposed, as the case may be.

(3) Costs referred to in subsection (1) (d) (vi) are recoverable as a civil debt.

(4) After hearing an appeal the Appeal Board shall determine the appeal by upholding, varying or quashing the appeal subject matter and may make such consequential orders as may be necessary.

(5) Every decision of the Appeal Board under subsection (4) shall be in writing and contain a statement of the reasons for its decision.

(6) Every sitting of the Appeal Board shall be held in public unless the Appeal Board considers that in the interests of justice a sitting or part of a sitting should not be held in public in which case it may hold the sitting or part of the sitting in private.

(7) The Chairman may determine any matter of practice or procedure relating to the hearing of appeals where no provision governing such matter is made in this Ordinance or in regulations made thereunder.

32P. Appeal Board's decision

is final

Subject to section 32Q, the determination of an appeal by the Appeal Board or any order as to costs made by the Appeal Board shall be final.

32Q. Case may be stated for

Court of Appeal

(1) The Appeal Board may refer any question of law arising in an appeal to the Court of Appeal for determination by way of case stated.

(2) On the hearing of the case, the Court of Appeal may -

- (a) determine the question stated; or
- (b) remit the case to the Appeal Board, in whole or in part, for reconsideration in the light of the Court's determination.

(3) Where a case is stated under subsection (1), the Appeal Board shall not determine the relevant appeal before the Court of Appeal determines the relevant point of law.

**32R. Offences relating to appeals,
etc.**

(1) In relation to an appeal, any person who, without reasonable excuse, refuses or fails -

- (a) to attend and give evidence when required to do so by the Appeal Board;
- (b) to answer truthfully and completely questions put to him by the Appeal Board; or
- (c) to produce any document which he is required by the Appeal Board to produce,

commits an offence and is liable on summary conviction to a fine at level 4.

(2) Any person who publishes or otherwise discloses any material in contravention of -

(a) an order under section 32O(1) (d) (vii); or

(b) subject to subsection (3), an order under section 32O(1) (d) (viii),

commits an offence and is liable on summary conviction to a fine at level 4.

(3) It shall be a defence for a person charged with an offence under subsection (2) (b) to prove that he did not know and had no reason for knowing that the Appeal Board had made an order under section 32O(1) (d) (viii) prohibiting the publication or other disclosure of the material concerned.”.

32S. Immunity

(1) The Chairman, a Deputy Chairman and a panel member have, in the performance of their duties under this Part, the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that court.

(2) A witness before the Appeal Board shall be entitled to the same privileges and

immunities as if he were a witness in civil proceedings in the Court of First Instance.

32T.Rules

The Secretary for Information Technology and Broadcasting may make rules -

- (a) to provide for the lodging of appeals;
- (b) relating to the practice and procedure of the Appeal Board.”.