

## **Bills Committee on the Telecommunication (Amendment) Bill 1999**

### **The Administration's Further Response to the Concerns on the New Section 36D Relating to the Telecommunications Authority's Request for Information From Non-licensees**

#### **Background**

At the last Bills Committee meeting on 14 April 2000, a Member asked whether the application for a magistrate order to request disclosure of information by a non-licensee could be done ex-parte. There was concern from that Member about the protection to non-licensees under the new section 36D as amended by the Committee Stage Amendments (CSAs). After the meeting, the Administration received further comments from the Hong Kong Society of Accountants (HKSA) which raised the following issues –

- (a) In respect of the CSA to section 36D(6) which sets out that providers of information will not be compelled to deliver information that they could not be compelled to disclose in civil proceedings before the Court of First Instance, at what point could a court challenge be mounted? Before or after the Telecommunications Authority (TA) has ruled?
- (b) Confidentiality agreements require notification prior to disclosure and provide for injunctive relief against the party disclosing or threatening to disclose confidential information. In respect of the CSA to section 36D(5) which absolves the non-licensee providing information pursuant to a magistrate order from liabilities in an action for damages, the non-licensee may not automatically cooperate given the possibility of the injunctive relief.

#### **Proceedings before a magistrate under the proposed section 36D**

2. Proceedings before a magistrate under the proposed section 36D are ex parte, not inter parte. This is in line with the arrangement under many other Ordinances. If the concerned parties are allowed to appear before the magistrate to object to the issuing of an order, this will lead to unnecessary

protracted proceedings and would prolong the investigation process and affect the preservation of information.

3. When the TA applies to a magistrate for an order under the proposed section 36D, he has to put his case on oath to persuade the magistrate that there are reasonable grounds for believing that the non-licensee is, or is likely to be, in possession of the information or document that is relevant to the TA's investigation of a breach of suspected breach of a provision of this Ordinance, or of a determination or direction of the TA or a licence condition. In his submission to the magistrate, the TA will have to set out very clearly the information or document that he intends to obtain, the reasons for believing that the non-licensee possesses such document or information, the relevance to his investigation of the breach or suspected breach in question.

4. The magistrate would then take into account all the relevant matters before deciding whether a magistrate order is to be issued. The TA is bound by duties under administrative law to act lawfully and not to exercise his powers arbitrarily. If the magistrate considers that the TA has abused this provision, the application for a warrant will not be granted. An order issued by the magistrate under the proposed section 36D can be challenged by way of judicial review.

### **Response to HKSA's comments**

5. On HKSA's comments in (a) above, we would like to point out that it is not for the TA to rule whether or not any information or document falls within proposed section 36D(6). That is ultimately a matter for the courts should there be any dispute. For example, if the subject of an order under the proposed section 36D(1) is of the view that information or a document that he possesses falls within the protection of the proposed section 36D(6), the subject of the order may refuse to give the information to the TA on that basis. If the TA holds a view to the contrary, he may resort to the court. Each party would then put its case to the court for ruling.

6. We note HKSA's comments in (b) above. The proposed CSA to section 36D(5) is in response to the Bills Committee's suggestion to give further protection to the non-licensees who are compelled to provide information under a magistrate order.

### **Section 36D – A necessary and balanced provision**

7. Our proposed CSAs will further improve the section –
  - (a) The CSA to amend section 36D(1) will more clearly circumscribe that the section will only apply to information that is relevant to the TA’s investigation of a breach or a suspected breach of the Ordinance, licence conditions and the TA’s determinations and directions.
  - (b) The CSAs to add sections 36D(3) and (4) will require that the TA shall keep in confidence any information produced to him in confidence, 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.
  - (c) The CSA to add a new section 36(5) will make it explicit that the non-licensee, in disclosing any information to the TA under the section, 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 non-licensee and a third party.
  - (d) The CSA to section 36D(6) will make it explicit that a person will not be required to produce any information or documents which that person could not have been compelled to give in evidence, or produce, in civil proceedings before the Court of First Instance.
  
8. Finally, we would like to reiterate that the proposed section 36D as amended by the CSAs is a necessary and balanced provision. As set out in our earlier paper entitled “The Administration’s Further Response on the New Sections 35A and 36D Relating to the Telecommunications Authority’s Request for, and Inspection of Records, Documents and Accounts” [LC Paper No. CB(1)141/99-00(03)], the new section 36D is proposed in the light of operational experience that information from non-licensees may sometimes be necessary to determine whether a breach has or has not occurred. For example, the TA may have to obtain information from customers for the

investigation of anti-competitive practices. Another example is that the TA may have to ask a shop owner to supply information on the importer or supplier of illegal radio apparatus (e.g. illegal cordless telephones) found at his/her shop premises. Sometimes, such information is provided voluntarily. But sometimes, this may not be the case. The proposed section 36D provides a mechanism for the TA to obtain information required for his investigation of a breach or suspected breach through application to a magistrate for an order.

9. In the above-mentioned paper, we have also reviewed how overseas jurisdictions such as the UK, Australia, Canada and Singapore empower their telecommunications regulators to require production of information from non-licensees. Our new section 36D is more restrictive than the powers granted to other overseas regulators, requiring the TA to go to the court for an order to obtain information from a non-licensee as a “check and balance” measure. In contrast, other regulators such as the Director-General of Telecommunications in the UK may by notice in writing require any person to produce any document specified in the notice, furnish such estimates, returns or other information as may be specified in the notice, for the purpose of investigation of any offence under the Act or exercise of the powers of the Director-General under the Telecommunications Act 1984 (section 53 of the Act). In view of the fact that section 36D is a new power given to the TA, we believe that our proposal is reasonable and suitable for the circumstances in Hong Kong.

10. We believe that the above CSAs have already met the concerns over the protection of the non-licensees under section 36D. There are sufficient checks and balances to guard against any abuse of powers under the section. The proposal is in the public interest as this helps provide a more effective regulatory regime to facilitate the development of the telecommunications industry.

Information Technology and Broadcasting Bureau  
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