

Bills Committee on Telecommunication (Amendment) Bill 1999

Further Committee Stage Amendments

The Administration submitted a paper “Committee Stage Amendments” [L/C Paper No. CB (1) 1138/99-00 (01)] to the Bills Committee on 8 March 2000. Having regard to the views expressed by Members on the Committee Stage Amendments (CSAs) as set out in that paper, the Administration considers that further CSAs can be made to improve the Bill. This paper highlights the further CSAs to be made which involve substantive amendments.

2. A full set of CSAs (including those covered under the previous paper [L/C Paper No. CB (1) 1138/99-00 (01)]) with the amended/new ones sidelined at the margin is attached at Annex.

Further CSAs

Section 14(5A)

3. To provide assurance that the access fees to be determined by the arbitrator will be fair and reasonable in all the circumstances of the case, we have already proposed a CSA to section 14(5A)(a) to require that the arbitrator shall have regard to factors including but not limited to those relating to cost, property value and the benefits to be derived from the authorization concerned. Furthermore, the arbitrator shall have regard to the guidelines on the charging principles to be issued by the Telecommunications Authority (TA) after consultation with the parties concerned. We believe that this formulation would on one hand provide guidance to the arbitrator on the overriding principle of a fair and reasonable fee, and on the other hand allow flexibility to the arbitrator to exercise his/her professional judgement on how to arrive at the fee.

4. Some members raised concern as to whether the guidelines issued by the TA would include the factors relating to cost, property value and the benefits to be derived from the authorization concerned. We believe that our earlier paper to the Bills Committee on the outline of the

consultation paper [L/C Paper No. CB (1) 806/99-00 (01)] already covers the three factors set out. Nevertheless, we propose to make a further CSA to put beyond doubt in s.14(5A)(b) that the guidelines are based on the application of the principle including the three factors referred to in s.14(5A)(a).

Section 14(5B)

5. Apart from the fee, we envisage that there may be dispute on matters other than technical requirements relating to the exercise of the authorization of access. We have therefore proposed to make a CSA to section 14(5B) to empower the arbitrator to determine such matters if he/she is of the view that without determining such matters, either the two sides still cannot agree on any part of the contract; or the fee and terms and conditions of payment cannot be determined. A Member asked whether we should spell out the criteria or bases on which the arbitrator should make determination on such matters. We believe that the arbitrator would exercise his/her professional judgement to determine such matters. However, to put it beyond doubt, we propose to make a further CSA to section 14(5B) that the arbitrator would determine such matters in any manner fair and reasonable in all the circumstances of the case.

New Section 14(8)(a)

6. As explained at the Bills Committee meeting on 15 March 2000, the TA, in granting authorization under the new section 14(1A), may have to specify the 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). We have therefore proposed a CSA to section 14(1B) on this.

7. In respect of access to the two Railway Corporations' premises, a Member was concerned that the TA could specify any technical requirements that might affect the safety of railway operations as

governed under other legislation. We would like to reiterate that the TA is under administrative law to act reasonably and not arbitrarily and should not contravene other legislative provisions. Nonetheless, to address the Member's concern, we propose a further CSA to introduce a new section 14(8)(a) to put beyond doubt that where there is an inconsistency between any provision of a technical requirement and any provision, relating to public safety, of any other Ordinance, the latter provision shall prevail over the former one to the extent of the inconsistency.

Other Issues

8. At the Bills Committee meeting on 10 March 2000, Members were concerned that on one hand, the TA was required by law not to depart from the guidelines, but on the other hand, the TA might do so with written reasons under section 6A(3)(b)(ii). We have explained at the meeting that it is an additional safeguard which imposes a statutory duty on the TA to provide reasons in writing for his departure from guidelines. This would enhance the transparency of the TA's decision-making process, as well as the opportunity for judicial review since the reasons for the TA's departure of guidelines would reveal the factors the TA had considered in arriving at an opinion/decision. We therefore see no need to move any further CSA to amend section 6A(3)(b)(ii).

9. At the Bills Committee meeting on 10 March 2000, there was a suggestion to move the provisions in relation to TA's consultation with affected parties under section 32D and section 32G, etc., to section 6. Having given due considerations, we consider that such provisions should remain in the specific sections because moving them to section 6 may only create difficulties in cross referencing. For example, section 32D(1) contains a list of technical standards the TA may prescribe. Section 32D(2) flows with it with the requirement for the TA to consult. There are also consultation sections in relation to the licensing regime (sections 7(3) and 7B(3)). These sections must be read in context and extracting them to the front would only create problems in reading the new licensing regime. This suggestion is different from another Member's proposed deletion of scattering references that the TA "may" issue guidelines

whereas there is already a cover-all provision (s.2(2) of the Bill) on the TA's general power to issue guidelines (that proposal does serve the purpose of avoiding duplication and imposes no cross-referencing problem).

Information Technology and Broadcasting Bureau
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