

Points to note in discussing s 36D on the Telecommunications Authority's Request for information from non-licensees

A. Need for the regulatory power : A necessary provision

- Unlike telecommunications authorities overseas from open and liberal regulatory regimes, the TA does not, at present, have power to obtain information from non-licensees. Operational experience shows that this source of information may sometimes be necessary to determine whether a breach has or has not occurred and to investigate any breach of the Telecommunication Ordinance or licence conditions in order for the TA to discharge his regulatory functions. For example, the TA may have to obtain information from customers for the investigation of anti-competitive practices.
- s 36D provides a statutory basis for the TA to obtain information required for investigation of a breach or suspected breach through application to a magistrate for an order. This power, as explained below, will be well checked and balanced.
- Our proposal has always been to subject this power to obtain information from non-licensees to obtain a magistrate's order as a check and balance measure. We proposed in August 1996 to include a provision in the Telecommunication Ordinance for the purpose. We put out the same proposal in the paper "The 1998 Review of Fixed Telecommunications – A Consultation Paper" for public consultation in April 1998. Having received comments from various sectors, including telecommunications operators from the telecommunications and IT industry, consumer groups (such as the Consumer Council and Hong Kong Telecommunications Users Group) and other parties, we confirmed our policy in the paper "The 1998 Review of Fixed Telecommunications – A Considered View" issued in September 1998.

B. Statutory checks and balances introduced to safeguard the non-licensees providing the information : A balanced provision

- Our proposed CSAs introduced will further improve the section as follows

- (a) the CSA to amend s 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 determination and directions;
- (b) the CSA to add s 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 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 s 36(5) will make it explicit that the non-licensee, in disclosing any information which is subject to a confidential agreement between the non-licensee and a person to the TA under the section, will not be liable in an action for damages for breach of the confidential agreement; and
- (d) the CSA to s 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^{Note}.

C. A considered view taken to adopt a provision more restrictive compared to overseas authorities : A **restrictive** provision

- Telecommunications Authorities overseas, for example, the UK, Australia, and Singapore are empowered to require production of information from non-licensees. For example, under section 53 of the Telecommunications Act 1984, the Director-General of Telecommunications may, by **notice** in writing, require any person to produce documents or furnish information. A person who refuses or, without reasonable excuse, fails to comply with the notice shall be guilty of an offence. Telecommunications Authorities in Australia and Singapore are similarly empowered to issue notices to obtain information from non-licensees.
- We have taken a considered view to adopt a more restrictive provision compared to overseas authorities in obtaining information from non-licensees. TA should apply for a

^{Note} They include information which is self-incriminating or which falls within the protection of legal professional privilege or public immunity.

magistrate order *in the first place*. Under such circumstances, it will be in line with the **established** arrangement under many local Ordinances to pursue ex parte proceedings before the courts. It would avoid protracted proceedings and preserve the information.

D. To review the issue of magistrate order through judicial review : A proportionate provision

- The requirement of a magistrate order aims to circumscribe TA's power to obtain information through the courts. We have given due consideration that the provision may apply to third parties who are telecommunications users or small enterprises and who may possess information essential for investigation by TA of breach or suspect breach by licensees. In terms of safeguarding non-licensees on the proper exercise of the power, the proposal is a proportionate one. The magistrate order will require the non-licensee to give the information or document to the TA in writing or to produce the document within the specified time in the order. It is ultimately a matter for the courts by way of judicial review should there be any dispute.
- Where there are reasons when the non-licensees cannot or should not provide the information sought under the order, they may give his/her explanations to the TA. For example, when he/she in fact does not have such information, notwithstanding that the TA has reasons to believe he/she has; or if such information falls within the statutory provision under the new s 36D(6). It is only when either the TA or the non-licensee is not content will either side pursue legal action.
- An alternative is to seek to empower the TA, like overseas telecommunications authorities, to issue notices to non-licensees to provide information under the Telecommunication Ordinance. The two sides may still need to settle any dispute in the courts. Our proposal does not make the process more litigious. We are however pursuing a more restrictive provision with the present proposal.