

**Paper for the Bills Committee on
Telecommunication (Amendment) Bill 1999
Meeting on 19 January 2000**

**Legal analysis on proposed right of access, fee determination
and facility sharing provisions of the
Telecommunication (Amendment) Bill 1999**

Purpose

This paper provides a legal analysis on whether the proposed right of access, fee determination and facility sharing provisions of the Bill would amount to a breach of certain provisions in the Basic Law to assist members of the Bills Committee in their consideration of the submissions of the tunnel companies on the legal and constitutional issues arising from the proposed amendments under the Bill (LC Paper No. CB(1)599/99-00(02) refers). This paper will focus on the rights protected under Articles 6, 105 and 160 of the Basic Law.

Rights protected by the Basic Law

2. The right of private ownership of property is guaranteed by Articles 6 and 105 of the Basic Law.

Article 6 provides:

"The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

Article 105 provides :

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

3. Article 160 of the Basic Law provides, among other things, that documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene the Basic Law.

Proposed amendments

4. Proposed section 14(1A) provides for the right of licensees authorized by the Telecommunications Authority (TA) to have access to buildings and land to place and maintain a radiocommunications installation in, over or upon such buildings and land for the purpose of providing a radiocommunications service to a public place. This right, however, is subject to TA being satisfied that the authorization of access to land is in the public interest and the payment of a reasonable fee by the licensee to persons having a lawful interest in the land.

5. Proposed section 36AA empowers TA to direct a licensee to coordinate and cooperate with another licensee or another person specified by TA in the public interest to share the use of any facility owned or used by it. If the relevant parties do not reach an agreement within a reasonable time, TA may determine the terms and conditions for the shared use of the facility.

The question

6. The question which this paper seeks to assess is whether the above provisions proposed by the Bill are consistent with the protection of the right to own property and the protection of contracts valid under the laws previously in force in Hong Kong.

Whether the proposed provisions on right of access and fee determination amount to deprivation of property rights

7. According to Article 105 of the Basic Law, landowners will have a right to compensation for lawful deprivation of their property and such compensation shall correspond with the real value of the property concerned at the time.

8. It would appear that "deprivation" denotes expropriation of property. In considering whether a legislative provision amounts to a deprivation of property, the European Commission of Human Rights¹ has considered whether the provision concerned interferes with the landowner's title to the property concerned or with the substance of the property and whether the landowner concerned remains free to dispose of the property as he likes. It has been decided by the European Commission of Human Rights that a law which imposes restrictions on the income receivable from property does not constitute a deprivation of possessions under the European Convention.

9. The existing tunnel legislation contains a provision which provides that notwithstanding anything to the contrary in any other Ordinance no person other than the relevant tunnel company may install any utility within the tunnel area without the consent of the company concerned. Further, the company shall not give such consent unless the Commissioner for Transport has previously approved the giving of consent and the terms and conditions (other than a term or condition relating to charges), if any, subject to which consent is to be given.

10. The Administration intends that the proposed section 14(1A) will prevail over the above provision in the tunnel legislation. The result of this is that TA may authorize a licensee to place and maintain radiocommunications installation within the tunnel area.

11. It is apparent that even without the proposed section 14(1A), the installation of utilities within the tunnel area is subject to the consent of the Commissioner for Transport. Hence, the right of the tunnel companies to approve installation of utilities within the tunnel area is by no means absolute. The effect of enactment of proposed section 14(1A) would be to subject the right of the tunnel companies to approve installation of radiocommunications apparatus to TA's authorization of access rather than to the consent of the Commissioner for Transport. Seen in this light, it would appear unlikely that proposed section 14(1A) would amount to a deprivation of property as the proposed section would not impose new restrictions on the rights of the tunnel companies.

12. As for fees or charges for the installation of utilities within the tunnel area, the provision in the tunnel legislation allows the tunnel companies to make the sole determination. The tunnel companies argue that proposed section 14(5)(b) of the Bill, which empowers TA to determine the fee in the absence of agreement within a

¹ *X v Austria* (8033/77) Report: 3 EHRR 285

reasonable time between the licensee and the person having a lawful interest in the land, deprives the tunnel companies of their statutory right to determine charges for installation of utilities within the tunnel areas. Moreover, TA's determination may lead to a reduction in the fees receivable from the licensees.

13. In determining whether proposed section 14(5)(b) amounts to a deprivation of property, members may note that under the Bill, the tunnel companies remain free to negotiate with the licensees for the fees or charges to be payable for the installation of radiocommunications apparatus and TA will intervene only if the parties could not reach an agreement on the fees or charges to be paid within a reasonable time. It is true that the possible intervention by TA imposes a restriction of the freedom of the tunnel companies in setting the appropriate fee. However, it would appear that deprivation will occur only if the value of the property will be destroyed or permanently diminished as a result of the restriction.² As proposed section 14(5)(b) provides that the fee determined by TA must be fair and reasonable in all the circumstances of the case, it is unlikely that the proposed provision will have the effect of destroying or permanently diminishing the value of the property rights of the tunnel companies. Moreover, it can be said that the possible effect of proposed section 14(5)(b) is that the amount of fees receivable from the property may be reduced. As it has been decided by the European Commission of Human Rights that a law which imposes restrictions on the income receivable from property does not constitute a deprivation of property, it is possible for the courts in Hong Kong to make the same finding in respect of proposed section 14(5)(b) of the Bill.

14. However, it may be true to say that TA's powers to authorize access to land and determine the fee payable by the licensee subject the use which the tunnel companies could make of their tunnels to certain restrictions, in particular, as regards their right to exclude licensees from accessing and using their property if they are not satisfied with the amount of fee proposed by the licensees. As Article 105 of the Basic Law also protects the right to the use of property, restrictions of this kind would seem to come within the scope of the Article concerned.

15. Constitutional rights, like those protected by Article 105 of the Basic Law, however, are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society and any limits so imposed must be proportionate to the aims sought to be achieved thereby.³ This issue will be discussed in detail in paragraphs 18-25 below.

² Gordon N Cruden, *Land Compensation and Valuation Law in Hong Kong*, (Butterworths Asia, 1999), p.189.

³ *HKSAR v Ng Kung Siu and Lee Kin Yun*, FACC No. 4 of 1999, CFA

Whether the provision on sharing of use of facilities amounts to deprivation of property

16. Section 36AA of the Bill provides that TA may direct a licensee to coordinate and cooperate with another licensee or another person in the public interest to share the use of any facility used or owned by it. Under proposed section 36AA(7), "facility" includes any tunnel.

17. It would appear that the proposed provision does not affect the tunnel companies' title to the property concerned. However, it would be true to say that their use of the property will become subject to certain restrictions. It will be necessary to see whether such restrictions on the use of property is reasonably justified and proportionate to the aims sought to be achieved thereby.

Whether reasonably justified

18. Where a legislative provision imposes a restriction on a particular right and that restriction is challenged on the ground that it is inconsistent with the guarantees set out in the Basic law, the burden rests on the Government to justify the restriction.⁴

19. To determine whether a restriction imposed is reasonably justified, one has to consider whether the restriction serves any legitimate societal and community interest. What may be relevant for consideration is whether there are legitimate societal and community interests in the provision of ubiquitous coverage for mobile telecommunication services, the availability of quality mobile telecommunications services to consumers at reasonable cost, and the encouragement of the efficient investment in telecommunications infrastructure. According to the Administration, these are the objects of the amendments proposed by the Bill.

20. If the courts accept that mobile radiocommunications services are and will become increasingly important for businesses and domestic use in Hong Kong, the demand for mobile telecommunications services will increase and the services will become an important part of Hong Kong's information infrastructure, it is likely for them to come to the view that the proposed provisions on right of access and sharing of use of facilities could serve legitimate community interests which might possibly justify a restriction on the right to use property.

⁴ *R v Sin Yau-ming* [1992] 1 HKCLR 127

Whether proportionate

21. In the human rights jurisprudence context, the principle of proportionality dictates that, when public policy requires limitation of a particular protected right, the limitation imposed must go no further than is strictly necessary. In applying this test to the proposed statutory right of access and facility sharing provisions, the courts will have to consider whether the restriction on the right to use property guaranteed by Article 105 of the Basic Law is proportionate to the aims sought to be achieved thereby.⁵ This will require the courts to balance the interests of the affected person against the interests of society generally.⁶ Moreover, the courts will have to be satisfied that the restriction is necessary having regard to the facts and circumstances prevailing in the specific case before them.

22. Articles 6 and 105 of the Basic Law protect the right of private ownership. In the case of the tunnel companies, although the proposed right of access and facility sharing provisions may not amount to a deprivation of property, their use of the property would possibly be restricted if those provisions are enacted. Any restriction on the right to use property will be narrowly interpreted by the courts. Having regard to the decisions of the Canadian courts, the European Commission on Human Rights and the Hong Kong courts, the following factors may be taken into consideration in deciding whether the test of proportionality is satisfied in the present case:

- (a) whether what is proposed is a wide or limited restriction;
- (b) whether the proposed provisions are rationally related to the objectives of providing quality mobile telecommunications services to the community at reasonable cost, providing ubiquitous coverage of such services, etc.; and
- (c) whether the proposal represents the minimum impairment on the right guaranteed by the Basic Law.

23. As the Bill allows the parties concerned to come to an agreement on the fees to be payable before TA exercises his power of determination, it would appear that the restriction on the right to use the property is a limited one.

24. In considering whether the proposal is rationally related to the objectives to be achieved, one has to investigate whether there are ways other than access to

⁵ *HKSAR v Ng Kung Siu and Lee Kin Yun*, FACC No. 4 of 1999, CFA

⁶ *R v Sin Yau-ming* [1992] 1 HKCLR 127 & *Secretary for Justice v Oriented Press Group Ltd* [1998] 2 HKC 627

shielded areas of public places which can achieve the same objectives. Such information may enable us to make a more detailed assessment of this point.

25. On the other hand, there may be doubts as to whether the proposal represents the minimum impairment on the right guaranteed by the Basic Law. It would appear that any impairment to the right of the tunnel companies may be minimized if there exists a fee setting mechanism which enables the companies concerned to receive a fair market price for allowing licensees to install radiocommunications apparatus in the tunnel areas. Moreover, the fee may be determined by an independent person or body rather than by a public officer who is himself the regulator of the industry.

Interpretation of Article 160 of the Basic Law

26. Article 160 of the Basic Law which deals with "laws previously in Hong Kong" should be read together with Articles 8 and 18. The intention of these provisions under the Basic Law is that there is no change in Hong Kong's laws and legal system, except for those which contravene the Basic Law.⁷ In other words, those provisions serve to preserve the validity of laws previously in force after the change of sovereignty. In our view, Article 160 does not preclude the power to make future amendments to existing laws, contracts, etc. provided that the amendments do not contravene the Basic Law. In the event that the amendments will have the effect of limiting the rights guaranteed by the Basic Law, the burden is on the Government to satisfy the Legislature that those amendments are reasonably justified in a democratic society and are proportionate to the aims sought to be achieved by those amendments.

Way Forward

27. We understand that the Administration will give their views on the submissions of the tunnel companies on the legal and constitutional issues arising from the proposed amendments under the Bill. We may make further comments, if necessary, after the Administration's views on those submissions have been considered.

Prepared by
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⁷ *HKSAR v Ma Wai Kwan David* [1997] 2 HKC 315