

Bills Committee on the Telecommunication (Amendment) Bill 1999

Policy Paper on the Procedural Safeguards

Background

The Telecommunications Authority (TA) is bound by administrative law to act lawfully, not to exercise his powers arbitrarily and to observe the rules of natural justice. As we have explained in paragraph 6 of the Legislative Council Brief on the Bill issued on 30 April 1999, we have considered carefully the decision-making powers of the TA when preparing the legislative proposals. We have already introduced in the Bill the necessary checks and balances of TA's powers. The TA has always exercised his power in a lawful and accountable manner and to put this in law will strengthen the assurance on such safeguards.

2. In considering the Bill, some deputations and members of the Bills Committee have asked to codify more administrative practices in the Bill and to further strengthen the statutory checks and balances. For the sake of clarity and certainty and given that it is in line with our policy objective, we agree to formalise the existing practices of the TA, as set out below.

The Proposal

3. In addition to the provisions already introduced to the Bill, we will introduce Committee Stage Amendments (CSA) to the Bill to strengthen the statutory checks and balances on TA's powers -

- (a) Duty to give reasons for forming an opinion, or making a determination, direction or decision
- (b) Duty to give reasonable opportunities to the affected parties to make representations and to take due regard to the representations
- (c) Requirement to issue guidelines
- (d) Requirement to consult
- (e) Standards of Costing, and Factors for Considerations for Interconnection and Sharing of Facilities

(a) *Duty to give reasons for forming an opinion, or making a determination, direction or decision*

Provisions in the Bill

4. Under the new section 6A(3) as proposed by the Bill, the TA, amongst other things, will be required to provide reasons in writing for making a decision. This is a general obligation on the TA.

CSAs

5. It is also the existing practice of the TA to give reasons when forming an opinion of significance. To codify this practice, we propose to make amendments to the Bill to require that the TA shall provide reasons in writing for forming an opinion particularly under sections 7K to 7N.

6. On certain important decisions, we propose to add specific provisions to reiterate the requirement for the TA to give reasons in writing. These decisions include refusal to grant a licence, revocation or suspension of a licence.

(b) *Duty to give reasonable opportunities to the affected parties to make representations and to take due regard to the representations*

Provisions in the Existing Ordinance and the Bill

7. It is the existing practice of the TA to invite the affected parties to make representations before making decisions of significance. The Bill and the existing Ordinance already contain some provisions to impose an obligation on the TA to provide reasonable opportunities to the affected parties to make representations. For example, under the existing section 36A(4) and the new section 36AA(2), it is a duty on the TA to give reasonable opportunities to the affected parties to make representations before proceeding to make determination on interconnection and issue direction on facility sharing.

CSAs

8. It is the existing practice of the TA to have due regard to the representations made by the affected parties. We propose to formalise this by explicitly stating

under section 36A and 36AA that the TA shall have due regard to such representations.

9. We also propose to make it an obligation on the TA to invite representations and take regard to such representations before making decisions on -

(a) revocation or suspension of licenses;

(b) authorisation of the mobile network operators to access to shielded areas under section 14(1A); and

(c) imposition of a penalty under the amended section 36C.

(c) *Requirement to issue guidelines*

Provisions in the Bill

10. It is an existing practice of the TA to issue guidelines as appropriate. Guidelines serve to enhance transparency of TA's decision-making process. The new section 2(2) as proposed by the Bill makes it a statutory power of the TA to make guidelines. We have also included specific provisions on the issue of guidelines in the Bill. For example, under section 14(6)(C), the TA may issue guidelines setting out the manner in which the right of access of fixed and mobile network operators is to be exercised. We however do not propose a general obligation on the TA to issue guidelines as some of the decisions of the TA are very case specific and do not warrant the issue of individual guidelines. For example, the TA has issued a set of guidelines governing the general criteria in the interpretation of interconnection under section 36A, but a specific set of guidelines for every single case of interconnection would not be necessary.

CSAs

11. In order to uphold the principles of openness, fairness and impartiality in the decision-making process of a licensing exercise, it has been the established practice of the TA to issue guidelines setting out the criteria for the licensing of services which have relevance to a significant number of players in the industry or the public. In order to codify the existing practice and to give assurance of the procedural safeguards, we propose to add an express provision to impose a mandatory requirement on the TA

to issue guidelines on applications for licences. The guidelines so issued shall include, but not limited to, the licensing criteria and other relevant factors that the TA would take into account in considering the applications;

12. We will also consider to make an explicit provision under section 36AA to formalise the arrangement that the TA may issue guidelines to govern the criteria for any mandating of facility sharing under section 36AA.

13. We propose to add the requirement that the TA should not depart from the guidelines without giving the reasons for so doing.

(d) Requirement to consult

Provisions in the Bill

14. It is the existing practice of the TA to consult the industry or public before making decisions of significance. For certain decisions, the Bill has imposed an obligation on the TA to consult (e.g. prescription of standards and specifications of telecommunications equipment under section 32D). However, we do not propose a general obligation on the TA to conduct consultation, as there are many decisions which need to be taken by the TA on a routine basis (e.g. daily interference monitoring).

CSAs

15. To give further assurance of the procedural safeguards, the Administration propose the following -

- (a) To introduce a general provision to make it a statutory power of the TA to conduct public or industry consultation in performing his functions and exercising his powers.
- (b) In view of the importance of the guidelines that the TA may issue under the existing section 36(8) to govern the criteria for any determination under section 36A, as well as the proposed explicit provision under section 36AA on the issue of guidelines as set out in paragraph 12 above, we propose to make it explicit that such guidelines can only be issued after consultation.

(e) ***Standards of Costing and Factors for Consideration for Interconnection and Sharing of Facilities***

Provisions in the Bill

16. Section 36A as introduced by the Bill provides certain standards of costing in considering a determination charge, but there is not a mandatory requirement that the relevant costs incurred in providing the interconnection should be recovered. Under section 36AA(3), the matters that the TA shall take into consult in considering whether a direction is in the public interest are set out. These provide transparency of the decision-making process of the TA.

CSAs

17. It has been the established practice of the TA to ensure that the charge for interconnection and sharing of facilities shall include the relevant costs. We propose to make amendments to sections 36A and 36AA to impose a mandatory requirement that such costs should be recovered.

18. In the “Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of Telecommunication Ordinance and the FTNS Licence” issued by the TA in 1995, the criteria that the TA would take into account in considering the public interests are set out. To codify the existing practice and increase the transparency, we propose to make amendments to the Bill to make explicit provisions on these public interest considerations under section 36A.

The Way Forward

19. The Administration will proceed to prepare the amendments on the above proposals and will present them before the Bills Committee in due course.

Information Technology and Broadcasting Bureau
24 January 2000