

立法會
Legislative Council

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**Paper for the House Committee meeting
on 26 May 2000
Report of the Bills Committee on
Telecommunication (Amendment) Bill 1999**

Purpose

This paper reports on the deliberations of the Bills Committee on the Telecommunication (Amendment) Bill 1999 (“the Bill”).

Background

2. The last major amendments to the Telecommunication Ordinance (Cap. 106) (“the Ordinance”) were made in 1993 in preparation for the introduction of competition in the local fixed telecommunication network services (FTNS). In order to bring the Ordinance up to date and in keeping with anticipated developments in the telecommunications sector, the Government has formulated further proposals to amend the Ordinance. Most of the proposals in the Bill are modelled on the proposals set out in the consultation paper entitled “The 1998 Review of Fixed Telecommunications : A Considered View” issued by the Information Technology and Broadcasting Bureau in September 1998.

The Bill

3. The main purposes of the Bill are -
- (a) to consolidate and enhance the regulatory powers of the Telecommunications Authority (TA);
 - (b) to strengthen competition safeguards;
 - (c) to improve interconnection and access arrangements to telecommunications services; and
 - (d) to streamline licensing procedures.

The Bills Committee

4. Members agreed at the House Committee meeting on 14 May 1999 to form a Bills Committee to study the Bill. Hon SIN Chung-kai was elected chairman of the Bills Committee and the membership list of the Committee is at **Appendix I**.

5. The Bills Committee has held a total of 22 meetings. Apart from discussing the Bill with the Administration, the Bills Committee has also met with 21 deputations from the telecommunications industry, tunnel operators and other interested parties to receive their views. A list of the organizations which have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

6. Members are in support of the overall objective of the Bill to enhance competition and strengthen the regulatory framework of the telecommunications industry. They also note that the industry agrees with the need to provide a level playing field in the telecommunications market but some deputations have expressed very strong views on certain provisions in the Bill relating to the powers of TA and the proposed mandatory access arrangements.

7. Apart from deliberating on the policy, technical and legal aspects of the Bill, the Bills Committee has also examined the detailed legal submissions from Cable & Wireless HKT Limited (CWHKT) and the "Build, Operate and Transfer" (BOT) tunnel operators which query the constitutionality and legality of certain proposed provisions. It has considered the Administration's response, as well as the comments by the legal adviser to the Committee. Members have also had opportunities to exchange views with the Administration's special legal adviser from the UK who has expertise in utility regulation and European law. The Administration has maintained its view that the Bill is in conformity with the Basic Law and the Hong Kong Bill of Rights (HKBOR) Ordinance but has agreed to introduce a number of amendments to the Bill to address some of the concerns raised by members and the deputations.

Exercise of powers by the Telecommunications Authority (Clauses 3)

8. At present, TA derives most of his regulatory powers from provisions in the licences rather than from legislation. The Bill seeks to codify some of the existing administrative requirements of TA to give written reasons for his decisions, to issue guidelines and to consult relevant parties prior to making significant decisions. To enhance the transparency of the decision-making process, the Bills Committee and some deputations are keen to ensure

that major decisions of TA are well accounted for in writing, and that the statutory duty on TA to conduct consultation and to issue guidelines should be clearly specified in law.

9. Having considered these concerns, the Administration has agreed that TA should also be required to give written reasons when forming an opinion, which is actually the basis of his decisions. The Administration will also add new sections 6C and 6D to the Bill to provide TA with a general power to conduct consultation and to issue guidelines and to spell out the circumstances under which TA will be obliged to issue guidelines and to conduct consultation. That is, TA has a duty to issue guidelines on licence application and on the charging principles for access fees into shielded areas payable by mobile network operators (MNOs) to land/facility owners. Consultation with the concerned parties/telecommunications industry will also be made mandatory before TA can issue guidelines on the charging principles for access fees, and on the principles governing the criteria for determining interconnection or sharing of facilities. The Administration has nevertheless stressed that having regard to the role of TA as an independent regulator, it will not be appropriate to impose on it a general obligation of consultation as there are many decisions which need to be taken in a timely manner or on a routine basis.

Licensing (Clause 4)

10. To enable TA to respond quickly to new technology and service offering, the Bill proposes a tiered licensing framework whereby the Chief Executive in Council will continue to prescribe the conditions in, and issue exclusive licences, while the Secretary for Information Technology and Broadcasting will prescribe, after consultation with the industry, the general conditions of carrier licences to be issued by TA. In addition, there will be a new system of class licences to cover the supply of certain telecommunications services and to operate certain networks. The scope of the intended class licences and their terms and conditions will be determined by TA after consultation with the industry. The Bill will also extend the licensing requirement to persons who provide non-facilities-based services, such as international calling cards marketed in Hong Kong, in order to protect consumers.

11. Members note that the proposed new licensing regime cannot come into operation until the relevant subsidiary legislation to prescribe the general conditions for a carrier licence and to repeal the prescribed forms of the existing licences has been passed. As time is needed for consultation, the Administration will not be able to introduce the relevant regulations to the Legislative Council within this legislative session and plans to do so in the next session. As such, the Bills Committee note that the provisions under the Bill relating to the new licensing regime will only commence operation at a later date and not upon enactment of the Bill.

Competition safeguards (Clause 4)

12. The Administration re-affirms its commitment to providing a pro-competition and pro-consumer regulatory framework for the telecommunications industry. Proposed sections 7K, 7L, 7M and 7N of the Bill seek to strengthen safeguards against anti-competitive practices, abuse of dominant position, misleading or deceptive conduct and discriminatory acts. Members note that the proposed provisions seek to codify TA's existing powers for the promotion of fair competition as provided in the FTNS licences.

13. With the exception of CWHKT which is currently the dominant fixed carrier, the other three FTNS licensees support the proposed amendments. The Bills Committee in principle agrees with the need to promote fair competition in the telecommunications market but has taken on board the queries raised by CWHKT about the compatibility of the proposed amendments with the HKBOR. CWHKT has suggested that a general competition law should be introduced to curb anti-competitive acts by licensees and non-licensees alike. It contends that subjecting licensees alone to regulation under proposed sections 7K to 7N is a violation of the right to "equality before and equal protection of the law" protected by Article 22 of the HKBOR.

14. The Administration, on the other hand, considers that the special characteristics of the telecommunications market justify the sector-specific approach proposed in the Bill and that an all-embracing competition law is outside the context of the Bill. It disagrees that proposed sections 7K to 7N violate the HKBOR as the differentiation between licensees and non-licensees is not due to discrimination based on grounds involving immutable personal characteristics such as race, colour and sex. It is of the view that telecommunications operators, in opting to be licensees, also opt into the regulatory regime governing their conduct of business. The Bills Committee has also noted its legal adviser's comments that Article 22 of the HKBOR does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited in the objects to which it is directed. The Article merely requires that all persons subjected to such legislation shall be treated alike and as all licensees will be subject to the regulation under proposed sections 7K to 7N, it appears that there is no violation of Article 22 of the HKBOR.

Financial penalties (Clause 22)

15. To effectively deter anti-competitive acts, the Bill proposes to amend section 36C of the Ordinance to increase TA's powers to impose financial penalties ten-fold to a maximum of \$200,000, \$500,000 and \$1,000,000 respectively for breaches on the first, second and subsequent occasions of licence conditions, statutory provisions, determinations and directions issued by TA. Where necessary, TA may also apply to the Court of

First Instance to impose heavier penalties on the licensee concerned for serious breaches. The Administration explains that the substantial increase in financial penalties has the support of the industry and is reasonable, given the importance of the telecommunications sector in the economy, its size of operation and the revenues derived by the licensees in the telecommunications market. The Bills Committee has noted that with the exception of CWHKT, the other existing FTNS operators are in support of the proposed amendments aimed at curbing anti-competitive acts.

16. In CWHKT's view, the proposed amendments are unconstitutional and in breach of relevant articles in the HKBOR. The imposition of financial penalties under proposed 36C is in effect a criminal process. If TA makes an application to the Court of First Instance as provided for under proposed section 36C(3B), TA will be the "prosecutor" and will have "prejudged" the licensee's guilt before such guilt has been proven beyond reasonable doubt by the competent court. CWHKT further queries the lack of provisions on the licensee's right to a fair hearing and on access to a court of full jurisdiction, as well as possible undue delay caused by the proposed three-year limitation period for TA to bring the matter to the Court of First Instance.

17. The Administration disagrees that proposed section 36C conferring on TA increased powers to impose financial penalties is "criminal" in nature. Therefore, the presumption of innocence and trial without undue delay in the criminal context is not applicable. The Administration is of the view that the proposed penalty is administrative and disciplinary and for preventive purposes. The Administration also considers the three-year period appropriate bearing in mind the time required for investigating into alleged breaches before applying to the court for a higher penalty. In this connection, the legal adviser of the Bills Committee has advised that a breach of licence conditions or competition safeguards, which may lead to imposition of financial penalty as proposed in the Bill, may not amount to a criminal charge under the relevant article of the HKBOR, having regard to decisions of the European Court of Human Rights. Notwithstanding its position, the Administration will provide additional safeguards by introducing Committee Stage amendments (CSAs) to require TA to give a reasonable opportunity to the affected parties to make representations and to consider such representations before imposing the sanction under proposed section 36C, as well as not to impose a financial penalty or sanction unless it is proportionate and reasonable in relation to the concerned breach.

Right of access to land and buildings (Clause 7)

Authorization of access

18. One of the most controversial issues of the Bill is the proposal under section 14 empowering TA to authorize MNOs to gain access into shielded areas in order to install their facilities therein to provide services, if it

is in the public interest to do so, and having taken into account factors such as no alternative locations and no technical alternatives for installation, and on payment of a reasonable fee to the land/facility owner. Where both parties fail to reach a mutual agreement on access fees, TA will determine the fee which is required to be "fair and reasonable in all circumstances of the case".

19. The six existing MNOs and the Telecommunications Users Group (TUG) welcome the proposed amendments. In their submissions to the Bills Committee, the operators have highlighted their current difficulties, such as being charged exorbitant rentals when negotiating with the owners concerned on gaining access. The Consumer Council also supports the proposed amendments and considers that in the absence of a general competition law, it is necessary to empower TA to arbitrate disputes on access to infrastructure which is vital to maintaining ubiquity of the telecommunications network.

20. The Bills Committee notes that the Real Estate Developers Association of Hong Kong (REDA) respects the need for non-discriminatory treatment for all MNOs in the interest of fair competition. REDA accepts that MNOs be granted a right of access subject to payment of fees but urges that an independent body, instead of TA, should be set up to determine fees. Two individual property developers have written to the Bills Committee expressing objection to the proposed provisions on grounds that they interfere with free market negotiation which currently works very well.

21. The Mass Transit Railway Corporation (MTRC) and Kowloon-Canton Railway Corporation (KCRC) object to the proposed amendments which, in their view, will in effect give TA the power to intervene and determine commercial terms between railway corporations and MNOs both prospectively and retroactively. They also cast doubt on whether TA will base his determinations on public interest, or in the commercial interest of telecommunications operators.

22. The BOT tunnel operators have raised strong objection to the proposed amendments and consider that they may be in breach of relevant articles in the Basic Law. They are of the view that contrary to Article 160 of the Basic Law, proposed section 14 is inconsistent with the relevant tunnel legislation and pre-existing franchise agreements between the BOT tunnel companies and the Government since the companies will no longer be the sole authority entitled to determine the access fees as a result of possible intervention by TA. The tunnel operators further consider that the proposed amendments upset the principles of commercial negotiation and will ultimately damage the free market economy of Hong Kong. The tunnel operators have also submitted that pursuant to Article 6 of the Basic Law, the owner of property has the exclusive right to own, access and use his property, as well as the right to exclude others from accessing and using his property. As such, the proposed right of access and fee determination by TA constitutes a

derogation from the right of private ownership of property. The BOT tunnel operators consider that the proposed amendments, if enacted, will lead to a deprivation of property for which compensation should be payable as required under Article 105 of the Basic Law. In their view, the proposed access provisions are neither necessary nor proportionate for achieving a wider coverage for mobile telecommunications services and the proposed payment of an access fee also falls far short of such compensation.

23. Some members of the Bills Committee share the grave concerns of the BOT tunnel operators and consider that the proposed amendments will put the tunnel companies in a disadvantaged position when negotiating with MNOs. They see no problem with the existing arrangements of determining the terms and conditions of access by commercial negotiation and query the justification for the proposed amendments which may amount to governmental intervention into commercial relationships. The Bills Committee also seek clarifications on the legal and constitutional questions raised by the tunnel operators.

24. In this regard, the Bills Committee has taken note of its legal adviser's view that possible intervention by TA under proposed section 14 will impose a restriction on the freedom of the tunnel companies in setting the appropriate fee and may result in a reduction in the amount of fees receivable. Nevertheless, a law which imposes restrictions on the income derived from the property does not necessarily constitute a deprivation of property. Members have also been advised that where a legislative provision imposes a restriction on a particular right (such as proposed section 14) 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 such restriction on grounds of reasonableness and proportionality.

25. In response, the Administration stresses that ubiquitous mobile service coverage is essential for Hong Kong's development into a major telecommunications hub and to achieve this objective, the access problems faced by operators in the roll-out of their networks must be resolved. The Administration confirms that it has taken into consideration the relevant provisions in the tunnel legislation and believes that the proposed amendments to bring about ubiquitous coverage will serve legitimate societal and community interests. On mandating access, the Administration will propose a CSA to make it an obligation on TA to invite and consider representations before making decisions on authorization of access. Moreover, TA's power to determine fees will only be exercised if commercial negotiation fails. In the Administration's view, the proposed amendments are reasonable and proportionate and it disagrees firmly that the proposed amendments will have the effect of "depriving" the property rights of the tunnel companies for the purposes of Articles 6 and 105 of the Basic Law.

Fee determination

26. On the proposed role of TA as arbiter of fees, the two railway corporations, the BOT tunnel operators and some members of the Bills Committee have raised strong objection. Despite the Administration's assurance that under the Bill, TA's authorization for access must meet the public interest test, take into account all relevant factors including representations, the availability of technical alternatives etc and subject to the payment of a fair and reasonable fee, some members maintain their view that the Bill has conferred on TA almost unfettered discretion in mandating access and determining the fees payable by MNOs. These members further query that TA, as the regulator of the telecommunications industry, has a vested interest and lacks the necessary expertise in tunnel operations to determine a fair and reasonable access fee. In the absence of any statutory appeal channel, it is quite impossible for the aggrieved party to challenge the merits of TA's determination. Some members have therefore suggested that to avoid possible conflict of interests, the Bill should provide for fee determination by an independent body or arbitrator, instead of by TA.

27. Whilst the Administration reiterates that TA is bound under administrative law to act reasonably and not arbitrarily, it has agreed to remove doubts about impartiality of fee determination by introducing the necessary amendments to provide for independent arbitration in accordance with the Arbitration Ordinance (Cap. 341) in case the MNO and the land/facility owner concerned cannot reach an agreement on access fees. The arbitrator can also determine other issues (except the technical requirements relating to the access) which are necessary for fee determination. Regarding the basis for determining access fees, members note that upon enactment of the Bill, TA will issue a consultation paper to collect views from all relevant parties (including MNOs and land/facility owners) on the charging principles applicable in various circumstances and then issue guidelines on the subject. In response to members' concern, the Administration will include in the CSAs that the arbitrator, in determining the fee, must give regard to such guidelines and consider factors relating to cost, property value and the benefits to be derived from the authorization of access.

Interim access arrangements

28. The Bills Committee has deliberated on whether access by MNOs into shielded areas should only take place after fee determination by the arbitrator which might take some time to conclude. Having considered the need to safeguard the interest of the land/facility owner and the need for early access to provide service coverage, members have suggested that an interim arrangement should be put in place to facilitate early access by MNOs in a practicable and legal manner pending the outcome of arbitration. The Administration has accepted members' suggestions and has proposed CSAs to provide for the payment of an interim access fee by the MNO to the

land/facility owner to gain early access. The level of the fee is to be agreed by both parties or set by TA. Upon determination by the arbitrator, the final access fees will be applied retrospectively from the date of access. In order not to prejudice the determination of the final access fees, it will be explicitly provided that in making his determination, the arbitrator shall not have regard to the amount of interim fees.

Safety concerns

29. Under the proposed provisions, TA remains the authority for granting the right of access having regard to public interest and other relevant factors. He will also be required to specify in writing any technical requirements for access. The Bills Committee has noted the concerns raised by MTRC and KCRC that mandatory access by MNOs into their premises might affect the safety of railway operation. Members are concerned that the technical standards specified by TA might conflict with or prevail over the safety requirements (including any safety by-laws) of the two railway corporations and railway safety might be jeopardized as a result.

30. In response, the Administration assures members that in the set of operational guidelines governing the exercise of statutory right of access by MNOs to be issued by TA after consultation with MTRC and KCRC, it will be clearly stated that the corporations will be the sole authorities in determining the technical specifications or standards of the radiocommunications installations that are relevant to the safety of railway operation. The Administration has considered that it is inappropriate to make the guidelines statutory due to its operational nature and the need for frequent updating. However, to allay members' concerns on railway safety, the Administration will spell out explicitly in the Bill that where there is an inconsistency between the technical requirements specified by TA and any provision relating to public safety of any other Ordinance, the latter shall prevail.

Interconnection and sharing of use of facilities (Clauses 19 and 20)

31. The Bills Committee has noted that with the exception of CWHKT, the other three FTNS licensees and the TUG support proposed sections 36A and 36AA relating to TA's powers to determine the terms and conditions of interconnection and to direct a licensee to share a facility in certain circumstances respectively. Apart from reiterating the importance of interconnection and facility sharing in fostering network development, the Administration also points out that these two requirements are part of the existing licence conditions applicable to CWHKT.

32. CWHKT submits that proposed sections 36A and 36AA will encroach on the property rights of the licensee who will be compelled to grant access to its network for interconnection or its facilities for sharing. This will constitute a deprivation of private property, contrary to Articles 6 and 105 of

the Basic Law. CWHKT also points out that a licence is a contract between the Government and the licensee, but codifying the licence conditions into law must be subject to constitutional and legal constraints.

33. The Administration, on the other hand, considers that the proposed sections manifestly fall short of extinguishing all the legal rights of the licensee which provides interconnection or sharing of use of facilities in its own telecommunications system. The licensee may have lost some right to exclude others from connecting or using its facilities but proposed sections 36A and 36AA will not take away its title to the facilities concerned. In this regard, the Bills Committee legal adviser has also come to the view that the proposed sections may not involve deprivation of private property. Similar to the situation arising under proposed section 14, the restriction imposed by the proposed sections on the use of the facilities has to be considered in the light of whether such restriction is reasonably justified and proportionate to the aim sought to be achieved thereby.

34. The Administration has clarified that proposed section 36AA is intended to apply to licensees under or deemed to be under the Telecommunication Ordinance only and will therefore make amendments to reflect such intention more accurately. Pursuant to the said amendments, BOT tunnel operators, not being telecommunications licensees, will not be subject to the statutory requirements under proposed section 36AA.

Request for information and inspection (Clauses 4 and 18)

35. Under proposed section 7I, TA may require a licensee to produce information relating to its business as TA may reasonably require to perform his functions. He may also disclose information supplied to him if it is in the public interest to do so. CWHKT is of the view that the proposed powers for TA are excessive. The request for and disclosure of information may even include commercially sensitive information and there are no statutory limits to prevent TA from going on a "fishing expedition" in relation to a licensee's business. Members have also expressed concern about the checks and balances on TA's exercise of powers and how third party information is safeguarded having regard to relevant provisions in the Personal Data(Privacy) Ordinance(Cap. 486) (PDPO), as well as the civil liability of the licensee in providing to TA information which is the subject of a confidentiality agreement.

36. The Administration has advised that licensees of the major public telecommunications services have all along been subject to the licence condition similar to proposed section 7I. It considers that proposed section 7I only confers on TA a restrictive power necessary for him to perform his regulatory functions effectively. TA will only disclose the information obtained from the licensee if it is in the public interest to do so and there is also a requirement to give a reasonable opportunity for the affected persons to make

representations. The Administration also confirms that TA will be obliged to comply with the PDPO when exercising his power to obtain or disclose information which contains personal data.

37. Proposed section 35A empowers TA to enter the premises of a licensee and inspect and make copies of any document or account. In CWHKT's view, since TA will not be required to obtain a warrant from a court beforehand, such power of entry, search and seizure falls short of the requirements of the relevant articles under the HKBOR and the Basic Law. The Hong Kong Society of Accountants (HKSA) considers the proposed powers overly wide as to render the working papers of an accountant whilst working in the licensee's premises liable to be seized or copied by TA during his inspection.

38. The Administration nevertheless stresses that proposed section 35A is modelled on an existing licence condition and is intended to empower TA to conduct routine or random inspections to monitor the status of compliance of licensees, not for investigation into offences under the Ordinance. The Bills Committee also notes its legal adviser's comments that a court warrant is not absolutely necessary for the purposes of the HKBOR and the Basic Law if the purpose of entering and inspecting the licensee's business premises is to ascertain compliance with the Ordinance or licence conditions. A similar power of entry is also provided in other Ordinances. The Administration has also confirmed that requests for documents belonging to third parties (such as accountants) will be made in accordance with the requirements under proposed section 36D and not under proposed section 35A.

39. To address members' concerns and to clarify its policy intent, the Administration will include under proposed sections 7I and 35A a provision that where a licensee provides information to TA which is the subject of a confidentiality agreement with another person, the licensee will not be liable in an action for damages for breach of the agreement. The Administration will also state clearly under the proposed sections that TA will not compel the production of information which cannot have been compelled to be produced in civil proceedings before the Court of First Instance.

Obtaining information from non-licensees (Clause 23)

40. Proposed section 36D empowers TA to apply to a magistrate by information on oath for an order to obtain information from non-licensees if the information is relevant to the performance of TA's functions or the exercise of his powers. Two telecommunications licensees have expressed support for the proposed section which, in their view, will facilitate TA's investigation into complaints about anti-competitive conduct.

41. HKSA considers that the proposed provisions will adversely affect non-licensees in that the grounds or purposes for which TA requires the

information are very wide. Besides, TA is not under any confidentiality obligation in respect of the information he obtains. Since the order can be applied by TA *ex parte*, the non-licensee will not have the opportunity to explain his case in open court before the magistrate decides to grant the order.

42. Some members of the Bills Committee share the view that unlike telecommunications licensees who have opted into the regulatory regime, third-party non-licensees should not be subject to such onerous requirements as imposed by proposed section 36D. They considered it unfair that third-party non-licensees are not given any prior opportunity to respond to TA's demand for information and that their only course of redress is to seek a judicial review on the magistrate's decision to issue the order.

43. The Administration has stressed the importance of empowering TA to obtain information from non-licensees to facilitate his investigation into suspected breaches of the Ordinance or licence conditions. It also considers the proposed section a balanced provision as it is the court which ultimately decides on whether or not the non-licensee should be required to produce the information. To address concerns about the wide scope of the proposed section, the Administration will introduce CSAs to circumscribe its scope to cover only information that is relevant to TA's investigation of breaches or suspected breaches. It will also propose amendments to provide safeguards on the disclosure of information by TA and by the third party.

44. On *ex parte* proceedings, the Administration reiterates that this is in line with the established arrangement under many other Ordinances and will avoid protracted proceedings and preserve the information required. It has very strong reservation on the suggestion of making the application proceedings *inter partes*. Nevertheless, to address members' concerns for greater protection to the third party, the Administration has agreed to include a requirement that before applying for a court order, TA should first serve on the non-licensee a written notice requesting the latter to produce the information and to allow the person to make representation in writing if he objects to TA's request. If TA still considers the production of the documents necessary and the third party refuses to comply with the request, TA may then apply to a magistrate for an order but he should serve a notice to the third party notifying him/her of the date of his application to the magistrate. TA should also submit for the magistrate's consideration the written representations, if any, received from the third party. Members note that under this approach, although the application by TA remains *ex parte*, the magistrate will have to consider the representations made by the third party to TA before deciding whether an order should be made. The Administration considers that this will ensure that the views and position of the third party in refusing to provide information to TA will be taken into account by the magistrate. If the magistrate is not satisfied with the information on oath by TA after considering the representations, he will refuse granting the order. The Administration has also proposed provisions modelled on those under PDPO to prevent the requested information from

being unduly processed before it is provided to TA.

Appeal body

45. Whilst improving substantially the regulatory powers of TA, the Bill does not provide for a statutory appeal channel against the decisions of TA. A person aggrieved by TA's decisions can only seek judicial review. A number of deputations, including some telecommunications licensees, the BOT tunnel operators and the Consumer Council, urge that an independent body should be established to deal with appeals against TA's decisions.

46. According to the Administration, the existing system whereby appeals against TA's decisions are by means of judicial review has worked well and has the general support of the industry. The Administration further points out that TA has to deal with highly technical issues and is often required to take timely decisions given the rapid developments in the telecommunications industry. It considers that the Bill already provides for adequate checks and balances and greater transparency in TA's exercise of powers so that the affected parties can effectively challenge TA's decisions in judicial review.

47. The Bills Committee finds the existing arrangements of appealing against TA's decisions by way of judicial review only highly unsatisfactory. As judicial review is not concerned with reviewing the merits of the decision but with the decision-making process, the court cannot substitute its own decision in place of TA's decision. Members therefore consider that judicial review is a very limited remedy and have urged the Administration to critically re-consider whether TA's decisions, which often carry important economic implications, should be subject to more stringent scrutiny by the court or a statutory appeal body

48. Whilst maintaining that the Bill meets the fair hearing requirement under the relevant human rights legislation, the Administration has agreed, as a matter of policy, to provide under the Bill a Telecommunications (Competition Provisions) Appeal Board (the Appeal Board) to hear appeals against TA's opinions and decisions, determinations and directions under proposed sections 7K, 7L, 7M or 7N relating to competition matters, as well as the financial penalties/remedies imposed by TA under proposed section 36C. In order to ensure that the appeal mechanism meets its policy objective and will not be susceptible to abuse, it has been proposed that while the Appeal Board can review the merits of TA's decisions/opinions, such decisions/opinions should not be suspended as an interim relief, with the exception of the penalties and remedies imposed by TA under proposed section 36C. On appeal, the Appeal Board may uphold, vary or quash the decisions/opinions of TA. The Board's decisions will be final except on questions of law which the Appeal Board may refer to the Court of Appeal.

49. The Appeal Board will comprise a Chairman and at least one Deputy Chairman who will be persons qualified for appointment as a High Court Judge, as well as a panel of members to be appointed by the Chief Executive. The Bills Committee note that the procedures of the Appeal Board's proceedings will be made by subsidiary legislation after enactment of the Bill. Members in general consider the proposed appeal mechanism acceptable.

Committee Stage amendments

50. A full set of the CSAs to be moved by the Administration to address members' concerns is at **Appendix III**. The Bills Committee has not proposed to move any CSAs.

Recommendation

51. The Bills Committee supports the resumption of the Second Reading debate of the Bill on 7 June 2000.

Advice sought

52. Members are invited to support the recommendation of the Bills Committee in paragraph 51 above.

Legislative Council Secretariat

May 2000

Bills Committee on Telecommunication (Amendment) Bill 1999

Membership list

Hon SIN Chung-kai (Chairman)
Hon David CHU Yu-lin
Hon HO Sai-chu, SBS, JP
Hon Eric LI Ka-cheung, JP
Hon Fred LI Wah-ming, JP
Hon MA Fung-kwok
Dr Hon Philip WONG Yu-hong
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Mrs Miriam LAU Kin-yea, JP
Hon CHOY So-yuk

Total : 11 members

Legislative Council Secretariat

21 July 1999

List of organizations which have submitted views to the Bills Committee

Cable & Wireless HKT CSL Limited

Cable & Wireless HKT Limited

Consumer Council

Hong Kong Cable Television Ltd

Hong Kong External Telecommunication Service Association

Hong Kong Internet Service Providers Association

Hong Kong Telecommunications Users Group

Hutchison Telecommunications (Hong Kong) Limited

Kowloon-Canton Railway Corporation

Mass Transit Railway Corporation

New T&T Hong Kong Limited

New World Telephone Limited

Operators of build-operate-transfer tunnels

- Cross Harhour Tunnel Co Ltd (up to 31 August 1999)
- New Hong Kong Tunnel Co Ltd
- Route 3 (CPS) Co Ltd
- Tate's Cairn Tunnel Co Ltd
- Western Harbour Tunnel Co Ltd

Peoples Telephone Company Limited

SmarTone Telecommunications Holdings Ltd

Sunday (Mandarin Communications Ltd)

The Real Estate Developers Association of Hong Kong

Hong Kong Society of Accountants }

Sun Hung Kai Real Estate Agency Ltd }

Telecom Association of Hong Kong }

Wharf Estates Management Company Limited }

Written submissions only