Bills Committee of the Legislative Council
Telecommunication (Amendment) Bill 1999

Reply of Cable & Wireless HKT Limited to:
"The Administration's Response to Cable & Wireless HKT (CWHKT)'s submissions on the legal and constitutional issues arising from the Telecommunication (Amendment) Bill 1999"
Paper No. CB(1)883/99-00(01)

Introduction

As we have stated in previous submissions to this Bills Committee, Cable & Wireless HKT (CWHKT) does not oppose the need for an overhaul of the Telecommunications Ordinance. We welcome the positive steps that the Administration has committed to take by way of committee-stage amendments (CSAs) to remove many of the ambiguities and inconsistencies which are currently part of the Telecommunication (Amendment) Bill 1999 (the Bill).

CWHKT has reviewed the "Administration's Response to Cable & Wireless HKT (CWHKT)'s submissions on the legal and constitutional issues arising from the Telecommunication (Amendment) Bill 1999" (Paper No. CB(1)883/99-00(01)) (the "Administration's Response"), written in conjunction with counsel's advice provided by Mr Richard Fowler Q.C. With regard to many aspects of the Administration's Response and their counsel's advice, CWHKT believes that at this stage there remains certain fundamental disagreements as to what the Basic Law and the Bill of Rights require in the way of procedural fairness and basic protections. CWHKT's positions on the detailed legal and constitutional aspects of the Bill remain the same as previously submitted, and in that regard CWHKT would reemphasize the compelling arguments made in the joint advice of leading counsel, Mr Michael Thomas Q.C. S.C., Mr Timothy Eicke and Professor Johannes Chan, which has been tabled before this Committee.

However, CWHKT believes that three fundamental issues from the Administration's Response must still be addressed:

- telecommunications regulators in most liberalised markets, including OFTEL in the UK, are subject to a right of appeal as to whether a decision is right or wrong. This is evident from Annex 1 to the Administration's Response. Hong Kong should follow international best practice and provide for a right of appeal against decisions of the Telecommunications Authority (TA). Judicial review is not a sufficient remedy;

- the Administration makes frequent reference to the fact that the current TA's existing practice is to take consultation in relation to issues of importance. With respect, that misses the point: in enacting legislation, the **rule of law** must be enshrined over the rule of discretion;

- in the absence of a general competition law, all persons who engage in conduct which has the purpose or effect of restricting competition in a telecommunications market should be equally subject to competition safeguards, regardless of whether or not they are a licensee.

Right of Appeal against decisions of the TA

The Administration states in paragraph 34 that the regulatory model for the telecommunications sector contemplated by the Bill is not unique, either in the global telecommunications industry or in Hong Kong. In fact, the decisions of **telecommunications regulators in most liberalised markets in the world** are subject to a right of appeal, as is clearly demonstrated by Annex 1 to the Administration's Response. Further, the decisions of each of the main bodies responsible for monitoring regulation of utilities and financial services in Hong Kong, such as the Gas Authority, the Electrical and Mechanical Services Department, the Broadcasting Authority, the Securities and Futures Commission, and the Hong Kong Monetary Authority, are all subject to a right of appeal (see CWHKT's First Submission dated 13 July 1999, paragraph 2). It is only the TA that is out of step.

The Administration's Response discusses at some length the recent decision of the UK to enact the Telecommunication (Appeal) Regulations 1999 which came into force on 20 December 1999. The Administration notes that the appeal under such Regulations is to be made to the court on **material error of fact, law or procedure or illegality.**

The reasons for the change were to bring the UK into conformity with licensing and interconnection directives of the European Community. Previously in the UK, aggrieved operators were only able to resort to judicial review, which is currently the only recourse available in Hong Kong, and the practice the Administration proposes to maintain after the enactment of the Bill. The EC directives required that suitable mechanisms must exist at national level under which a party affected by a decision of the national regulatory authority has a right to appeal to a body independent of the parties involved. The UK Government took the decision that **judicial review alone was not enough** to preserve the balance between the rights of operators and the duties and obligations of the regulators and, accordingly, concluded that sole reliance on this remedy did not comply with the directives.

As CWHKT has previously submitted on several occasions, and as confirmed by the Department of Trade and Industry in the UK (DTI), judicial review is not appropriate as the sole avenue of appeal. Judicial review is inadequate because appeal is concerned with the merits of a decision, while judicial review is concerned with its jurisdictional and procedural legality. On appeal the question is "right or wrong?"; on review it is "lawful or unlawful?". Accordingly, an error made within jurisdiction can be corrected only on appeal, not on review.

The DTI also set out its conclusions with regard to the appropriate appellate body to hear appeals from decisions of the Director General of Telecommunications, settling on the Courts because the "Courts are well placed to consider issues of procedural irregularity as well as issues of factual error." Accordingly it is not accurate to suggest, as the Administration does at paragraph 36 of the Response, that "debates in overseas jurisdictions on whether to establish an appeal channel centred on the availability of a streamlined and straightforward appeals mechanism": the debate actually centred on the merits of entertaining appeals against the regulator with a wider scope than judicial review.

Further, decisions of the Director General of Telecommunications under the Competition Act 1998 are subject to two levels of appeal: first, a full right of appeal on issues of fact and law lies to the Competition Commission against decisions of the Director General, and an appeal tribunal must be established by the Competition Commission to hear the appeal. Secondly, decisions of that appeal tribunal are subject to a further right of appeal to the Courts on matters of law or on the amount of any penalty imposed.

We have attached to this Reply as Annex 1, to which the members of this Committee may wish to refer, the set of documents published by the DTI in relation to the "New Appeals Mechanism in the Telecommunications Act 1984 and the Wireless Telegraphy Act 1949", including the DTI's Introduction, the full text of the Appeals Regulation, the Consultation paper and the Response to the Consultation paper. We would be glad to supply copies of the UK Competition Act 1998 to any members of this Committee upon request.

'The existing practice of the TA'

Frequent reference is made in the Administration's Response to the 'existing practice of the TA'. For example, at paragraph 14: "the TA has imposed self-regulation on giving detailed reasons whenever he forms an opinion whether a licensee is in breach of any licence condition or whether an operator is dominant operator [sic]".

The existing practice of the TA is simply irrelevant to a consideration of whether the Bill conforms with the Basic Law and the Bill of Rights. The **rule of law** must be enshrined in the legislation in clear and unambiguous terms. Accordingly, the procedural safeguards which CWHKT has proposed, some of which are to be included in the proposed CSAs, should not be viewed as 'enhancements' to the legislation but as essential requirements to ensure the Bill is in full compliance with the Basic Law and the Bill of Rights.

Competition Provisions

The Administration's Response states at paragraph 49 that the problem of non-licensees acting anti-competitively with respect to a telecommunications market is addressed by the "associated persons" provision of proposed section 7K(3)(c). In CWHKT's view, there are many organisations capable of acting anti-competitively in respect of

telecommunications markets that may not be affiliated with, or an associated person of, any licensee. CWHKT reiterates its position that it is discriminatory, and from the policy perspective illogical, to single out licensees for the application of the competitive safeguards in the Bill, and the resultant legal liabilities the Bill will create when, with a simple amendment, the Bill could be made to apply equally to all persons who may engage in anti-competitive conduct in relation to a telecommunications market.

Cable & Wireless HKT
21 February 2000

ANNEX 1(A)

NEW APPEALS MECHANISM IN THE TELECOMMUNICATIONS ACT 1984 AND THE WIRELESS TELEGRAPHY ACT 1949

Communications and Information Industries

NEW APPEALS MECHANISM IN THE TELECOMMUNICATIONS ACT 1984 AND THE WIRELESS TELEGRAPHY ACT 1949

Introduction

In April 1999 the Government issued a Consultation Document **to explain proposals to introduce a wider right of appeal in connection with certain types of telecoms regulatory decisions. Comments were received by June 1999 and a** Response to Consultation **was published in October 1999. A** New Statutory Instrument **implementing the new appeals mechanism came into force on 20 December 1999.**

General enquiries about the new appeals mechanism should be addressed to:

Ben Collins Communications and Information Industries Directorate Department of Trade and Industry 151 Buckingham Palace Road London SW1W 9SS
Tel: 0171 215 1745
Fax:0171 215 1721
e-mail: ben.collins@ciid.dti.gov.uk

Enquiries about the new appeals mechanism in relation to the Wireless

Telegraphy Act 1949 should be addressed to:

Jo Madigan
Radiocommunications Agency
New King's Beam House
22 Upper Ground
London SE1 9SA
Tel: 0171 211 0233 Fax: 0171 211 0523
e-mail: madiganj@ra.gtnet.gov.uk

Consultation Document

Response to Consultation

New Statutory Instrument

Last revised : Thursday 7 January, 2000

ANNEX 1(B)

NEW APPEALS MECHANISM IN THE TELECOMMUNICATIONS ACT 1984 AND THE WIRELESS TELEGRAPHY ACT 1949

NEW STATUTORY INSTRUMENT

TELECOMMUNICATIONS

The Telecommunications (Appeals) Regulations 1999

Communications and Information Industries

NEW APPEALS MECHANISM IN THE TELECOMMUNICATIONS ACT 1984 AND THE WIRELESS TELEGRAPHY ACT 1949

NEW STATUTORY INSTRUMENT

TELECOMMUNICATIONS

The Telecommunications (Appeals) Regulations 1999

Made .....26th November 1999

Laid before Parliament .....29th November 1999

Coming into force .....20th December 1999

***NOTE**

The Secretary of State, being a Minister designated(a) for the purposes of section 2 (2) of the European Communities Act 1972(b) in respect of measures relating to telecommunications, in the exercise of the

powers conferred on him by that section, hereby makes the following Regulations:-

Citation and commencement

1. These Regulations may be cited as the Telecommunications (Appeals) Regulations 1999 and shall come into force on 20th December 1999.

Interpretation

2. In these Regulations-

“the Licensing Directive” means Directive 97/13/EC of the European Parliament and of the Council on a common framework for general authorisations and individual authorisations in the field of telecommunications(c);

“the ONP Framework Amending Directive” means Directive 97/51/EC of the European Parliament and of the Council amending Council Directives 90/387/EEC and 92/44/EEC for the purposes of adaptation to a competitive environment in telecommunications(d).

Amendments to the Telecommunications Act 1984

3.-(1) For the purposes of implementing the Licensing Directive and the ONP Framework Amending Directive, the Telecommunications Act 1984(e) is amended in accordance with the following paragraphs.

(2) In section 18-

(a) subsections (1) and (2) are repealed; and

(b) in subsection (3), for the words “this section” there are substituted the words “section 46B”.

(3) After section 46A there is inserted

“Appeals

Appeals 46B.-(1) This section shall apply to the following decisions of the Secretary of State or the Director taken on or after 20th December 1999-

(a) a decision to grant or refuse a licence under section 7;

(b) a decision to include within a licence on its grant particular provisions-

(i) describing the telecommunication systems authorised to be run under the licence;

(ii) describing the connections authorised to be made;

(iii) describing the telecommunication services authorised to be provided;

(iv) imposing a condition; or

(v) applying the telecommunications code to the licensee subject to such exceptions and conditions as may be included in the licence;

(c) a decision with regard to the designation under section 9 of a telecommunication system as a public telecommunication system;

(d) a decision with regard to the modification of any exception or condition included in a licence under section 10(3);

(e) a decision to exercise any power contained in a licence to give a direction or consent to make any determination;

(f) a decision with regard to the enforcement of conditions in a licence;

(g) a decision to revoke a licence;

(h) a decision with regard to approval of any person, apparatus or meter; and

(j) any other decision (other than a decision

made under sections 12 to 15) in respect of which the rights or interests of a person running or wishing to run a telecommunication system under a licence or making or wishing to make any connection or providing or wishing to provide any telecommunication service by means of a telecommunication system licensed under this Act are materially affected.

(2) Subject to subsection (5) below, a person aggrieved by a decision to which this section applies may appeal against the decision on one or more of the following grounds-

(a) that a material error as to the facts has been made;

(b) that there was a material procedural error;

(c) that an error of law has been made; or

(d) that there was some other material illegality, including unreasonableness or lack of proportionality.

(3) In England and Wales and Northern Ireland, an appeal lies to the High Court, and in Scotland, an appeal lies to the Court of Session.

(4) The court determining an appeal may-

(a) dismiss the appeal; or

(b) quash the decision,

and where the court quashes a decision it may refer the matter to the Secretary of State or the Director (as the case may be) with a direction to reconsider it and reach a decision in accordance with the findings of the court.

(5) No appeal under this section shall be brought unless the permission of the court has been obtained.

(6) An appeal under this section shall be brought-

(a) in respect of a decision made under section 16, without unreasonable delay and in any event not later than 42 days from the date on which the Secretary of State or the Director made his decision; or

(b) in respect of any other decision to which this section applies, without unreasonable delay and in any event not later than three months from the date on which the Secretary of State or the Director made his decision, or within such other period as may be specified by rules of court.

(7) The effect of a decision to which an appeal under this section relates shall not, except where the court so orders, be suspended in consequence of the bringing of the appeal.

(8) Any proceedings under this section in the Court of Session shall be before the Lord Ordinary."

Amendments to the Wireless Telegraphy Act 1949

4.-(1) For the purposes of implementing the Licensing Directive and the ONP Framework Amending Directive, the Wireless Telegraphy Act 1949(f) is amended in accordance with the following paragraphs.

(2) In sub-section (1) of section 1D, for the words "the following section" there are substituted the words "sections 1E and 1F".

(3) After section 1E there is inserted-

"Appeals 1F.-(1) This section shall apply to the following decisions of the Secretary of State taken on or after 20th December 1999-

(a) a decision to grant or renew, or refuse to grant or renew, a licence under section 1;

(b) a decision to include within a licence particular terms, provisions or limitations;

(c) a decision with regard to the variation of any term, provision or limitation in a licence;

(d) a decision to revoke a licence;

(e) a decision under this Act or under section 84 of the Telecommunications Act 1984 with regard to the approval of any apparatus; and

(f) any other decision under this Act or the Wireless Telegraphy Act 1998(g) in respect of which the rights or interests of a person who is authorised or who wishes to be authorised by a licence are materially affected.

(2) Subject to subsection (5) below, a person aggrieved by a decision to which this section applies may appeal against the decision on one or more of the following grounds-

(a) that a material error as to the facts has been made;

(b) that there was a material procedural error;

(c) that an error of law has been made; or

(d) that there was some other material illegality, including unreasonableness or lack of proportionality.

(3) In England and Wales and Northern Ireland, an appeal lies to the High Court, and in Scotland, an appeal lies to the Court of Session.

(4) The court determining an appeal may-

(a) dismiss the appeal; or

(b) quash the decision,

and where the court quashes a decision it may refer the matter to the Secretary of State with a direction to reconsider it and reach a decision in accordance with the findings of the court.

(5) No appeal under this section shall be brought unless the permission of the court has been obtained.

(6) An appeal under this section shall be brought without unreasonable delay and in any event not later than three months from the date on which the Secretary of State or the Director made his decision, or within such other period as may be specified by rules of court.

(7) The effect of a decision to which an appeal under this section relates shall not, except where the court so orders, be suspended in consequence of the bringing of an appeal.

(8) Any proceedings under this section in the Court of Session shall be before the Lord Ordinary.

(9) Except as provided by this section, the validity of a decision to which this section applies shall not be questioned in any legal proceedings whatsoever."

Amendment to the Telecommunications (Interconnection) Regulations 1997

5. In the Telecommunications (Interconnection) Regulations 1997(h), after regulation 12 there is inserted-

"Appeals

12A. Section 46B of the Act shall apply to decisions made by the Secretary of State or the Director under these Regulations as they apply to such decisions made under the Act."

Amendment to the Telecommunications (Open Network Provision and Leased Lines) Regulations 1997

6. In the Telecommunications (Open Network Provision and Leased Lines) Regulations 1997(i), after regulation 14 there is inserted-

"Appeals

14A. Section 46B of the 1984 Act shall apply to decisions made by the Secretary of State or the Director under these Regulations as they apply to such decisions made under the 1984 Act."

Amendment to the Telecommunications (Open Network Provision)(Voice Telephony) Regulations 1998

7. In the Telecommunications (Open Network Provision)(Voice Telephony) Regulations 1998(j), after regulation 38 there is inserted-

"Appeals

38A. Section 46B of the Act shall apply to decisions made by the Secretary of State or the Director under these Regulations as they apply to such decisions made under the Act."

26th November 1999 *Patricia Hewitt,*
Minister for Small Business
and E Commerce,
Department of Trade and
Industry

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement provisions in Directive 97/13/EC of the European Parliament and of the Council on a common framework for general authorisations and individual licences in the field of telecommunications services and Directive 97/51/EC of the European Parliament and of the Council amending Council Directives 90/387/EEC and 92/44/EEC for the

purposes of adaptation to a competitive environment in telecommunications, which require Member States to provide an appeals procedure in relation to certain decisions of national regulatory authorities in the field of telecommunications.

The Regulations insert a new section 46B into the Telecommunications Act 1984 specifying that parties may appeal to the court against decisions of the Secretary of State or the Director General of Telecommunications on grounds of error of fact, error of law, procedural error or other illegality. The types of decision which are subject to this appeals procedure are set out in section 46B(1). The new appeals procedure replaces the existing procedures for reviewing licence enforcement decisions in sections 18(1) and (2), which are repealed.

The Regulations also amend the Telecommunications (Interconnection) Regulations 1997, the Telecommunications (Open Network Provision and Leased Lines) Regulations 1997 and the Telecommunications (Open Network Provision)(Voice Telephony) Regulations 1998 to apply the new appeals procedure to decisions made under those Regulations in the same way as it applies to decisions under the Telecommunications Act 1984.

The Regulations insert a new section 1F into the Wireless Telegraphy Act 1949 which provides a similar mechanism for appealing against certain decisions of the Secretary of State in the field of wireless telegraphy.

Introduction

Consultation Document

Response to Consultation

(a) S.I. 1996/266.
(b) 1972 c.68.
(c) O.J. No. L117, 7.5.97, p.15.
(d) O.J. No. L295, 29. 10.97.p.23.
(e) 1984 c. 12; section 46A was inserted by section

49 of the Competition and Services (Utilities) Act
1992 (c.43).
(f) 1949 c.54; sections 1D and 1E were inserted by
S.I. 1997/2930.
(g) 1998 c.6.
(h) S.I. 1997/2931.
(i) S.I. 1997/2932.
(j) S.I. 1998/1580.

Last revised : Thursday 7 January, 2000

ANNEX 1(C)

NEW APPEALS MECHANISM:
CONSULTATION DOCUMENT

Communications and Information Industries

NEW APPEALS MECHANISM: CONSULTATION DOCUMENT (This consultation is now closed).

1 The Government intends to introduce a wider right of appeal in connection with certain types of regulatory decisions made under the Telecommunications Act 1984 ("the 1984 Act") and the Wireless Telegraphy Act 1949 ("the 1949 Act") by means of secondary legislation using regulations made under section 2(2) of the European Communities Act 1972 as part of its continuing implementation of obligations a rising under the European Open Network Provision Framework([1]) and Licensing([2]) Directives. This document outlines the Government's proposals.

The current system

2. Section 18 of the 1984 Act provides that telecommunications operators who are aggrieved by a final or provisional order of the Director General of Telecommunications ("the DGT"), and who desire to question its validity on grounds of it being ultra vires or having been made in a manner that failed to follow due procedure, may appeal to the courts against it. The appeal body in England, Wales and Northern Ireland is the High Court; in Scotland it is the Court of Session. The relevant Court can quash an

order or any provision of an order if it is satisfied that the making or confirmation of the order was not within the relevant powers of the DGT (specified in section 16 of the 1984 Act), or that the interests of the telecommunications operator has been substantially prejudiced by a failure to comply with the proper procedure (specified in section 17 of the 1984 Act).

3. Other decisions of the Secretary of State and the DGT under the 1984 Act are subject to judicial review. This represents an effective means by which improper exercise of administrative power can be remedied, as it provides recourse to the courts where the DGT or Secretary of State are felt to have acted improperly through, for example, acting ultra vires using a power to achieve some other purpose to that for which it was given, failing to follow proper procedure or acting in an unreasonable manner. This has been an important check on the actions and decisions of the Secretary of State and DGT.

4. Judicial review is also available against decisions taken by the Secretary of State under the 1949 Act. That Act does not contain any separate appeals procedure on licensing decisions.

Reasons for the new appeals process

5. The Government considers it important that regulatory decision-making in this sector should be subject to checks and balances which do not, however, detract from effective regulation. Although judicial review provides an effective check on improper decision-making, the Government has recognised that it may be beneficial to allow for more extensive appeal rights in appropriate sectors, especially so as to allow errors of fact to be considered. This approach chimes well with recent developments in European legislation, so that the proposals outlined in this document can be expected to implement better the relevant requirements of the ONP

Framework Directive and the Licensing Directive. These require' the laying down of certain procedures for appealing against decisions of a national regulatory authority ("NRA").

6. The Licensing Directive contains four requirements for an appeals procedure, covering decisions of the NRA in relation to non-compliance with a condition in a general authorisation (Article 5(3)); non-compliance by an individual licensee with a condition of its licence (Article 9(4)); refusal, withdrawal, amendment or suspension of an individual licence (Article 9(6)); and refusal of a licence for new telecommunication services not covered by a general authorisation (Article 19). The ONP Framework Directive contains one requirement in Article 5a(3) to "ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved." The current regulatory system relies primarily on judicial review to satisfy these requirements, but the Government believes that wider grounds for appeal as outlined in this document would implement these Directives more effectively.

7. The provisions of these Directives apply to all types of telecommunications, including wireless telegraphy. It is therefore proposed to introduce an appeals procedure into both the 1984 Act and the 1949 Act in relation to specified decisions of the Secretary of State (and, in relation to the 1984 Act, the DGT). The proposed procedure for both Acts is broadly the same and, in this consultation document, comments apply equally to both Acts unless indicated otherwise.

8. The Government's policy objectives are that the new appeals mechanism should:

- be efficient, effective and responsive;

- provide a full and fair means of allowing relevant parties to appeal against decisions of the DGT and Secretary of State in this sector;

- nevertheless avoid unnecessary delay and bureaucracy.

Decisions subject to the new appeal process

9. The wider appeals mechanism is proposed to apply to the decisions of the Secretary of State or the DGT outlined in the draft clauses enclosed at Annex A.

These cover decisions regarding the grant or refusal of licences, the inclusion and modification of licence conditions, enforcement and revocation of licences. The procedure would also apply to other decisions which materially affect those providing or seeking to provide telecommunication services.

10. The new appeals procedure is intended to apply only in respect of decisions taken by the Secretary of State and the DGT using powers under the 1984 Act and to decisions taken under the 1949 Act which relate to the provision of a telecommunication service involving the use of wireless telegraphy. It is not intended to apply to decisions made by the DGT under powers conferred on him by the Competition Act 1998 which he exercises concurrently with the Director General of Fair Trading (in these circumstances, the DGT acts in a role similar to that of a competition authority, not as an NRA). These powers are subject to a different appeals procedure contained in that Act.

11. It is to be noted that the draft sections attached would apply this appeal mechanism to a decision by the Director to modify a licence. However, this would be an interim position which would be further amended by the provisions on collective licence modification proposed by DTI's consultation document published on 10th March 1999. Those provisions outline a similar, but more specific, appeal mechanism to deal with occasions where the DGT has chosen to dispose of

objections that have not been withdrawn. That mechanism would operate in place of the more general one outlined here.

Persons able to appeal

12. A person wishing to appeal under this system would first need to obtain leave of the court. This would avoid the need to divert resources to objections where the applicant does not have a sufficiently arguable case. It is considered that the rights conferred by the Directives are conferred on those using telecommunication networks or providing telecommunication services. Persons operating as providers of telecommunication networks or services to others are therefore within the provisions of the Directives.

Grounds for appeal

13. It is proposed that a person aggrieved by a decision made which the new section would apply, and who has obtained leave, may appeal against the decision on one or more of the following grounds:

a) that a material error as to the facts has been made;

b) that there was a material procedural error;

c). that a material error of law has been made; or

d) that there was some other material illegality.

It is intended that these grounds for appeal under the new procedure should include grounds on which an appellant might otherwise seek judicial review, but should also allow the court to examine the regulator’s findings of fact.

Timing of appeals

14. It is proposed that appeals using this process in respect of a decision made under section 16 of the 1984 Act (which provides for the enforcement of licences) should be brought as soon as reasonably practicable, and in any event not later than 42 days from the date on which the Secretary of State or the DGT has made his decision.

This is the period which is currently provided in relation to section 18(1) of the 1984 Act. Appeals using this process in respect of any other decision to which it applies would also be required to be brought as soon as reasonably practicable, but in any event not later than three months from the date on which the Secretary of State or the DGT made his decision. This period is designed to reflect the period within which an application for judicial review should be brought. The two time periods are different because, in relation to a decision to issue an enforcement order under section 16, the licensee will (except in the case of some provisional orders) have been aware for some time of the intentions of the DGT because of the consultation requirement built into the section 16 procedures, and so will have had ample time to prepare his case.

15. It is proposed that appeals under the 1949 Act must be brought as soon as reasonably practicable and in any event not later than three months from the date of the decision.

Courts of appeal

16. In England, Wales and Northern Ireland the appeal is intended to lie to the High Court; In Scotland an appeal would lie to the Court of Session and would be heard in the Outer House.

Decisions on appeals

17. It is proposed that the court determining the appeal may either dismiss the appeal, or quash the decision and refer the matter to the Secretary of State or the DGT with a direction to reconsider it and reach a decision in accordance with the findings of the court. The court would not have the power to substitute its decisions for those of the DGT or Secretary of State.

Regulatory Impact Assessment

18. In considering proposals for new or amended regulations the Government seeks views from business on how it views the likely impact of the proposal. To measure the impact a Regulatory Impact Assessment is produced for all UK and European Community regulatory proposals affecting business, which is made available on request. It would therefore be helpful if you could comment on the likely cost implications (including any likely cost savings) and benefits which you believe would be likely to arise for your organisation as a result of the proposals in this document. Please note that we may make copies of your response publicly available unless you indicate that it is confidential.

Comments

19. Comments are invited on the issues set out in this paper by **21st June 1999.**

(I) Comments in relation to the overall proposals or their application to the 1984 Act should be sent in writing or emailed to Chris Barton at the following address:

Chris Barton
Communications and Information Industries
Directorate
Department of Trade and Industry
151 Buckingham Palace Road
London SW1W 9SS
Fax: 0171 215 1721

email: chris.barton@ciid.dti.gov.uk

(ii) Comments specifically in relation to the application of these proposals to the 1949 Act should be sent in writing or e-mailed to Jo Madigan at the following address:

Jo Madigan
Radiocommunications Agency
New King's Beam House
22 Upper Ground
London SE1 9SA
Fax: 0171 211 0523
Email: madiganj@ra.gtnet.gov.uk

April 1999

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[1] 90/387/EEC as amended by 97/51/EC

[2] Directive 97/13/EC on a common framework for general authorisations and individual licences in the field of telecommunications services

Last revised: Thursday 7 January, 2000

ANNEX 1(D)

NEW APPEALS MECHANISM IN THE TELECOMMUNICATIONS ACT 1984 AND THE WIRELESS TELEGRAPHY ACT 1949 RESPONSE TO CONSULTATION

Communications and Information Industries

NEW APPEALS MECHANISM IN THE TELECOMMUNICATIONS ACT 1984 AND THE WIRELESS TELEGRAPHY ACT 1949 RESPONSE TO CONSULTATION

The Department of Trade and Industry issued a consultation document in April 1999 on a proposed statutory instrument to provide a new appeals mechanism with respect to certain types of regulatory decisions made by the Secretary of State (SoS) and Director General of Telecommunications (DGT) under the Telecommunications Act 1984 ("the 1984 Act") and the Wireless Telegraphy Act 1949 ("the 1949 Act").

Responses welcomed moves to introduce a wider appeals mechanism. However issues were raised in responses received from BT, Cable & Wireless, BT Cellnet, COLT, Energis, NTL, One2One, Orange and Scottish Telecom. This document clarifies the Government's intentions on various aspects of the new appeals mechanism.

1. Decisions to which appeal applies (subsection 1)

(a) Does this appeals mechanism affect the procedure for modifying telecommunications licences?

Under the current licence modification procedures contained in sections 12 to 15 of the 1984 Act, this appeal mechanism will have no effect. If a proposal for a licence modification does not receive consent from a licensee, then the DGT will either abandon the modification or refer it to the Competition Commission (CC). The appeal process outlined in the Department's April 1999 consultation document will not apply to decisions of the CC, so there would be no effect on the licence modification procedure.

However, under the revised licence modification procedure which has been published as part of the draft Electronic Communications Bill, it is proposed that the DGT will be able to make a licence modification in certain circumstances without either the consent of the licensee or referring the matter to the CC. In these circumstances, it is proposed that the appeals mechanism outlined here will apply to the licence modification.

(b) Are disputes under the Telecoms (Interconnections) Regulations 1997 covered?

It is intended that a direction by the DGT under these regulations should be covered by the appeals procedure in order to meet the requirement of Article 5a of the Open Network Provision (ONP) Framework Directive. It is considered that the current clauses attached to the April 1999 consultation document will achieve this.

2. Grounds for appeal (subsection 2)

(a) Will appeal be allowed on the merits of decisions?

The majority of responses received suggested that the new procedure should provide an appeal against the merits of decisions made by the regulator. Comparison was made with the appeals procedure contained in the Competition Act 1998 ("the 1998 Act") and it was suggested that the grounds for appeal in the new

procedure should be identical to those in the 1998 Act. Furthermore, some responses suggested that the appeal body should be able to go so far as to substitute its own decision for that of the regulator.

The Government remains of the view that such an extension of the proposed appeal is not necessary, and that the requirements of EC legislation for “a right of appeal to a body independent of the parties involved” would be satisfied by the proposals. The EC Directives do not provide a definition of “appeal”, but the Government believes that the proposed mechanism both provides adequate safeguards to the rights of those affected by the relevant regulatory decisions, and adequately implements the requirements of the EC. The proposed mechanism allows appeal against both the procedure by which, and the findings of facts upon which, a decision was made. There are also grounds for appeal against the substance of a decision in so far as the term “some other material illegality” includes the concepts of unreasonableness, lack of proportionality and discrimination. Thus if the appeal body considers that a decision could not have been reached by a reasonable regulator in the light of the established facts then the appeal body could find against the regulator.

The Government is not persuaded that it is either necessary or desirable for the grounds of appeal under the new procedure to correspond to those of the 1998 Act. The Government’s aim when formulating the new procedure was to preserve within the framework of the existing UK and EC legislation a reasonable balance between the powers and duties of the regulators and the rights of operators. The Government believes that the proposed procedure achieves this aim by widening the grounds on which a person may appeal against a decision beyond the limits of existing judicial review, while at the same time ensuring that the regulatory regime remains sufficiently strong and responsive to ensure effective

regulation for the whole industry. This also provides protection for smaller operators since a right of appeal on the merits would enable an operator with market power to delay action by the regulator to protect smaller competitors from anti-competitive practices. Thus it is considered that a full appeal on the merits of the regulators' decision is not required by the EC Directives, and would upset the balance of the regulatory regime.

(b) Should the grounds for appeal be specified in detail?

Some respondents suggested that the grounds for appeal should contain explicit mention of Directive requirements such as objective justification, proportionality and non-discrimination. It was also suggested that "unreasonableness" in the Wednesbury sense deserved explicit mention. The Government took the view when formulating the new procedure that there was a risk of the grounds for appeal being narrowed if such grounds were to be explicitly listed and, in particular, that a list of such grounds could prevent this appeal from evolving with general developments in public law. It was for these reasons that the ground of "other material illegality" was included and it is intended that this ground would include regulatory decisions which are contrary to the general principles contained in the EC Directives.

(c) Should the DGT and SoS be required to set out their understanding of the facts?

Such details would have to be divulged by the DGT or SoS if their decisions were to be appealed against. However, it is not the intention to set out in statute how the regulators are to carry out their duties. There are already a number of statutory requirements to state reasons for decisions which meet the obligations set out in the EC Directives, and it is beyond the scope of this exercise to impose any further obligations on the regulators.

(d) Should the word "material" be included?

Some suggested abandoning the word “material”, while others sought clarification of its meaning. However, such a concept is familiar to courts, and, by definition, “immaterial” errors should not provide basis for a decision to be quashed or referred. However, it is accepted that “material” is not an appropriate qualifier for “illegality” and therefore it is proposed that this word should be dropped from subsection (2)(d).

(e) Will the court be able to admit fresh evidence?

The courts will need to hear all evidence relevant to the issue before it.

(f) Will judicial review still be available as a means of appeal?

The courts’ judicial review functions will not be changed. However, the courts will not grant leave for judicial review of the decisions for which these regulations provide an appeals mechanism. The right of appeal provided by the new regulations is intended to contain the essential elements of judicial review and more, in which case judicial review will not be necessary.

3. To whom the appeal lies (subsections 3 & 4)

(a) Should the appeal lie to a specialist body rather than the Courts?

A number of responses suggested that the appeal should lie to a specialist body, such as a tribunal within the CC, rather than the High Court. The Government is not persuaded of the desirability of this proposal. In formulating its proposals, the Government gave considerable thought to the question of which was the most appropriate body to which an appeal should lie and it took the view that, given the grounds on which an appeal can be brought, the courts were the most appropriate body. The courts are well placed to consider issues of procedural irregularity as well as

issues of factual error. In particular, a large number of the decisions which it is proposed should be subject to the new appeal, particularly in the field of wireless telegraphy, are unrelated to any issue of economic regulation or competition. The Government, therefore, remains of the view that the new appeal should lie to the courts.

(b) Will there be the normal right of appeal from the High Court to the Court of Appeal?

It is intended that, in England, Wales and Northern Ireland, it will be possible for a party to seek to appeal from the decision of the Court to the Court of Appeal and then to the House of Lords in the usual way (see section 16 of the Supreme Court Act 1981). In Scotland, the appeal would lie to the Inner House and then to the House of Lords.

(c) Will there be provision for a "fast-track" approach as in the Court of Session?

One respondent suggested that a specific fast-track procedure might be needed in Scotland. However, it is not thought that an appeal in Scotland would be dealt with less expeditiously than in England and Wales. It is therefore not intended to introduce a specific "fast track" procedure in Scotland.

4. What the appeal body can do (subsection 5)

(a) Will the Court be able to substitute its own decision for that of the regulator or Secretary of State?

As explained above, it is not intended for there to be an appeal on the merits of decisions (except in so far as this is enabled by the term "some other material illegality"). Thus it is inappropriate to provide the Court with an ability to substitute its own decision for that of the regulator or Secretary of State.

(b) Will the appeal body have power to give formal guidance as to what the decision

should be?

The Court will not be given formal power to give guidance, although it will give a judgment in the usual way and thus explain why it has reached its decision.

(c) Should the appeal body have power to award damages?

The purpose of the appeal is not to determine whether someone has suffered a loss as a result of a decision, but merely to decide whether the decision before it should stand. It is not therefore considered appropriate to include a power to award damages.

(d) Will the appeal body be able to uphold a decision whilst setting aside a finding of fact on which it was based?

The inclusion of the word "material" in subsection (2)(a) allows for this.

(e) Would the court be allowed to apportion legal costs between parties?

The question of costs would be subject to the usual rules (see section 51 of the Supreme Court Act 1981). In other words it is a matter of discretion for the court as to whether it should order one party to pay another party's costs.

5. Leave requirement (subsection 6)

Should the leave requirement be removed?

It is not appropriate to remove the leave requirement, as to do so might expose the courts to a large number of vexatious appeals that could prevent their efficient running. In any event, whether or not this appeals process specifically includes a leave requirement, it is likely that it will be subject to one next year. The Lord Chancellor's Department is proposing to introduce rules of court in the first half of next year, under section 54 of the Access to

Justice Act 1999, which will require leave to be granted before any appeal can be brought, subject to a limited number of specific exceptions.

6. Timing of an appeal (subsection 7)

(a) Should there be changes to the time in which an appeal must be made?

It is thought desirable to encourage certainty and promptness in the appeals process, and it is therefore proposed to maintain a general 3 month time-limit for bringing an appeal other than for decisions made under section 16 of the 1984 Act. However, subsection (7) of the draft provisions does provide some flexibility in also allowing appeals to be brought "within such other period as may be specified by rules of court."

(b) Why should the timing be different for section 16 decisions?

There is to be a shorter time limit of 42 days for bringing appeals under section 16 of the 1984 Act, as at present, as an operator will have prior warning of the making of an enforcement order under the terms of that section, and will thus have greater opportunity to decide to make an appeal than would be the case prior to the making of other decisions by the regulator or Secretary of State. Furthermore, as an enforcement order will be dealing with a breach of a licence condition it is likely to be particularly desirable to achieve a swift resolution to the problem.

7. Stay (subsection 8)

Should the provisions allow the courts to suspend a decision appealed against under certain circumstances?

It is thought that it may be appropriate for the courts to suspend a decision appealed against under certain circumstances, and

that it should be for the courts to decide when to do so. However the bringing of an appeal should not automatically operate to suspend the effect of the decision appealed against. Thus subsection 100A(8) will be amended to read, "The bringing of an appeal under this section shall not operate to suspend the effect of the decision appealed against unless the court so orders".

8. General

(a) Should Oftel be prevented from starting a Telecommunications Act enforcement action on a competition matter where a previous attempt at enforcement under the Competition Act 1998 was still subject to appeal?

The aim of the proposed Statutory Instrument is simply to introduce a new appeals right in the 1949 and 1984 Acts. It is beyond its scope to rule on the workings of the Competition Act 1998.

(b) Is there any change to the order-making system of section 16 of the Telecommunications Act 1984?

No.

(c) Would moving from judicial review to a statutory appeal process slow up decisions and hence increase costs?

This may be the case in certain circumstances, but the extra protection afforded by the proposals more than compensates for the possible increase in costs.

DTI

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Introduction

Consultation Document

New Statutory Instrument

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