The Administration's Response to the Cable & Wireless HKT's submission dated 20 October 1999 to the Bills Committee on Telecommunication (Amendment) Bill 1999

In the paper "The Administration's response to the views submitted by the deputations" [CB(1) 1960/98-99] to the Bills Committee, we have addressed the issues raised by the deputations, including the views of Cable & Wireless HKT (CWHKT), through detailed explanation of our policy objective and legislative intent regarding the concerned provisions of the Bill. We believe that our response has addressed the issues raised fully and fairly.

2. In its submission dated 20 October 1999, CWHKT has provided three pieces of "independent legal opinions" which reiterated its concerns over the Bill and provided further views on the Administration's response. We will in this paper explain the key considerations of our policy objective and legislative intent, and respond to the new points made.

Sections 6A - Powers of the Authority

3. The submission asked the Administration to clearly set out the functions of the Telecommunications Authority (TA). As explained in the paper [CB(1) 1960/98-99], we do not consider it necessary to set out explicitly the functions of the TA in the Telecommunication Ordinance. The services of the Office of the Telecommunications Authority Trading Fund (OFTATF) are already set out in Schedule 1 of the Legislative Council Resolution on the establishment of the OFTATF under the Trading Funds Ordinance. The TA's powers are spelt out under the Telecommunication Ordinance and his functions are restricted by the statutory powers conferred on him.

4. The submission suggested the Administration to amend section 6A to require the TA to provide written reasons when forming opinions. The new section 6A(3)(b) requires the TA to provide reasons in writing for its determination, direction or decision. We have explained before that the omission of the word "opinion" in this section is not a deliberate act of releasing the TA from giving reasons for forming such an "opinion". The framework, as amended by the Bill, is that in case of breach of any provision of the Ordinance or licence condition, the TA may enforce the provision or condition by making a decision as to whether to issue a direction, impose penalties, suspend or revoke the licence. Accordingly, forming an "opinion" will not be a stand-alone action. When the TA forms an opinion that a licensee is in breach of any of the proposed sections 7K, 7L, 7M or 7N, the TA will at the same time decide the kind of disciplinary measure, in which case the TA will be obliged under section 6A(3)(b) to set out his reasons in writing.

Section 7I - Information

5. CWHKT requested the Administration to make it clear that the power of the TA under section 7I applied only to information belonging to the licensee and that a licensee was to have the same privileges in respect of disclosure of information as it would before a court. We have explained before that the power conferred on the TA under the proposed section 7I is a restrictive power necessary for the TA to perform his functions. It is not our legislative intent for the TA to require the licensee to produce any document which the licensee could not have been compelled to produce in civil proceedings before the court. In the past, the TA had not required any licensee to produce documents that he/she could not have been compelled to produce in civil proceedings before the court.

6. The submission opined that section 7I(2) should be amended to make it clear that a person, who, at the request of the Authority, discloses information in breach of a confidentiality undertaking, would not be liable to any other person as a result of such a breach. We do not think that such an amendment is necessary; the defence of statutory authority arises if there is any action against breach of the confidentiality agreement. It is a standard exception of confidentiality agreement that the parties are allowed to disclose the information if required by law to do so.

7. There are already adequate statutory checks and balances in the proposed section 7I. Section 7I(3) empowers the TA to disclose information only if it is in the public interest to disclose that information and subject to the requirement in subsection 4 that the TA shall give a person reasonable opportunity to make representations on a proposed disclosure of information obtained under section 7I.

8. The submission further suggested that there was no provision for a third party who might be adversely affected by such a disclosure to make such representations and such a right should be expressly included. We do not think that such a provision is necessary. It is an existing practice of the TA to invite the person providing the information to make representation as to whether any part of the information provided cannot be disclosed to the public. The proposed section 7I(4) codifies this arrangement to invite representations from licensees. As at present, when confidential agreements are involved, the licensees who provide the information has the liability to consult the parties to the agreements and take into account the interests of these parties in their representations.

Section 7L - Abuse of Position

9. The submission opined that the proposed section 7L(1) established an objective test as to whether a licensee was in a dominant position, whereas the proposed section 7L(2) provided that it was for the TA to decide whether a licensee was in a dominant position. It suggested that sub-section (1) should be amended to make the position clearer. We do not consider the proposed amendment necessary, as there is no conflict between the two sub-sections. Sub-section (1) creates the prohibition, while sub-section (2) is the interpretative provision for the term "dominant position" in sub-section (1).

Section 35A - Inspection of records, documents and accounts

10. The submission opined that it was unclear from the wording of the section 35A whether a licensee was entitled to decline to produce documents which, as a matter of law, were privileged from production. We wish to clarify that it is not our legislative intention for the TA to require the licensee to produce any document which the licensee could not have been compelled to produce in civil proceedings before the court. In the past, the TA had not required any licensee to produce document that he/she could not have been compelled to produce in civil proceedings before the court.

11. The submission suggested that a warrant should be obtained before the TA could exercise the power under the proposed section 35A. We have explained in the paper [CB(1) 1960/98-99] that such power has to be exercised from time to time on a routine basis as part of the operational functions of the TA to monitor compliance of licence conditions by the licensees. The TA will not exercise the power under the proposed section 35A in respect of searches and seizures relating to offences under the Telecommunication Ordinance as presently provided for under the Telecommunication Ordinance. The proposed arrangements do not conflict with the requirements of the Basic Law and the Bill of Rights Ordinance. A similar power of entry without a search warrant issued by a magistrate is provided in existing legislation (e.g. Amusement Game Centres Ordinance (Cap. 435) and Mandatory Provident Fund (MPF) Schemes Ordinance (Cap. 485)).

Section 36A - Authority may determine terms of interconnection

12. The submission argued that property right also included peaceful enjoyment of property without interference; taking away of property right should be subject to the existence of clear criteria for doing so, and a right to fair and equitable compensation. As explained in the paper [CB(1) 1960/98-99], the property rights over the facilities including the local loops subject to interconnection (including type II interconnection) remain to be vested in the licensee who owns the facilities/loops. The rights of the party obtaining

interconnection under the proposed section 36A are not assignable. The TA's exercise of his powers under this section is therefore not in the nature of a "deprivation of property" within the meaning of the Basic Law 105. We should note that the right of interconnection to local loops is an internationally recognized practice to ensure effective competition in the telecommunications market. Similar statutory powers are provided for regulators in the US, Germany and Australia. There are already clear statutory procedures under the section 36A that the TA should follow in making a determination on interconnection arrangements.

13. The submission argued that under the section 36A(3B), the TA might not in its determination of the terms and conditions for interconnection, provide any charges payable by one party to another. Section 36A(3B) sets out the basis for the TA to determine the interconnection charge including the relevant costing methods that the TA considers fair and reasonable. As explained before, it has been a long established practice that the TA would devise a fair and reasonable method of determining interconnection charge after consultation with the industry. In fact, it has been made clear in the "Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of the Telecommunication Ordinance" that one of the fundamental consideration for the TA is to ensure that all licensees are fairly reimbursed for the relevant costs incurred in supplying interconnection facilities and services to other licensees. The word "may" rather than "shall" is used in the section as the TA may consider it fair and reasonable to base on charging models not only cost-based, but other charging models (e.g. profit sharing) may also be considered depending on the particular situation of the case.

Section 36AA - Sharing of use of facilities

14. The submission commented that section 36AA, as presently drafted, did not require the TA to mandate that fee should be paid to the party offering the facilities for sharing. The TA, under section 36AA(6), will determine the essential terms and conditions for the sharing of the facilities. From the experience of making interconnection determination, the course of action to be taken by the TA to establish the framework for making determination on sharing of facilities would be that: (a) an industry-wide consultation will be conducted to solicit views and consultants may be engaged to advise on specific issues; (b) charging principles will be formulated after taking into account views from the industry and parties with different interests with a view to devising a mechanism for determining a fair compensation. Section 36AA(4) provides that the parties should endeavour to come to agreement which includes fair compensation for the sharing of facilities. If they fail to come to an agreement, the TA may determine the terms and conditions for the sharing of facilities. In this context, it is unlikely that the TA will determine terms other than those which constitute fair compensation.

Section 36C - Authority or court may impose financial penalties

15. The submission suggested that the drafting of section 36(3B)(b) was unclear as to whether the court could revisit the merits of the particular matter before imposing the fine. As explained in the paper [CB(1) 1960/98-99], the increase in penalty even by ten times, as proposed by the Bill, will mean that the maximum penalty that may be imposed by the TA will be increased to HK$200,000 on the first occasion and HK$500,000 on the second occasion and HK$1,000,000 on any subsequent occasion. This amount is considered to be reasonable, and not excessive, given the fact that telecommunications sector is a significant sector of the economy by virtue of its size of operation and importance to economic development and the revenues derived by the telecommunications licensees in the telecommunications markets.

16. In our consultation on the proposed legislative amendments, many submissions considered that the existing maximum penalty that the TA could impose was grossly inadequate. Some even suggested that a ten-fold increase might still be insufficient as a deterrent under certain circumstances. We have therefore concluded that the TA should be empowered to apply to the Court of First Instance that will be able to impose a higher fine. It is not our intent to preclude the Court from considering the whole case before deciding on whether the fine should be imposed.

17. The submission also suggested that under the existing section 36C, the TA might impose a financial penalty under sub-section (3) and then apply to the court for the imposition of a higher financial penalty in the event that the TA considered the penalty levied under sub-section (3) was inadequate. As explained in the paper [CB(1) 1960/98-99], there will not be any double penalty imposed first by the TA under the proposed section 36C(3), and then by the Court under section 36C(3B)(b) on the same breach.

Section 39A - Remedies

18. The submission suggested that section 39A be amended to limit the right to only those who had suffered loss and damage as a result of the breach. We have explained that it is our intention that the aggrieved party should be able to claim remedies for the loss or damage as a result of anti-competitive practices. The court will have due consideration as to whether a person may substantiate his or her claims.

Appeal Channel

19. The submission had raised concern over the provision of an appeal channel under the Telecommunication Ordinance. We have explained before that the existing system whereby appeals against the TA's decisions are by

means of judicial review has worked well and has the general support of the industry. In response to deputations' views on the appeal channel, we set out in the paper [CB(1) 1960/98-99] that HKCTV's proposal to have an appeal board under the legislature to review and quash the independent regulator's decision was out of step with the structure of government and could not be accepted as a matter of principle. We were commenting specifically on HKCTV's proposal to have an appeal board set up under the auspices of the Legislative Council. Of course there are statutory bodies such as the Town Planning Board and the Administrative Appeals Board empowered through legislation to handle appeals, as quoted in Mr Johannes Chan's Short Advice dated 5 October 1999. We believe that the concern raised has arisen from a misunderstanding of our comment.

Information Technology and Broadcasting Bureau
November 1999