Summary of deputations' views and relevant comments
on major clauses of the Telecommunication (Amendment) Bill 1999

Issues	Clause	Proposed section	Deputations' major views	Administration's response	LSD's comments on legal issues
Powers of Telecommunications Authority (TA)	3	S6A(1)	(a) Cable & Wireless HKT LTD (CWHKT) considers that the functions of TA should be clearly stipulated.	The services of the Office of the Telecommunications Authority Trading Fund (OFTATF) are 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. We do not, therefore, consider it necessary to set out explicitly the functions of the TA in the Telecommunication Ordinance. See paper [CB(1)1960/98-99].	It is desirable but not legally necessary to stipulate clearly the TA's functions in the Bill. As a public officer, TA is under a duty to act fairly and lawfully and what he does must be within the scope of the empowering provision in legislation.
		S6A(3)	(b) CWHKT considers that the law as presently drafted has no statutory requirement on the TA to give written reasons for forming an opinion on whether the licensee has engaged in anti-competitive conduct.	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	● "in the opinion of the Authority" contains a subjective element. The intention of this subjective language is to make TA the sole judge of the existence of the conditions which make the power exercisable. However, courts have been repugnant to such legislative devices for making public

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				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 appropriate disciplinary measure, in which case the TA will be obliged under section 6A(3)(b) to set out his reasons in writing. Details of our response are set out in the paper [CB(1) 1960/98-99].	authorities judges of the extent of their powers. Such subjective expressions differ only in degree from the exercise of a discretion. Indeed, despite the use of subjective language, courts have imposed limits on the exercise of power, i.e. the relevant public authority must act reasonably and in good faith, and upon proper grounds. The duty to act fairly imparts at least a general duty to give reasons. ● The drafting of S6A(3) may be improved to reflect the TA's practice of providing reasons for the opinion if the opinion forms the basis for a decision or determination under the Ordinance. ● Natural justice does not require that there should be a right of appeal from any decision. Statute may, nevertheless, provide for a right of appeal.
Tariffs and price control	4	S7F and S7G	(a) CWHKT advocates that S7F and S7G be deleted	These two sections are in line with the international practice. Price regulation is	

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			as price control regulation is inconsistent with the current competitive environment.	extremely important in ensuring effective competition in a market environment where there is a "dominant" operator. Our fundamental objective is to encourage competition in a market which is in the course of transition from some form of monopoly to full competition. Details of our response are set out in the paper [CB(1) 1960/98-99].	
		S7H	(b) The HK Society of Accountants (HKSA) suggests that "accounting practices" in the first line and second line should be replaced by "accounting policies" and "accounting principles" respectively.	The term "accounting practices" has been adopted in existing licence conditions. OFTA has issued an Accounting Manual specifying in detail the accounting practices to be adopted, including the items in the licensee's Chart of Accounts, the separation of accounts for different service segments, etc. It is well understood and accepted by the telecommunications industry as part of the current operation. See paper [CB(1)46/99-00(01)].	● In other legislation, "accounting principles" is used to refer to principles adopted in preparation of annual accounts or calculation of assets and liabilities. "Accounting practice" is referred to as "會計慣例" in the Companies Ordinance and the term is used together with "accounting principles" in that Ordinance.
		S7I	(c) CWHKT considers that S7I(3) is unnecessary and arbitrary within the meaning of the Basic Law and Bill of Rights Ordinance and should be	The power under the proposed section 7I(3) is a restrictive power necessary for the TA to exercise his functions. The TA would only disclose the information if it is in the public interest to do so and there is requirement to give a reasonable	● To determine whether a legislative provision is in breach of the Basic Law and the Hong Kong Bill of Rights (BOR) Ordinance, the court has to consider whether the

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			deleted.	opportunity to the licensee to make representations under the circumstances specified under section 7I(4). The power is in line with the international practices as many overseas telecommunications regulators (e.g. in Canada and the UK) are also empowered to require disclosure of information. Details of our response are set out in the paper [CB(1) 1960/98-99].	provision satisfies the tests of reasonableness and proportionality. The principle of proportionality requires that administrative measures must not be more drastic than is necessary for attaining the desired result. ● A discretionary power is given to TA under S7I(3). The exercise of that discretion is subject to judicial review. TA must act reasonably and in good faith, and upon proper grounds. S6A(3) requires TA to give reasons for his decision.
Competition safeguards		S7K-N	(a) Hutchison, New T&T and HK Telecommunications Users' Group (HKTUG) support the proposed sections.	We welcome the support from Hutchison, New T&T and HKTUG.	
			(b) CWHKT proposes to delete "in the opinion of the Authority " and where applicable, to replace "licensee" with "person" in S7K to S7N.	● For the telecommunications market where there was a monopoly in the past and full competition has yet to be achieved in many sectors of the market, it is in the public interest to have regulatory measures against anti-	● Please see LSD's comments on S6A(3) above. ● Article 22 of the BOR does not require perfect equality. It forbids class legislation, but does not forbid

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			It considers that in the absence of a general competition law, the proposal in the Bill to single out licensees alone is a violation of the right to "equality before and equal protection of the law" protected by Article 22 of the Bill of Rights Ordinance on the ground that it would not cover those who are not licensees but whose conduct has the purpose or effect of restricting competition in a telecommunications market.	competitive behaviour of licensees. ● As explained in the paper [CB(1) 1960/98-99], there is no question that our measures against anti-competitive behavior of licensees falls within the scope of Article 26 of the BOR as the differentiation is not based on grounds involving immutable personal characteristics (e.g. race, colour, sex).	classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited in the objects to which it is directed. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. As all licensees will be subject to S7K-S7N if the Bill is passed, it would appear that there is no violation of Article 22.
				An all-embracing competition law is outside the context of the Telecommunication (Amendment) Bill. The special characteristics of the telecommunication markets justifies the sector-specific approach proposed in the Bill.	● However, the Bills Committee and the Administration may consider, as a matter of policy, whether it is appropriate to extend the control to persons who are not licensees but whose conduct has the effect or purpose of restricting

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					competition in a telecommunications market, as proposed by CWHKT. Such a proposal may, however, affect the interest of non-licensees who are carrying on business legitimately.
New licence requirements	5	S8	HKTUG supports the amendment but considers the new requirement for a licence to offer in the course of business any telecommunications service a bit too broad.	For consumer protection, a system of regulatory control through licensing should be set up. The TA does not envisage that the licensing system would impose unnecessary administrative burden on the industry. Details of our response are set out in the paper [CB(1) 1960/98-99].	
Right of access	7	S14	(a) CWHKTCSL, Hutchison, New World, Peoples, SmarTone, Sunday and industry groups support the proposed amendments. (b) The Consumer Council considers that in the absence of general competition law, it supports the proposed role of TA in arbitrating disputes on access to	We welcome the support from Hutchison, New T&T and HKTUG. We welcome the support from the Consumer Council.	

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			infrastructure which is vital to ubiquitous coverage of the telecommunications network. (c) The two railway corporations do not support the proposal which they claim will give an unfettered right of access to licensees and affect the safety of the railways.	● There is no question of railway safety being compromised under the proposed arrangement. KCRC and MTRC will still have the right to require that the installations of the mobile network operators should be compatible with the railway systems and meet the safety standards required. Details of our response are set out in the table of the paper [CB(1) 1960/98-99]. ● As agreed at the Bills Committee, the TA has already drafted guidelines on the exercise of right of access by mobile network operators under the proposed section 14(1A) to premises of MTRC and KCRC and forwarded the draft to the railway companies. The TA will be meeting with the railway companies to discuss the draft. ● With regard to the LSD's research on the regulatory regime in the UK, we	● In UK, operators are given a right to place telecommunication apparatus across railways, canals and tramways, without the agreement of the person with control of the railway, etc., subject to the operator giving that person a notice containing a plan and section of the proposed works. The controller may object to the works and such objection may be referred to an arbitrator appointed by agreement between the parties concerned. The arbitrator may award such sum as he may determine in respect of compensation to the person who objects to the works in respect of loss or damage sustained to that person as result of the carrying out of the works,

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				should clarify that under its Telecommunications Act 1984, a telecommunications operator may be granted powers under the telecommunications code by the Secretary of State. Such an operator must obtain an agreement with the occupier of land before it has the right for the installation of telecommunications apparatus on the land. In the absence of an agreement, the operator may apply to the court for an order to confer the right and the court may determine the financial terms which appear to the court as fair and reasonable. Our understanding on determination by the court in this regard is similar to the findings by BOT tunnels in their submission to the Bills Committee dated 25 October 1999. ● The reference to an arbitrator is found in paragraph 13 of the UK Telecommunications Code in relation to "linear obstacles". It applies to telecommunications operators who "cross any relevant land with a line". It may apply to fixed telephone lines (as we know in the local situation) or overhead lines (which are common in	and consideration payable to that person for the right to carry out the works. ● Any telecommunications apparatus so installed must not interfere with traffic on the railway, canal or tramway.

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				the UK) but does not apply to mobile telecommunications.	
			(d) BOT tunnel companies strongly object to the proposed amendments on grounds, inter alia, that the proposal is contrary to both the letter and spirit of the BOT agreements with the Government, is apparently in contravention of a number of Articles in the Basic Law and damages free market economy. The arbitrator, if any, should not be TA but an independent body such as a Judicial Tribunal or a Competition Commission. There should also be an appeal procedure. They consider that tunnels should be exempted from the "right of access" provisions. Sun Hung Kai and Wharf Estates Management object on	● When we prepared the proposed section 14(1A), we were aware of the relevant provisions in the tunnel legislation. The section, as presently drafted, has already taken into account the concerned provisions in the tunnel legislation. We believe that there is sufficient public interest to warrant the setting up of a mechanism to ensure ubiquitous coverage of mobile networks in shielded areas, including tunnels, if commercial agreement cannot be reached under the existing framework. However, the Bill provides that such power of intervention must satisfy statutory checks and balances stipulated in section 14. ● TA's determination is subject to public scrutiny through the publication of the reasons for his determination. The proposal is supported by the telecommunications user groups and the Consumer Council. Details of our response are set out in the papers [CB(1)141/99-00(01), CB(1)46/99-00(03),	● The legislation on BOT tunnels contains a provision which provides that notwithstanding anything to the contrary in any other Ordinance no person other than the relevant tunnel company may install any utility within the tunnel area without the consent of the company concerned. The right of access provision in this Bill appears to contradict the relevant provision in the tunnel legislation. ● Whether the provision contravenes the Basic Law would depend on the reasonableness and proportionality of the provision. ● In UK, an authority with control of a tunnel or subway is given the power to - (i) carry out, or to authorise another person to carry out, any works in relation

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			similar grounds. The BOT tunnel companies consider that the guidelines on determination of access fees should be included in the Bill.	CB(1)1960/98-99, CB(1)1860/98-99(01)] and our recent paper to the Bills Committee issued on 13 November 1999.	to that tunnel or subway for or in connection with the installation, maintenance, adjustment, repair or alteration of telecommunication apparatus; and (ii) enter into agreements, on such terms (including terms as to the payments to be made to the authority) as it thinks fit, in connection with the installation etc. of telecommunication apparatus.
			(e) The Real Estate Developers Association of HK can accept that access be granted subject to payment of fees, but requests that an independent body should be the arbitrator on terms and conditions of access.	As stated in our previous response to the Bills Committee [CB(1)141/99-00(01), CB(1)1860/98-99(01)], the TA will carry out research and analysis on the relevant factors and considerations, including the commercial consideration put forward by landlords/tunnel operators, to determine the appropriate charging models. As agreed at the Bills Committee, we will prepare an outline of the draft consultation paper on the	In UK , where private land (as opposed to land used as a railway, tramway, etc.) is involved, an operator may, in the absence of agreement, apply to court for an order conferring the right of establishing and running the operator's system, etc. The court will make an order only if satisfied that any prejudice caused by the order is-

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				charging principles to be adopted by the TA and present it to the Bills Committee.	● capable of being adequately compensated for by money; or ● outweighted by the benefit accruing from the order to persons whose access to a telecommunications system will be secured by the order. Any compensation awarded will include compensation relating to any prejudice caused by the installation of apparatus to a landowner's interest in neighbouring land as well as land in which apparatus is actually installed.
Spectrum utilization fee	16	S32I	CWHKTCSL considers that the principle of charging for spectrum usage may result in more expensive mobile telecommunication services and less efficient spectrum utilization. New World and SmarTone have expressed concern on the sale and lease of spectrum.	The levying of spectrum utilisation fees is implemented in many overseas jurisdictions to manage the spectrum efficiently. The current formulation provides that the TA will consult the industry before determining the range of spectrum for which a utilisation fee should be conducted, and that any such fee should be introduced by Regulation. The provision would ensure that the industry's and the legislature's views would be taken into consideration in determining whether certain spectrum use should be subject to a spectrum	

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				utilization fee. Details of our response are set out in the table of the paper [CB(1) 1960/98-99] and the paper [CB(1) 141/99/00 (03)].	
Numbering plan	16	32F	(a) Deputations have not expressed any objection. (b) The Bills Committee may wish to see whether it can agree on the proposed use of the proceeds from sales/auctions of telephone numbers for the Administration's further consideration.	The proposal to set up a Special Number Fund and to use the proceeds for charity, as well as education, research and development and activities relating to telecommunications was made in the light of the views in previous public consultations. Details of our response are set out in the paper tabled at the last Bills Committee meeting held on 21 October 1999.	
Inspection of records, documents and accounts	18	S35A	(a) HKSA considers that TA's powers to enter the premises of a licensee and to inspect and make copies of documents, etc. too broad.	Section 35A is modelled on an existing licence condition. This power has to be exercised from time to time on a routine basis as part of the operational functions of the TA to monitor the status of compliance of the licensees. In overseas jurisdictions such as Canada, the UK and Australia, their telecommunications regulators are also given similar statutory powers to enter and inspect any documents and information relevant to the exercise of their functions and powers. Details of our response are set out in the papers [CB(1)141/99-00(03)],	

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				[CB(1) 46/99-00(01)] and [CB(1) 1960/98-99].	
			(b) CWHKT considers that the power of entry, search and seizure under S35A interferes with one's privacy and such interference must not be arbitrary or unlawful under the Bill of Rights Ordinance and the Basic Law. They suggest that S35A be amended to require the TA to seek a warrant from a magistrate in order to be able search a licensee's premises and compel the production of information. It also proposes that S7I and S35A be consolidated.	● The TA is not intended to compel the production of documents which could not have been compelled to produce in civil proceedings. ● As pointed out by the LSD, a search warrant issued by a magistrate is not absolutely necessary in order to satisfy the requirements of the Basic Law and the BOR if the purpose of entering and inspecting the licensee's business premises is to ascertain whether or not the provisions of the Ordinance or the licence conditions are complied with. We note LSD's comment that a similar power of entry without a search warrant is provided in existing legislation e.g. the Amusement Games Centres Ordinance (Cap. 435) and the Mandatory Provident Fund Schemes Ordinance (Cap. 485). ● Section 101 of the UK Telecommunications Act mainly concerns the protection of personal data. Such protection is safeguarded by the Personal Data (Privacy)	● If information supplied by a licensee consists of personal data collected by the licensee, the Personal Data (Privacy) Ordinance (Cap. 486) will apply to such data. ● The Administration may consider imposing restrictions on disclosure of information in line with S101 of the UK Telecommunications Act 1984 insofar as it relates to information relating to the private affairs of a business (copy of section attached as Annex A to LegCo Paper No. LS18/99-00 circulated vide CB(1)176/99-00) ● Express provision should be included to stipulate that TA will not compel the production of privileged documents. ● The Administration has confirmed that the disclosure provision in S7I(3) is not

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				Ordinance (Cap. 486) ("PDO") in Hong Kong. Since PDO also applies to public bodies, the TA in exercising his power, shall have due regard to his legal obligations under PDO. Accordingly, we consider that it is not necessary to make an express provision modelled on section 101 of the UK Telecommunication Act 1984. ● Section 35A is intended to empower the TA to enter the premises of the licensees to inspect records, documents and accounts as a routine check to ensure the licensee's compliance of the Ordinance, but is not intended to investigate offence under the Ordinance. Under the existing section 35(1) of the Telecommunication Ordinance, the TA is already empowered to enter and search any place in which he reasonably suspects that there is anything in respect of an offence committed under this Ordinance or contain evidence of an offence under this Ordinance. Under the existing section 35(2) of the Ordinance, entry to and search of premises being used as private dwelling is allowed only under the authority of a magistrate	applicable to information obtained under S35A. ● If the purpose of entering and inspecting the licensee's business premises is to ascertain whether or not the provisions of the Ordinance or the licence conditions are complied with, it appears that a search warrant issued by a magistrate is not absolutely necessary in order to satisfy the requirements of the Basic Law and the BOR. A similar power of entry is provided in existing legislation e.g. Amusement Game Centres Ordinance (Cap. 435) and Mandatory Provident Fund (MPF) Schemes Ordinance (Cap. 485) ● However, a court warrant is required under Cap. 435 for entering and searching any place if the entry to and search of the place is for the investigation of an offence under that Ordinance. Under Cap. 485, entry to and search of premises being

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				warrant for the purpose of seizure of anything relating to an offence under the Ordinance. A similar requirement for search warrant in searches of dwelling places is provided under existing legislation e.g. the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and the Noise Control Ordinance (Cap. 400). ● The TA is bound by the administrative law duties under all circumstances to act lawfully and not to exercise his power arbitrarily. In addition, the TA is guarded by the administrative rules of natural justice to exercise the power reasonably for the purpose of performing his statutory functions.	used as private dwelling is allowed only under the authority of a court warrant for the purpose of investigating a contravention under that Ordinance.
Interconnection and sharing of facilities	19 & 20	S36A & 36AA	(a) Three of the four FTNS operators and HKTUG support the interconnection proposal. (b) CWHKT considers that the proposal will inevitably encroach on the property right of one	We welcome the support from the three FTNS operators and HKTUG. There is no question that the proposal will constitute a deprivation of property within the meaning of Articles 6 and 105 of the Basic Law. We have built in	● It would appear that "deprivation" in Article 105 refers to taking away from the property owner his entire

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			of the licensees and thereby constitutes a deprivation of the property. Moreover, the exercise of this power may contravene Articles 6 and 105 of the Basic Law.	adequate statutory checks and balances [e.g. the public interest consideration under sections 36A(2) and 36AA(1) and (3)] on the TA's exercise of powers under the proposed sections 36A and 36AA. We believe the current formulation is fair and reasonable for the purpose intended. Details of our response are set out in the paper [CB(1)1960/98-99] and the paper "The Administration's response to the Cable & Wireless HKT's submission dated 20 October 1999 to the Bills committee on Telecommunication (Amendment) Bill 1999" dated [9 November 1999].	property right, which does not seem to be the case in interconnection. ● However, the right to the use and disposal of property protected under Article 105 may be relevant here. Such right is subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Any limits imposed by statute must satisfy the tests of reasonableness and proportionality. ● The right to compensation is expressly provided under Article 105 for lawful deprivation of property. There is, however, no such provision in relation to use and disposal of property.
Increase in penalty	22	36C	(a) Three of the four FTNS operators support the proposal. (b) CWHKT requests that TA's power to impose fines should be subject	We welcome the support from the three FTNS operators. ● The increase in penalty by ten times, as proposed by the Bill, is considered to be reasonable, and not excessive,	● Natural justice embraces the right to a fair hearing in the case of administrative acts or

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			to review by an independent body. It also requests that licensees should have the right to ask the court to re-examine TA's decision before imposing penalties of such magnitude.	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. The proposed penalties are not excessive when set in the context of the relevant penalties in overseas jurisdictions. In our consultation on the proposed legislative amendments, some respondents suggested that a ten-fold increase might still be insufficient under certain circumstances and 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. ● The financial penalty is a civil debt due to the Government and will be recoverable in proceedings before the District Court or the Court of First Instance under existing section 36C(5). A similar provision is found in section 44 of the Television Ordinance. Moreover, under the existing section 36C(4), the TA already will not impose the penalty before the licensee has been given	decisions affecting rights. If this principle is applied to the present case, before imposing financial penalties on a licensee, the licensee should be given reasonable opportunity to make representations. As this right has been provided in other provisions of the Bill (e.g. S7I(4)), a similar provision should be included in S36C. ● Natural justice does not require that there should be a right of appeal from any decision. ● However, since a financial penalty imposed under S36C may be recovered in proceedings before the District Court or the Court of First instance (depending on the amount of penalty), the Administration may consider adding a provision similar to S45C of the MPF Schemes Ordinance. That section provides that on the hearing of proceedings brought for recovery of financial penalty

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				reasonable opportunity to make representations.	imposed by the MPF Authority, the court may, if satisfied that the defendant has failed to comply with a requirement or standard, order the defendant to pay the prescribed financial penalty or a smaller amount as appropriate. It is a defence to proceedings under S45C that it was not reasonably practicable to comply with the requirement, etc. Such a provision, if added here, would allow the court to hear the merits of TA's determination.
				● Advice from the Legal Services Division of OFTA is noted. We will keep in view the legislative progress of the District Court (Amendment) Bill 1999.	● The Administration may note that the District Court (Amendment) Bill 1999 proposes to raise the civil jurisdiction of the District Court to $600,000. Subject to passage of that Bill, S36C(5) may need to be amended to tie in with the revised jurisdiction of the District Court.

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			(c) CWHKT considers that the disclosure of information upon the demand of TA under proposed S36C(3A) could deprive a licensee of the protection afforded by the rules of evidence and the rules of civil and criminal procedure. It proposes that S36C(3A) be deleted.	It is not our intention for the Bill to deprive a licensee of the protections afforded by the rules of evidence and the rules of civil and criminal procedure.	Express provision may be included to give licensees the protection against disclosure of privileged documents.
			(d) CWHKT proposes that S36C(3B) should be amended to clarify that penalties imposed by the Courts could only be imposed instead of any fine which TA is otherwise empowered to impose.	There will not be any double penalty first by the TA under the proposed section 36C(3), and then by the Court under section 36C(3B)(b) on the same breach. Only when the TA considers a financial penalty inadequate under section 36C(3) may he make an application to Court under section 36C(3B)(b). The section, as presently drafted, already reflects this intent.	The drafting of the S36C needs to be improved to avoid the possible construction that TA's power under S36C(3B) is additional to his powers under S36C(1) and (2).
			(e) CWHKT proposes that S36C(3B) be amended to require TA to institute proceedings for a Court-imposed penalty immediately upon a	● The proposed penalty under section 36C is administrative in nature. We welcome the advice from the LegCo's Legal Services Division that the contravention of the provisions of the	● Article 11 of the BOR deals with "criminal charge". Cap. l defines "offence" as including any crime and any contravention or other breach of, or failure to comply with,

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			breach of the Ordinance, instead of within a period of 3 years as such delay may amount to violation of Article 11 of the Hong Kong Bill of Rights.	Telecommunication Ordinance is not criminal in nature. ● There is always an obligation on the TA to act promptly without undue delay. The three-year period is appropriate bearing in mind that the TA may need time to consider the relevant representations and collect relevant information before making decisions on whether the licensee has committed the breach and whether it is appropriate to apply to the court for a higher penalty. Details of our response are set out in the paper [CB(1)1960/98-99].	any provision of any law, for which a penalty is provided. Arguably, contravention of a provision of the Telecommunication Ordinance is an offence under Cap. 1 as it may lead to the imposition of financial penalty under S36C. However, the financial penalty so imposed is a debt due to the Government. This may suggest that such contravention is not intended to be criminal in nature. ● In the human rights context, based on the factors adopted by the European Court of Human Rights in deciding whether a given 'charge' is a criminal charge, it would appear that a breach of a licence condition or the competition provisions as introduced by the Bill which may lead to imposition of financial penalty may not be a criminal charge under Article 11 of the BOR.

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					The Bill does not propose that instead of imposing a financial penalty, criminal proceedings could be instituted for such breach. ● As a general legal policy, it is desirable that a fair hearing should be given to the alleged offender. The period of 3 years may be shortened to prevent undue delay in dealing with the breach.
TA's power to obtain information from non-licensees	23	S36D	(a) HKSA has expressed concern about the extensive grounds for the TA to be able to obtain information from third parties.	● The new section 36D empowers the TA to apply to a magistrate on oath for warrants to seek information or document from non-licensees if the information or document is relevant to the performance of the TA's functions or the exercise of his powers. If the magistrate considers that the TA has abused this provision, the application for a warrant will not be granted. We have also reviewed how overseas jurisdictions such as the UK, Australia, Canada and Singapore empower their telecommunications regulators to require production of information from non-licensees. In those cases, the regulators may by notice in	● In the UK Telecommunications Act 1984, there is a provision giving the regulatory body power to require any person to produce information for a relevant purpose. "Relevant purpose" is defined as purpose connected with the investigation of certain offences under the Act and the exercise of certain functions of the regulatory body. ● There is an express provision in the UK Act giving licensees the protection against disclosure of

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				writing require any person to produce documents or furnish information for the purpose of investigation of any offence under the relevant telecommunications legislation on the exercise of the powers of the regulators. Our new section 36D is more restrictive than the powers granted to other overseas regulators, requiring the TA to go to the court for an order to obtain information from a non-licensee as a "check and balance" measure. Details of our response are set out in the papers [CB(1)46/99-00(01) and CB(1)141/99-00(03)]. ● It is not our intention for the Bill to deprive a licensee of the protections afforded by the rules of evidence and the rules of civil and criminal procedure.	privileged documents. Similar protection should be given here.
			(b) Hutchison and New World support the proposed section.	We welcome Hutchison's and New World's support to the proposed section.	
Civil remedy	25	S39A	(a) New World and HKTUG support the proposed section.	We welcome New World's and HKTUG's support to the proposed section.	

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			(b) CWHKT suggests that the provision be amended to grant a private right of action to anyone who might "sustain loss or damage" as a result of anti-competitive conduct. It also points out that there is no private right of action against persons who are not licensees.	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.	The UK's 1984 Act confers on any person who may be affected by contravention of a licence condition a right of action if the contravention causes that person to sustain loss or damage. It would appear that "sustaining loss or damage" is more specific than "aggrieved".
Appeal body	N/A	N/A	(a) A number of telecommunications services operators and the Consumer Council considers that some channels should be in place for appeals against decisions of TA. Their proposals include appeals to the Courts [to the Administrative Appeals Board], setting up an independent body or a Competition Appeal Body.	Issues of the telecommunications industry that the TA has to deal with are highly technical and require timely action in response to rapid changes brought by technological advancements. The decisions on many issues (e.g. broadband interconnection) also involve important economic implications. 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 during the consultation stage.	● In UK, there is no appeal against the merits of the regulatory body's decision relating to a contravention of licence conditions by a licensee. Under the UK's 1984 Act, if the telecommunications operator is aggrieved by an order made by the regulatory body for breach of a licence condition and desires to question the validity on the ground that the making of an order was ultra vires or that any of the statutory procedural requirements have not been complied with in relation to the order, the

Issues	Clause	Proposed section	Deputations' major views	Administration's response	LSD's comments on legal issues
					operator may make an application to the court and the court may quash the order if it is satisfied with either of the grounds. ● Judicial review is not concerned with reviewing the merits of the decision but the decision-making process. Given that the number of decisions made by TA will increase and more people (not only licensees) are likely to be affected by his decisions if the Bill is enacted, judicial review may not be an appropriate and adequate mechanism for reviewing TA's decisions.
			(b) Members of the Bills Committee consider that notwithstanding the remedy of judicial review, the Bill should provide for an appeal mechanism against TA's decisions.	Please refer to Administration's response to (a) above.	Please refer to LSD's comments to (a) above.

*LSD: Legal Service Division of the LegCo Secretariat