The Administration's Response to
the Cable & Wireless HKT (CWHKT)'s Submissions
on the Legal and Constitutional Issues
Arising from the Telecommunication (Amendment) Bill 1999

INTRODUCTION

CWHKT has made the following submissions to the Bills Committee to raise concerns over the legal and constitutional issues arising from the Telecommunication (Amendment) Bill 1999 -

(a) First submission (First Submission) as supplemented by a Joint Opinion issued by Michael Thomas QC and Johannes Chan (Joint Opinion) dated 13 July 1999;

(b) Short Advice from Johannes Chan (Short Advice) dated 5 October 1999; and

(c) Further Representations of CWHKT dated 1 December 1999 (Further Representations).

In these submissions, CWHKT raised concerns over the constitutionality and legality of certain provisions in the Bill. We strongly disagree with the views that these provisions fell short of the Basic Law or Bill of Rights requirements. In our previous response to the Bills Committee [CB(1)(01) 1960/98-99, CB(1) 358/99-00, CB(1)372/99-00(02)], we have set out that there is no question that the provisions of the Bill are unconstitutional. The Office of the Telecommunications Authority (OFTA) has engaged a Queens' Counsel from UK, Mr Richard Fowler, QC, for advice. He is one of the leading UK practitioners in the field of competition and European law. He has particular expertise in utility regulation, where his practice includes the impact of human rights law on utility regulation. We set out below our point-by-point response to CWHKT's concerns which has been cleared by Mr Fowler.

2. At the outset, we would like to clarify one important point. We have explained to the Bills Committee that many of the powers conferred on the Telecommunications Authority (TA) by the Bill are largely existing powers under the conditions of the licences issued to telecommunications operators. In response, CWHKT claimed that legislation was subject to different constitutional constraint, which was not a matter that arises in relation to the contractual licence arrangements entered into between the TA and the licensees. Without doubt, the Administration fully recognises that there is a difference in the constitutional context as between

agreed licence conditions and legislation. However, in considering whether the legislation would interfere with existing rights, it is impossible to ignore the fact that those existing rights of CWHKT are circumscribed by the licence conditions. The provisions in the Bill to which CWHKT raised concerns relate to licensees. Those provisions will affect CWHKT only in their capacity as a licensee and for so long as they choose to remain a licensee. Their rights in that capacity are already circumscribed by the licence. For example, at paragraph 54 of the Joint Opinion, it is stated that interconnection and facility sharing would destroy the existing monopoly of the licensee and therefore constitute a deprivation of property. But the existing licences do not confer any monopoly rights as claimed. Under its existing Fixed Telecommunication Network Services Licence, CWHKT's rights are already subject to the powers of the TA to determine interconnection and mandate facility sharing.

DEFINITION OF THE FUNCTIONS AND POWERS OF THE TELECOMMUNICATIONS AUTHORITY

CWHKT's submission

3. CWHKT is of the view that express provisions should be made in the Bill specifying the functions of the TA, and that the TA's powers should be used only in the exercise of his stated functions.

Administration's Response

4. The services of OFTA Trading Fund are set out in Schedule 1 of the Legislative Council Resolution on the establishment of the OFTA Trading Fund under the Trading Funds Ordinance. As a matter of law, the rule governing *ultra vires* act has restricted the functions of the TA to the statutory powers conferred on him. The section, as cited by CWHKT, which describes the functions of the TA as contained in the 12th draft of the Bill issued for industry consultation in 1998, to a large extent, repeated the powers as conferred by the Ordinance (e.g. facilitate interconnection, administer numbering plan and promote competition) on the TA. In other ordinances, e.g. the Personal Data (Privacy) Ordinance, where the functions of the statutory body are enumerated in the ordinance, there is usually an all-embracing provision. That is: "perform such other functions as are imposed on him under this Ordinance or any other enactment." The section is usually not intended to be an exhaustive list, but instead a general outline of the functions as confined by the powers granted and the policy of the government. We do not, therefore, consider it necessary to set out explicitly the functions of the TA in the Ordinance.

5. We note that the Assistant Legal Adviser of the Legal Services Division (LSD) of the Legislative Council also takes the view that, although it is desirable, it is not legally necessary to stipulate clearly the TA's functions in the Bill. As a public officer, the 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.

APPEAL AGAINST DECISIONS OF THE TELECOMMUNICATIONS AUTHORITY MADE UNDER SECTIONS 7K TO 7N AND SECTION 36C

6. In the Further Representations, CWHKT has summarised its objection to the lack of an appeal channel on the grounds that the Bill confers broad powers on the TA to impose financial penalties on a licensee (but not others) for "breaches" of the proposed sections 7K to 7N and to give third parties a private right of action against the licensee based on such "breaches", all of which are based solely on the "opinion" of the TA. CWHKT counsel's views, as expressed in the Joint Opinion, are that these provisions are unconstitutional and in violation of the right to a fair hearing and the presumption of innocence. Our response to their views are set out in paragraphs 7-42 below.

TA's Power to Impose Financial Penalty under Clause 22 of the Bill

CWHKT's submission

7. In CWHKT's view, Clause 22 of the Bill provides far-reaching amendments to the powers of the TA under section 36C of the Ordinance.

8. CWHKT claims that under the present regime, the power of the TA to impose financial penalties under section 36C is subject to a requirement that the licensee must have failed to comply with a direction under section 36B(1) and the TA's power to issue directions under section 36B is subject to a number of safeguards against the abuse of power:

- the requirement to afford the licensee "reasonable opportunity to make representations";

- the public law duty to give reasons for administrative decisions which have a serious effect on a person; and

- the supervision by the courts both in relation to the legality of a decision and, to a limited extent, a review of the merits.

9. In CWHKT's view, the proposed clause 22 will effectively remove these safeguards:

- there is no requirement for the TA to issue a direction before imposing financial penalties which, in turn, removes the requirement that a licensee be given reasonable opportunity to make representations;

- clause 4 makes particular forms of conduct, including "breaches" of sections 7K to 7N, subject to the TA's power to impose financial penalties based solely upon "the opinion of the Authority", which, in turn, poses two problems:

  new section 6A expressly exempts the TA from the duty to give reasons for making "opinions", so that the licensee may never know what facts were before the TA or why the TA thought the licensee's conduct was objectionable;

  in order to activate his power to impose a financial penalty, the TA need only prove his "opinion": the burden of proof falls squarely on the licensee to establish its "innocence", without knowing the factual or judgmental basis for the TA's "opinion.

Administration's Response

Right to make representation

10. Clause 22 is not intended to give the effect, as envisaged by CWHKT, to relieve the TA of the obligation to afford a reasonable opportunity to the licensee to make representation. As a matter of fact, under the existing regime, the TA has observed the common law rules of natural justice and the self-imposed procedures, which have embodied such procedural safeguards.

11. The intention of the Bill is not only to preserve the existing procedural safeguards, but to enhance the model further by requiring the TA to give reasons for his decisions in writing (section 6A(3)) and to give regard to relevant considerations, when making any decision (including the decision to impose penalty under section 36C). For the purpose of keeping the TA's regulatory actions in check, the affected

parties would be given, as part of the established procedures, an opportunity to make representations under the proposed section 6A(3). Apart from complying with the statutory obligation of inviting representation, as a matter of administrative law, the TA has also observed the rules of natural justice of affording the affected parties a fair hearing. A fair hearing demands that decision-makers, in the reaching of decisions, should give the affected persons an opportunity to make representation, to submit evidence, to be aware of the grounds on which the decision is made. Nevertheless, for the sake of clarity, the Administration will consider to make it express obligations on the TA to give reasonable opportunity to the affected parties to make representations before imposing the penalty under section 36C, to take such representations into account and to give reasons for his decisions. Details of our policy on the procedural safeguards are set out in another paper "Policy Paper on Procedural Safeguards" submitted by the Administration to the Bills Committee.

Duty to give reasons

12. CWHKT is concerned that under the proposed sections 7K (anti-competitive practices), 7L (abuse of dominant position), 7M (misleading or deceptive conduct) and 7N (non-discrimination) whether the licensee is in breach of such sections depends on whether the TA forms such an opinion. Nevertheless, the omission of the word "opinion" in section 6A(3)(b) is not a deliberate act of releasing the TA from giving reasons for forming such "opinions". Section 6A(3)(a) has already imposed an obligation on the TA to give regard to relevant considerations when forming an opinion.

13. In practice, in case of any breach of the provision of the Ordinance or declaration of dominance, the TA may enforce the provision by making decision as to whether to issue direction, impose penalties, suspend or revoke the licence. Accordingly, forming an "opinion" will not be a stand-alone exercise. When the TA forms an opinion that a licensee is in breach of any of sections 7K, 7L, 7M or 7N or is a dominant operator, the TA will at the same time decide the kind of disciplinary measure to enforce the provision, in which case the TA will be obliged under section 6A(3)(b) to give written reasons.

14. This is the legislative background, but as a matter of practice under the existing regime, 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. As pointed out in the Joint Opinion, although the common law does not impose a duty to give reason, there is an increasingly recognised public law duty to give reasons for administrative decisions

that have a serious effect on a person.[1]

15. In fact, it has been an established practice of the TA that whenever he considers any significant decisions whether on matter of policy (e.g. broadband interconnection), making determination of interconnection, forming an "opinion" whether a licensee is dominant operator or issuing direction etc, he will consult in advance on the issues that must be taken in account, to explain the reasons for the decisions arrived at, and to publish, so far as permissible, the financial and other information considered justified in arriving at the conclusion. Such practice is reflected in the policy statements (i.e. TA Statement), determinations and reports made public by the TA on OFTA's website. The new section 6A(3) is in fact a codification of the present practice. For example, detailed reasons and analysis have been given in the report explaining the grounds on which the TA formed his "opinion" in the recent application made by CWHKT for declaration of non-dominance.

16. Accordingly, in the Administration's view, given the practice and statutory obligation of the TA to give reasons, it is a hypothetical situation, as alleged by CWHKT, that the TA need only to prove his "opinion", such that the burden of proof falls on the licensee to establish its "innocence", without knowing the factual or judgmental basis for the TA's "opinion". Nevertheless, for the sake of clarity, the Administration will consider to make it an express obligation on the TA to give reasons for forming an "opinion" under sections 7K to 7N. For more details about the procedural safeguards that we intend to codify in the Bill, please refer to the Policy Paper on Procedural Safeguards. We strongly object to CWHKT's claim that Clause 22, as presently drafted in the Bill, remove the procedural safeguards that the TA has been undertaking.

Constitutionality of the TA's Power to Impose Financial Penalties

17. CWHKT counsel's views, as expressed in the Joint Opinion and Further Representations, are that the power given to the TA to impose financial penalties under section 22 is in breach of articles 10 and 11 of the Bill of Rights (implementing Articles 14(1) and 14(2) to (7) ICCPR, respectively) for the following reasons:

(1) Criminal Charge

CWHKT's submission

[1] cited in the Joint Opinion: *Oriental Daily Publisher Ltd. v Commissioner for TELA* [1997] 3 HKC 93

18. In CWHKT's view, imposition of financial penalty is, in effect, a "criminal process". The TA's ability to impose fines should be subject to review by an independent body. See paragraphs 10 to 15 of the Joint Opinion.

Administration's response

19. Section 36C confers on the TA the power to impose "administrative penalty" and such penalty is not "criminal" in nature. The administrative penalty is imposed consequent upon an administrative finding against licensees that have committed acts constituting breach of licence conditions, provisions of the ordinance or directions.

20. The penalty is disciplinary in nature and for preventive purposes. Frequent breaches of licence conditions or anti-competitive provisions of the Ordinance will prejudice the development of a fair and competitive environment for the operators. The increase in penalty even by ten times, as proposed by the Bill, will make the maximum penalty that may be imposed by the TA increased to HK$200,000 on first occasion and HK$500,000 on the second occasion and HK$1,000,000 on subsequent occasion. The level of penalty was one of the major issues that the public had commented during the public consultation. Many of the submissions to the "1998 Review of Fixed Telecommunications - A Considered View" even considered that the proposal to increase the penalties by a factor of 10 was insufficient. When making this provision, we have taken into account the relevant penalties in overseas jurisdictions. (The EEC Council Regulation No. 17/62, Article 15(2), provides for a maximum of 10% of turnover in the preceding business year of the entity participating in the infringement of anti-competitive rules). This amount is considered to be reasonable, and not excessive, to achieve the purpose of a preventive effect in view that telecommunication sector is a significant sector of the economy by virtue of its size of operation and importance to economic development. The TA will exercise his discretion of imposing a proportionate amount of penalty taking into account the gravity of the breach. If the breach in question is so grave that warrants sanction under the proposed section 36C(3B), the TA is required to make an application to the Court of First Instance as a safeguard against any likely abuse of powers and to afford the licensee a fair hearing by an independent tribunal.

21. Although the penalty may, to certain extent, intend to have "deterrent" effect, it should not be the conclusive factor determining whether section 36C is "criminal" in nature for the purpose of ICCPR Article 14. In *R v Securities* and

Futures Commission, ex parte Lee Kwok-hung[2], Hon. Jones J in High Court stated that:

> "The Tribunal, if it decides that insider dealing has taken place, may make one of the orders referred to under section 23(1). However, these penalties are quite clearly disciplinary in nature and do not reflect criminal sanctions and relate exclusively to the pecuniary benefit derived or loss avoided by the insider dealing together with a disqualification for loss of office…**Whilst I accept the validity of the decisions in Engel and Kaplan, they relate to cases heard in other jurisdictions and that it is necessary to examine the present case in Hong Kong context.** (*emphasis added*) Although the classification of the Tribunal is not conclusive, the history of the legislation in Hong Kong clearly indicates that it was not intended that insider dealing be treated as a criminal offence…I am therefore quite satisfied that the proceedings before the Tribunal are not criminal or quasi-criminal, but are disciplinary in nature and form part of the regulatory system of the financial markets."

22. The above statement indicates that the Hong Kong court does not take the wholesale adoption of European authorities approach. Their relevance would be examined on a case by case basis. As a matter of fact, the cases cited in the Joint Opinion to support the argument that section 36C is criminal in nature are distinguishable as explained in paragraphs 23 to 26 below.

23. The Joint Opinion points out that in *R v Chan Suen Hay*[3], the District Court held that a disqualification order under section 168E of the Companies Ordinance constituted a "criminal penalty" within article 12 of the Bill of Rights. A distinction, however, could be drawn between the disqualification order and the financial penalty under section 36C. The disqualification order under section 168E was triggered by a prior criminal conviction. In contrast, the penalty under section 36C is not triggered by prior criminal conviction.

24. The case of *Societe Stenuit v France*[4] as raised in paragraph 15 of the Joint Opinion is also distinguishable from the sanction envisaged under section 36C. In that case, the European Commission of Human Rights held that the European equivalent of ICCPR Article 14 applies to the proceedings by which the Minister of Economic and Financial Affairs imposed a fine upon the applicant for engaging in anti-competitive behaviour in relation to a cartel operating between companies

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[2] (1993) 3 HKPLR 39; Unreported case [1992] MP 3039

[3] (1995) 5 HKPLR 345

[4] (1992) 14 EHRR 509

tendering for public works. The criminal aspect of that case is, first, that the relevant statutory provision pursued the aim of maintaining free competition within the French market and it affected general interests of society normally protected by criminal law. Further, the Minister could refer that case to the prosecuting authorities with a view to their instituting criminal proceedings against the offender. A fine was therefore a substitute for the penalty the criminal courts might imposed if the case had been referred to the prosecuting authorities. Thirdly, the maximum fine is a sum, which shows quite clearly that the penalty in question was intended to be deterrent.

25. At paragraph 15 of the Joint Opinion, it is stated that the approach in the case of *Societe Stenuit v France* was confirmed by the European Court of Human Rights in *Bendenoun v France*[5]. However, we would like to point out that in the latter case, the European Court of Human Rights relied upon the cumulative effect of other factors to justify the conclusion that the charge was criminal. These include (a) that the relevant law as of general application and not applicable solely to a given group with a particular status; (b) that the tax surcharges were not intended as compensation but as a deterrent; (b) that they were imposed under a general rule whose purpose was both deterrent and punitive; and (d) that they were very substantial and if the taxpayer failed to pay he was liable to be committed to prison by the criminal courts. Such combination of factors is not present in our case under Section 36C as introduced by the Bill.

26. We also note that the Assistant Legal Adviser of the Legislative Council also takes the view that 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 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 Bill of Rights. The Bill does not propose that instead of imposing a financial penalty, criminal proceedings could be instituted for such breach.

(2) The presumption of innocence

CWHKT's submission

27. CWHKT counsel's view, as expressed in the Joint Opinion, is that it is a fundamental principle embodied in the ICCPR that no person should be treated by a public official as being "guilty" of an offence before this is established by a competent

[5] (1994) 18 EHRR 54

court. In CWHKT's view, if a matter is brought before the Court of First Instance under new section 36C(3B), the TA will be the "prosecution"; he will have "pre-judged" the licensee's guilt; and he will, in effect, be treating the licensee as guilty before such guilt has been established, beyond reasonable doubt, by the competent court. The result of this is that the burden will be placed on the licensee to disprove its guilt (or prove its innocence, rather than on the prosecutor having to prove the licensee' guilt; and this burden will not be discharged in a criminal court with full jurisdiction of fact and law, but not on judicial review). See paragraphs 16 to 18 of the Joint Opinion.

Administration's response

28. CWHKT's arguments that the Bill infringes the presumption of innocence are premised on the ground that section 36C constitutes a "criminal" process. The offence/failure, alleged by CWHKT, giving rise to the penalty in section 36C (i.e. failure to comply with licence conditions, statutory provisions or TA's directions) is not by its nature "criminal" for the purpose of ICCPR Article 14. The determinative factor, as alleged by CWHKT, is the nature of the penalty, i.e. whether it is administrative or criminal in effect. In response, the Administration has, in its views expressed in details above, rebutted this argument and therefore the presumption of innocence in the criminal context is not applicable to the Bill.

(3) The Right to a Fair Hearing

CWHKT's submission

29. In CWHKT's view, articles 10 and 11(2) of the Bill of Rights essentially deal with the requirements of a fair hearing in the context of a "criminal charge". Among the fundamental requirements of a "fair hearing" are:

- the licensee must be informed, in detail, of the acts with which he is charged and of their legal classification i.e. a duty to state "reason" for instigating the criminal charge;

- the licensee must be given access to all the material evidence in the hands of the TA, whether it is in favour of or against the licensee.

30. In CWHKT's view, the proposed section 6A(3)(b) of the Ordinance, as introduced by clause 3 of the Bill, and particularly its interaction with the proposed new sections 7K to 7N and the power to impose financial penalties, on its face seems

to derogate from this essential safeguard for the right to a fair hearing imposed by the Bill of Rights. See paragraphs 19 to 21 of the Joint Opinion.

Administration's response

31. CWHKT essentially reiterates its views that the proposed section 6A(3)(b) relieves the TA's the obligation of giving reasons for his "opinion" made under the new sections 7K to 7N and this deprives the licensee of the right to a fair hearing. The Administration reiterates its views that section 36C is not a "criminal" process and the fair hearing requirement in the "criminal" context is not appropriate. In addition, as stated in the paragraph headed "Duty to give reasons" above, it is a hypothetical situation where the licensee will be considered "in the opinion" of the TA under sections 7K to 7N to have been in breach of those provisions without having been given the reasons. In any case, the Administration is prepared to include wordings in section 6A(3)(b) to clarify that the TA needs to give reasons for forming an opinion under sections 7K to 7N.

(4) Access to a Court of Full Jurisdiction

CWHKT's submission

32. In CWHKT's view, as presently drafted, the Bill does not appear to make any provision for access to a court in relation to an "opinion" of the TA or, even more importantly, a decision of the TA to impose a financial penalty under section 36C. According to the Joint Opinion (paragraph 25), "it is extremely doubtful whether, at least in the context of imposition of financial penalties, access to judicial review is sufficient to satisfy this requirement."

Administration's response

33. Under the existing regime, the telecommunications industry in Hong Kong is regulated by an independent authority, the TA set up under the Ordinance, and is supported by Office of the Telecommunications Authority (OFTA). Although there is no executive appeal channel, the exercise of powers of the TA under the Ordinance is subject to check and balance and important safeguards against abuse of powers governed by the statutory procedures to achieve the highest standard of accountability and transparency. No appeal channel is established by the legislation and the decisions of the TA are subject to judicial review. The Hong Kong model is similar to the UK and Ireland models and, in jurisdictions like the US, France and Switzerland, although the regulator is not a single person, the decisions made by the regulator, is final in the

executive channels. An outline of the regulatory regime in those jurisdictions has been set out in Annex D to the Administration's previous paper [CB(1) 1860/98-99 (01)] and is set out in Annex 1 for easy reference.

34. Although CWHKT has pointed out that there are a number of regulatory bodies in Hong Kong that are subject to some sort of appeal on merits, the regulatory model for the telecommunications sector is not unique either in the global telecommunications industry or in Hong Kong. The telecommunications regulators in the UK and Ireland are also not subject to appeal on "merits", and their decisions are subject to judicial review. Recently, the UK has enacted and brought into force the Telecommunications (Appeal) Regulations 1999 on 20 December 1999. The appeal under such Regulations is to be made to the court on **material error of fact, law or procedure or illegality**. There is **not** any appeal on the "merits" of the regulator's decisions.

35. ICCPR is applicable to the European countries such as the UK and Ireland. The UK and Ireland are implementing regulatory regimes similar to the HK model with no appeal on "merits" against the decisions of the regulators on licensing and determination of interconnections and sharing of facilities. There is no case law that challenges that such a regime infringes article 14 of ICCPR. In the document entitled "New Appeals Mechanism in the Telecommunications Act 1984 and the Wireless Telegraphy Act 1949 – Response to Consultation" issued by the UK Department of Trade and Industry in October 1999, the UK Government explains the reasons for not having an appeal on "merits", inter alia, as follows:

> "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 regulations and the rights of operators"

36. The Administration is also of the view that the reason for adopting this model of regulation is to enable the regulator to dispose of issues effectively and expeditiously, particularly when the telecommunications industry is undergoing rapid developments and focusing on driving forward competition. Debates in overseas jurisdiction on whether to establish an appeal channel centred on the availability of a streamlined and straightforward appeals mechanism.

(5) Undue Delay

CWHKT's submission

37. In CWHKT's view, the proposed new section 36C(3B) provides the TA with the power to apply to the Court of First Instance for the imposition of a financial penalty beyond that which the TA himself can impose. Although CWHKT supports the need for recourse to the Court, it is concerned that sub-section 3B(1) provides for a limitation period of three years. It argues that, in light of the criminal nature of the financial penalties imposed, there would be a very strong argument that a violation of Article 11(2)(c) of the Bill of Rights would occur if the TA waits for as long as the permitted three years instead of bringing the matter to the Court of First Instance as soon as possible. See paragraph 28 of the Joint Opinion.

Administration's response

38. It is necessary to distinguish the limitation period in the present case from the period of delay concerned in ICCPR Article 14(3)(c). For the purpose of ICCPR Article 14(3)(c), the time limit begins to run when a suspect is "charged". However, the 3-year period in section 36C(3B)(a) of the Bill refers to the lapse of time between the date of commission of the breach/the date on which the breach comes to the notice of the TA and the date of application to the Court.

39. There is always an obligation of the TA to act promptly and expeditiously without undue delay. The TA's exercise of powers is under sufficient public scrutiny. We consider that 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. Three years is not a long period in comparison with the limitation period of e.g. 6 years for actions of contract and tort provided under the Limitation Ordinance.

(6) Discrimination

CWHKT's submission

40. In CWHKT counsel's view, there is strong argument that new section 7K, which only penalises the "licensee" for anti-competitive conduct "which…has the purpose or effect of preventing or substantially restricting competition in a telecommunications market", is discriminatory. In the absence of a general competition law, which would cover others whose conduct also has the purpose or effect of restricting competition in a telecommunications market, it is arguably discriminatory to single out licensees for punishment. This arguably constitutes a violation of the right to "equality before and equal protection of the law" protected by

Article 22 of the Bill of Rights. See paragraph 29 of the Joint Opinion.

Administration's response

41. We strongly disagree with any suggestion that it is discriminatory to address the anti-competitive conduct only of licensees. Licensees are manifestly in a position that sets them apart from non-licensees and it would be discriminatory not to recognise that distinction. 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, the Administration considers it in the public interest to have regulatory measures against anti-competitive behavior of licences. There is no question that our measures against anti-competitive behavior of licensees falls within the scope of Article 22 of the Bill of Rights as the differentiation is not based on grounds involving immutable personal characteristics (e.g. race, colour, sex).

42. We note that the Assistant Legal Adviser of the Legislative Council also takes the view that Article 22 does not require perfect equality. It forbids class legislation, but does not forbid classification, which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited in the objects to which it is directed. 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 sections 7K to 7N if the Bill is passed, it would appear that there is no violation of Article 22.

THE PRICE CONTROL REGULATIONS

CWHKT's submission

43. In the paragraph headed "The Price Control Regulations Reflect An Outdated and Inappropriate Regulatory Regime which is Inconsistent with the Current Competitive Environment" of the First Submission, CWHKT argues that Hong Kong is now one of the most competitive telecommunications markets in the world. In its view, in a modern, competitive economy, and particularly in the intensely competitive telecommunications and Internet market, price control regulation is not only outdated and unnecessary; it will act as a deterrent to innovation and investment.

Administration's response

44. The view taken by CWHKT has overlooked the special nature of

telecommunications regulation. Like other jurisdictions e.g. UK and USA, Hong Kong's telecommunications sector is evolving from a monopoly towards a competitive market. Unlike regions such as Australia and New Zealand where the telecommunications markets have developed into fully competitive and open markets, Hong Kong started liberalisation in 1995, when three Fixed Telecommunication Network Services (FTNS) licences were issued to compete against the incumbent operator, Hongkong Telephone Company.

45. In the experience of overseas jurisdictions, regulation, especially in respect of the "dominant" operator, is extremely important because of the fundamental objective of intensifying competition in an immature market. During the initial phases of deregulation, the former monopoly still retains significant market power and this market power is generally constrained by some form of "dominant operator" regulation, as proposed by the Bill. These include the price control provisions (i.e. proposed sections 7F and 7G) and the competitive protection provisions (i.e. proposed sections 7K, 7L, 7M and 7N).

46. CWHKT argues that Hong Kong is in such a stage of intensive competition that the power to control dominant operator should be relaxed is flawed. In fact, the new FTNS operators after more than 3 years of operation have only succeeded in acquiring 3%, in total, of the market share in the local telephone market. The provision of local telephone services would depend on the rollout of the access networks (e.g. the local loops) to the customers' premises. Such rollout would take time and could be restricted by the availability of bottleneck facilities such as ducts underneath public streets and cable risers within buildings. It is therefore expected that the dominant status of CWHKT in the market for local telephone services would continue for a number of years. In addition, the market for external services is not yet fully competitive over some routes as a result of market restrictions at the distant ends. Whether such routes would become competitive would depend on the conclusion of correspondent agreements with the distant monopoly operators. The existence of the price control regulation is necessary only for the dominant operator, but does not mean that it will be enforced when competition in the markets has fully developed.

47. CWHKT argues that the price control provisions are outdated and unnecessary. Nevertheless, it is evident in a number of advanced jurisdictions like the United States, Australia, UK, Japan and Canada, price control regulations are still in force. Such provisions are important in constraining the market power of the dominant operator from detrimentally affecting competitive outcomes in a telecommunications market in transition to full competition, like Hong Kong. A

comparative analysis of the price control regulations in overseas jurisdictions is set out in Annex 2.

48. Our replies to the particular challenges raised by CWHKT on the proposed sections 7F and 7G in the First Submission are:

Section 7F: Section 7F intends to codify the current practice of the telecommunications sector. The policy intent is to make essential ingredients of the charges by the telecommunications operators public and give the TA a chance to vet the charges. In particular, it imposes the criteria for the telecommunications operators to publish the tariffs e.g. prohibition on bundling the charges with other tariffs, which may mislead the customers of the tariffs applicable to separate services. Similar requirements are imposed in overseas jurisdictions as shown in Annex 2.

Section 7G: This section is only applicable to "dominant" operators. It is not a re-imposition of price control but rather a codification of the existing GC 20(4) of CWHKT's FTNS licence. This section is only applicable to "dominant" operators, and will not be applicable to CWHKT in respect of the market in which it is not a dominant operator. Similar requirements are imposed in overseas jurisdictions as show in Annex 2.

COMPETITION PROVISIONS

49. CWHKT has raised the following issues in the paragraph headed "The "Competitive Protection" Provisions are Seriously Flawed" of the First Submission and our replies are:

- CWHKT argues that the TA is given wide discretion under the proposed sections 7K and 7L(4) and, in its view, the TA's opinion should be formed on the basis of objective evidence. The major challenge is that under the proposed section 6A(3)(b), the TA is not required to give reasons for forming his opinion. This repeats its argument in the paragraph headed "Duty to give reasons" and please sees our replies in that paragraph.

- CWHKT argues that there is no appeal on merits of the TA's decision. This repeats its argument in the paragraph headed "Access to a Court of Full Jurisdiction" and please see our replies to that paragraph. As explained in that paragraph, the legal and procedural safeguards and the judicial review mechanism have provided sufficient protection against arbitrary or

capricious decisions of the TA.

- CWHKT urges for independent review of the TA's enforcement decisions. Normal functioning of a regulator should involve investigation, decision-making and enforcement. Judicial review is a sufficient remedy to check on administrative acts. Enforcement is an essential duty of a regulator without which the Ordinance will become a toothless legislation.

- CWHKT argues that section 7K does not apply to non-licensees and the TA is therefore powerless to address e.g. property companies affiliated with certain holders of FTNS or PMRS licences that frequently deny, delay or restrict building access to other licensees wishing to install or maintain their telecommunications equipment and blockwiring. This is a misconception. In fact, anti-competitive practice in collaboration with affiliated companies has been taken into account by section 7K. For example, the licensee is considered to have engaged in anti-competitive practices if it gives preference to, or receives an unfair advantage from, an associated person, which as defined in the Bill, includes affiliated companies.

- In addition, CWHKT urges for the introduction of a general competition law in Hong Kong to encompass the broad competition principles in proposed sections 7K to 7N. In CWHKT's views, to single out licensee alone is a violation of the right to "equality before and equal protection of law" protected by article 22 of the Bill of Rights. Our reply to this allegation is given in the paragraph headed "Discrimination" above.

THE POWER TO IMPOSE DRACONIAN PENALTIES SHOULD BE SUBJECT TO RESTRICTION

50. CWHKT has raised a number of issues in respect of the proposed section 36(3B) in the paragraph of the First Submission headed "The Power to Impose Draconian Penalties Should be Subject to Restriction" and our replies to these issues are as follows:

- CWHKT argues that the power to impose fines is, in effect, a "criminal" process. We do not agree to this allegation. Section 36C is intended to confer on the TA the power to impose "administrative penalty" and such penalty is not intended to be "criminal" in nature. The administrative penalty is imposed consequent upon an administrative finding against firms

or corporate bodies that have committed acts constituting breach of licence conditions, provisions of the ordinance or directions. The policy intent is to impose administrative penalty with a view to ensuring that there will be effective competition in the telecommunications industry for the benefits of the community. The penalty is disciplinary in nature and for preventive purposes. Although the Joint Opinion has cited certain cases which classified administrative penalty as "criminal" penalty, all such cases can be distinguished from section 36C, and the detailed analysis is found in the paragraph headed "Criminal Charge" above.

- CWHKT argues that the amount of this penalty is excessive and arbitrary; penalties of this magnitude could potentially force licensees out of business. Such view is to the contrary of the views that we have received from other players in the industry and other sectors of the community during the consultation on the legislative proposals. 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 to prevent similar occurrences in the future. 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 increase in penalty even by ten times, as proposed by the Bill, will make the maximum penalty that may be imposed by the TA increased to HK$200,000 on 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, to achieve the purpose of a "preventive" effect in view that telecommunication sector is a significant sector of the economy by virtue of its size of operation and importance to economic development. When making this provision, relevant penalties in overseas jurisdictions have been taken into account. (The European Union at Article 15(2) of EEC Council Regulation 17/62 provides for a maximum of 10% of turnover in the preceding business year of the entity participating in the infringement of anti-competitive rules.) 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 proposed penalty is neither arbitrary nor excessive. In accordance with the administrative laws, the exercise of this power should not be disproportionate and the TA will not force licensees out of business by charging an excessive penalty. The business and financial situation of the licensees are relevant considerations which TA will take into account when

assessing the amount of the penalty to be imposed.

- CWHKT argues that there is no requirement that the "turnover" against which the penalty is assessed be linked to revenue derived from the alleged breach. Proposed section 36C(3B) states that the financial penalty to be imposed by the Court of First Instance should not exceed 10% of the turnover of the licensee in the relevant telecommunications market in the period of the breach, or $10,000,000, whichever is the higher. Hence, we have made it clear that the turnover should relate to the relevant market segment in the period of the breach Section 36C(3A) is modelled on similar provisions of overseas jurisdictions, as shown in Annex 3.

- CWHKT repeats its arguments in the paragraph headed "Access to a Court of Full Jurisdiction" above and please see our replies to that paragraph.

- Our intention is that the TA would not impose the increased penalties under the amended section 36C(3) and then subsequently apply to the Court for the more severe penalties.

INFORMATION AND INSPECTION: SECTIONS 7I and 35A

CWHKT's submission

51. Under the proposed section 7I, the TA may require a licensee to produce information relating to its business as the TA may reasonably require to perform his functions. CWHKT claims that there is virtually no limit on the type of information that the TA may demand, which could include commercially sensitive information. There are no statutory limits that would prevent the TA from going on a "fishing expedition" in relation to a licensee's business.

52. CWHKT argues that under the proposed section 35A, the TA is empowered to enter the premises of a licensee and inspect and make copies of any document or account. A person who, without reasonable excuse, refuses to give access to the document or account, commits an offence and is liable on conviction to imprisonment for up to six months. In CWHKT's view, the power of entry, search and seizure under proposed section 35A is an obvious interference with privacy. See paragraphs 30-38 of the Joint Opinion.

53. In CWHKT's view, proposed section 35A falls short of the requirements

under Article 14 of the Bill of Rights and Article 29 of the Basic Law. The TA is not required to apply for a warrant from a court or any other independent body before he can enter and conduct a search of the premises of a licensee. The decision to enter, search and seize documents or accounts is made by the TA alone, and a licensee's failure to comply with the TA's request is a criminal offence.

Administration's response

54. The TA's power to request for and inspect information under the proposed sections 7I and 35A are restrictive powers necessary for the TA to exercise his functions. We should note that the TA is bound by the administrative law duties 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. The TA may be challenged to have acted *ultra vires* if the information demanded under section 7I falls outside the scope as not being "information relating to [the licensee's] its business that the TA reasonably require to perform his functions." As to the reasons for the need for such powers and practical examples of their application, the Administration has responded in a separate paper [CB(1)830/99-00(01)] considered by the Bills Committee on 19 January 2000.

55. Nevertheless, to clarify the objective of section 35A, the Administration is prepared to improve this section by stating that the TA's power to enter the premises of a licensee and inspect and make copies of a document or an account relating to a telecommunications network, system, installation or service conducted by the licensee is for the purpose of performing his functions or exercising his powers under the Ordinance. The Administration is also prepared to include explicit provisions in sections 7I and 35A, as well as 36D to make it beyond doubt that the TA would not compel production of information that could not have been compelled to produce in civil proceedings.

56. Regarding entry to premises for inspection, distinction should be made between inspections in administrative context for compliance with the regulatory regime and searches and seizures in the criminal context. Section 35A is modelled on an existing licence condition and is intended to empower the TA to conduct routine or random administration inspection 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.

57. The Assistant Legal Adviser of the Legislation Council has also pointed out that, a search warrant issued by a magistrate is not necessary in order to satisfy the requirement of the Basic Law and the Bill of Rights if the purpose of entering and inspecting the licensee's business premises is to ascertain whether or not the licence conditions are complied with. 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).

DISCLOSURE OF INFORMATION

CWHKT's submission

58. Under the proposed section 7I, the TA, after hearing representations from the person who supplied the information, may disclose the information supplied to him to any party, including the public, if he thinks it is in the public interest to do so. In CWHKT's view, there is no restriction on the disclosure of information, nor are there any statutory criteria as to whom the TA may disclose information, nor is there any restriction on disclosure of information concerning a third party. On balance, the absolute, unfettered nature of the power of disclosure is neither necessary nor proportionate and is therefore "arbitrary" within the meaning of the Bill of Rights and the Basic Law and is therefore unlawful. See paragraph 48 of the Joint Opinion.

Administration's response

59. The Administration would stress that section 7I does not confer an "absolute and unfettered" right on the TA to demand information arbitrarily. It is a restrictive power and is considered necessary for the TA to perform his functions. The TA would only disclose the information if it is in the public interest to do so. There is requirement to give a reasonable opportunity for the licensee to make representation under the circumstances specified under section 7I(4). The power is in line with the international practices as many overseas telecommunications regulators (e.g. Canada and the UK) are also empowered to require disclosure of information. Proposed section 7I does not grant the TA a "blanket" power. The TA is bound by the administrative law duties to act lawfully and not to exercise the power arbitrarily so as to comply with Article 14 of the Bill of Rights and Article 29 of the Basic Law. 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. Section 6A(3) also requires the TA to give reasons for his decisions and

to give due consideration to all relevant factors before making the decision.

60. We note that the Assistant Legal Adviser of the Legislative Council also takes the view that to determine whether a legislative provision is in breach of the Basic Law and the Bill of Rights, the court has to consider whether the provision satisfies the tests of reasonableness and proportionality. A discretionary power is granted to the TA under section 7I(3). The exercise of that discretion is subject to judicial review. TA must act reasonably and in good faith, and upon proper grounds.

THE TA's POWER TO COMPEL PUBLIC DISCLOSURE OF IFNORMATION BY LICENSEES

CWHKT's submission

61. CWHKT argues in the paragraph headed "The TA's Power to Compel Public Disclosure of Information by Licensees Violates the Licensee's Constitutional Right of Privacy" of the First Submission that the TA's power to compel public disclosure of information by licensee under the proposed section 36C(3A)(a) violates the licensee's constitutional right of privacy protected by Article 14 of the Bill of Rights.

Administration's response

62. The Administration would stress that section 36C(3A) does not give the TA an "absolute and unfettered" power to compel the licensee to make public disclosure of information arbitrarily. The TA, in deciding the class of persons to whom and the kind of information that is required to be disclosed, has the legal duty to act reasonably. Proportionality is also a ground giving rise to judicial review. The TA has to balance the public interest against the right of the licensee to privacy. The statutory right of representation and the rules of natural justice have provided safeguards against the TA from acting unlawfully or arbitrarily.

63. In fact, section 36C(3A)(a) is modelled on section 80A of the Australian Trade Practices Act as shown in Annex 4.

INTERCONNECTION AND FACILITIES SHARING – SECTION 36A AND PROPSOED SECTION 36AA

64. CWHKT has made it clear that it has no objection to mandatory interconnection of networks by way of interconnection or sharing of facilities of CWHKT. Its concern is the mandatory unbundling of network elements without a requirement for payment of fair compensation. CWHKT's arguments and our response are set out in paragraphs 65 to 97 below .

(1) Deprivation of property rights

CWHKT's submission

65. In CWHKT's view, the power to mandate unbundling of network elements and the sharing of facilities will inevitably encroach on the property rights of the licensee compelled to grant access to its network for interconnection or its facilities for sharing, and thereby constitutes a deprivation of private property. The exercise of such power will, however, have to comply with the requirements of Articles 6 and 105 of the Basic Law. See paragraphs 49 to 57 of the Joint Opinion.

66. Article 6 of the Basic Law provides:

> "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law".

67. Article 105 of the Basic Law provides:

> "The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. …"

68. It is also the argument of CWHKT that the absence of any guidance to the TA (and the person affected) as to how to calculate the compensation due as a potential deficiency in constitutional legislation. See paras 3c and 56 of the Joint Opinion.

Administration's response

69. The exercise by the TA of his powers under section 36A or section 36AA is not in the nature of a deprivation of property for the purpose of Article 105 of the Basic Law because:

- the notion of "encroachment upon property rights" covers mere intrusion on or interference with property rights, which is a commonplace in our laws;

- the broad interpretation of "deprivation" is out of line with the Joint Declaration and the jurisprudence developed by the European Court of Human Rights (ECHR) on the notion of "deprivation" in the context of protection of property rights; and

- the rights that CWHKT currently enjoys to use its facilities for the purposes of its licensed telecomunications operations are already subject to the TA's powers to require interconnection and facility sharing under the licence.

(a) Joint Declaration and Continuity

70. Before and after China resumes the exercise of sovereignty over Hong Kong on 1 July 1997, there are many provisions in our statute book which interfere with or encroach upon property rights without compensation. For instance, apart from the types of claim expressly provided for in certain ordinances, there is no general right in Hong Kong to seek compensation for "injurious affection".[6] Similarly, there is building law which regulates construction activities on land, and environmental legislation which imposes obligations on landowners and occupiers relating to the prevention of air, water and noise pollution. It would be a major departure from existing Hong Kong laws if mere encroachment on property right attracts a general right of compensation.

71. It is unlikely that Article 105 of the Basic Law is intended to bring about such a major departure. This is supported by the wording of the first paragraph of Section VI of Annex I to the Joint Declaration, which reads "[r]ights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to real value…) shall continue to be protected by law."

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[6] "Injurious affection" refers to interference with enjoyment of land by its owner or occupier or loss of value of land due to activities (e.g. public works) carried out by government under statutory powers or other lawful authority.

72. The word "continue" in the above paragraph of the Joint Declaration echoes the theme of continuity in the Basic Law identified by the Court of Appeal in *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761. Further, in *Ng Ka Ling v Director of Immigrations* [1999] 1 HKLR 315 the Court of Final Appeal held that the Joint Declaration could serve as an aid to the interpretation of the Basic Law.

73. Moreover, Article 105 itself, which requires that compensation "shall correspond to the real value of the property concerned" plainly envisages that such compensation shall arise only where the proprietor has been wholly deprived of the property : compensation equivalent to the real value of the property would be plainly excessive if it were intended to be payable where there was mere interference with use.

(b) ECHR's Jurisprudence

74. That the provision for compensation under Article 105 has no application to sections 36A and 36AA may also be supported by the ECHR's interpretation of the notion of "deprivation" under Article 1 of the First Protocol of the European Convention of Human Rights, which provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law…"

75. In the Joint Opinion, CWHKT's counsel noted that the above Article 1, unlike Article 105 of the Basic Law, expressly protects the "right of a State to enforce such laws as it deems necessary to control the use of property …". The Administration is of the view that the above difference does not take away the reference value of the ECHR's jurisprudence in the interpretation of Article 105. It is because as discussed in para 70 above, uncompensated regulatory measures imposing restrictions or burdens on property have long been a feature of Hong Kong law, and Article 105 cannot reasonably be construed as rendering them unconstitutional. Moreover, the expression "in accordance with law" in Article 105 (or Article 6 for that matter) indicates that the property rights protected thereunder are subject to restrictions that are provided by law and are compatible with the Basic Law. Hence, although Article 105 (or Article 6) does not expressly provide for limitation of

property rights, permissible restrictions are implicit in it.[7] This interpretation is also in line with the approach of the Basic Law that rights are generally subject to reasonable limitations (see for example Article 39).

76. In the jurisprudence developed by the ECHR, "deprivation" has been held to include cases where all legal rights of the owner are extinguished by operation of law or by the exercise of a legal power to the same effect.[8] On the basis that ownership is seen as a bundle of rights, the fact that an owner has been deprived of one right will not usually be sufficient to say that he has been deprived of ownership: rather it is a control of use of property under the ECHR's jurisprudence.[9] Thus in *Baner v Sweden*, 60 DR 128 (1989), the European Commission of Human Rights held (at p 140) that the Swedish legislation which gave the public a right to fish with hand-held tackle in private waters did not have the effect of depriving the applicant's property. He still retained title to it. The applicant had not been deprived of his right to fish, including the right to fish with hand-held tackle. What he had lost was his right to exclude others from fishing with hand-held tackle. The Commission further observed:

> "Legislation of a general character affecting and re-defining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away … [G]eneral rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in national laws of many countries which make clear a distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.
>
> The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such

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[7] In the light of the ECHR's jurisprudence, such restrictions should be proportionate to the general interest of the public (ie, the "fair balance test", see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), pp 521-2 and 524). Privy Council's recent decision in *Alleyne-Forte v AG of Trinidad & Tobago* [1998] 1 WLR 68 also supports this fair balance approach (see particularly pp 71H-72A).

[8] In the ECHR's jurisprudence, "deprivation" has been held to include also cases where there is a *de facto* deprivation in that the authorities interfere substantially with the enjoyment of possessions without formally divesting the owner of his title. See Harris, O'Boyle and Warbrick, op cit, p 528. The notion of *de facto* deprivation was discussed in more detail in paras 91-2 below.

[9] Ibid, pp 528-9.

regulations fall to be considered under the 'control of use' rule…"

77. The above observation of the Commission is close to the following one made by Viscount Simonds in *Belfast Corporation v O D Cars Ltd* [1960] AC 490 (which was cited in note 45 of the Joint Opinion) (at p 517):

> "[Anyone using the English language in its ordinary signification] would agree that 'property' is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called 'property' and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a 'taking', 'taking away' or 'taking over' of 'property'."

78. Sections 36A and 36AA manifestly fall short of extinguishing all the legal rights of the party which provides interconnection or sharing of use of facilities in its own telecommunication system/service or facilities. It may have lost some right to exclude others from connecting or using its telecommunication system/service or facilities pursuant to these provisions. However, nothing in sections 36A and 36AA would take away its title to these things, or its right to use them (though such right would be subject to regulation). In the light of the above jurisprudence developed by the ECHR, sections 36A and 36AA do not have the character of "deprivation", and hence the provision for compensation under Article 105 has no application to them.

(c) US Jurisprudence

79. In the Joint Opinion, CWHKT's counsel opined that it might be appropriate to look to the United States (specifically the jurisprudence developed on the basis of the Fifth Amendment of the US Constitution[10]) for guidance as to how the right to property under Article 105 should be interpreted (para 51). Insofar as the US jurisprudence is relevant, it would appear to be consistent with the degree of interference envisaged by the Bill having regard to the public interest benefits that such interference is capable of making available. As noted in the Joint Opinion, in considering whether the deprivation was constitutional in the US jurisprudence,

[10] The Fifth Amendment provides "…No person shall be…deprived of…property without due process of law, nor shall private property be taken for public use, without just compensation."

various factors were taken into account (eg the nature, character, and duration of the interference, the purpose of the interference, the adverse impact on the property owner, the degree of public benefit, and the impact on the community if the interference was not taken) (para 55). Of particular importance, CWHKT's counsel noted that "[t]he mere fact that the owner has been denied the ability to exploit a property interest that he previously had believed was available for development, or that a more severe impact is made on some landowners than others, does not by itself constitute 'taking' of property within the meaning of the Fifth Amendment" (ibid).

80. CWHKT's counsel in the Joint Opinion did not discuss why sections 36A and 36AA should be regarded as a "taking" (or deprivation) by applying the above approach in the US jurisprudence. For the purposes of dealing with CWHKT's submissions related to property rights, the Administration sees no need to further comment on this approach and shall rest its case that sections 36A and 36AA do not raise any compensation issue under BL105 on the discussion in paras 69-78 above and 81-92 below.[11]

(d) Alternative Argument in support of Claim of Deprivation

81. In the Joint Opinion, CWHKT's counsel put forth another ground for their view that sections 36A and 36AA would entail deprivation of property for the purposes of BL 105. In para 54 of the Joint Opinion, they argued that legislation destroying the existing monopoly of a licensee and compelling the licensee to share his facilities with other competitors must constitute a form of deprivation of property. This argument was based on their earlier discussion in para 53 of the Joint Opinion on 2 cases each related to destruction of some existing business by certain state monopoly, namely *Societe United Docks v Government of Mauritius and Marine Workers Union v Mauritius Marine Authority* [1985] LRC (Const) 800, and *Manitoba Fisheries Ltd v The Queen* 88 DLR (3d) 462.[12] These two cases will be briefly examined in turn.

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[11] It would be of interest, though, to note that in *Penn Central Transportation Company v City of New York* (1978) 57 L Ed 2d 631 (cited in para 55 of the Joint Opinion), the US Supreme Court made the following observation (at p 648): "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' *Pennsylvania Coal Co v Mahon*…and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values."

[12] In footnote 47 of the Joint Opinion, the citation of the *Societe United Docks* case was wrongly referred to as "[1995] LRC (Const) 800".

82. In the *Societe United Docks* case, the Privy Council actually found that the appellants had not been deprived of goodwill by the legislation creating the new state monopoly (see p 845f). It found that the appellants' business could not compete with the state monopoly because it no longer provided an efficient service for the sugar industry (at p 845c). The Privy Council stated in obiter, though, that if the legislation had deprived the appellants of any goodwill, then the appellants would have been entitled to compensation equal to the value lost (at p 845e).

83. In the *Manitoba Fisheries Ltd* case, the new state monopoly had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless (at p 473).[13] On that basis, the Supreme Court of Canada found that there was a taking of the appellant's property as comprised in its goodwill so taken away. [14]

84. The position under sections 36A and 36AA is entirely different. Implementing those provisions would not deprive CWHKT of its assets or render them useless. CWHKT would not only be able to continue to use the assets itself (though such use would be subject to regulation), but would also be entitled to compensation for their use by others. Moreover, CWHKT does not currently enjoy monopoly rights : its right to use its assets for its licensed operations are already

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[13] The facts of the *Manitoba Fisheries Ltd* case are that the appellant owned and operated a profitable fish exporting business until, in 1969, the Fresh Water Fish Marketing Act, R.S.C. 1970, c. F-13, gave to a statutory corporation the exclusive right to carry on such business except on the issue by the corporation of a licence, none of which was issued. The Supreme Court of Canada was of the view (at p 465) that the appellant's suppliers and customers whom it acquired and cultivated over the years constituted one of its most valuable assets before the date of the creation of the statutory corporation, and on the following day that asset was completely extinguished "and the suppliers and customers were left with no choice but to do business with [the statutory corporation]…".

[14] This finding of a taking was for the purpose of the common law rule of statutory construction that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation", per Lord Atkinson in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, at p 542, cited by the Supreme Court of Canada in the *Manitoba Fisheries Ltd* case, at pp 467 and 473. In the view of the Supreme Court of Canada, there was nothing in the relevant enabling legislation providing for the taking of the appellant's goodwill as a going concern by the Government without compensation. It may be noted that in the *Belfast Corporation* case, Viscount Simonds was of the opinion (at p 518) that the above common law rule seemed to him to have no bearing upon the question of what was the meaning of the phrase "take property without compensation" in a constitutional instrument such as the Government of Ireland Act 1920.

subject to the powers of the TA, under the conditions of the licence, to require interconnection and facility sharing. CWHKT's counsel have not shown why sections 36A and 36AA alone (but not other factors such as efficiency of service as discussed in the *Societe United Docks* case) would inflict a damage on CWHKT's goodwill, nor why such damage, if any, would be as serious as that inflicted on the appellant in the *Manitoba Fisheries Ltd* case (ie its physical assets being rendered virtually useless). It is important to note that sections 36A and 36AA anticipate that the party providing interconnection or sharing of use of facilities will be compensated (see paras 94-7 below). Without an examination of these issues, it is unconvincing to argue that sections 36A and 36AA constitute a form of deprivation of property in the light of the above cited decisions. Even if there were such discussion, it might be found wanting if no or insufficient regard was given to the relevant provisions in the Joint Declaration and the notion of "deprivation" under ECHR's jurisprudence.

85. In para 52 of the Joint Opinion, CWHKT's counsel suggested that in principle a balancing process (having regard to the legitimate purpose of the restriction on property rights, and the consideration whether such restriction is a necessary and proportionate means to achieve that purpose) applies to Articles 6 and 105. This suggestion is in line with the fair balance test adopted by the ECHR on protection of property rights (see footnote 7 above). However, CWHKT's counsel have not discussed whether sections 36A and 36AA pass muster under such balancing process.

86. In the view of the Administration, sections 36A and 36AA do satisfy the above balancing process.

87. First, there are strong public interest in support of sections 36A and 36AA. Since the introduction of competition in the local network market, it has been evident that network operators have, on many occasions, not been able to resolve issues on interconnection and sharing of facilities by commercial negotiation. For example, new entrants have encountered difficulties with CWHKT in making interconnection with CWHKT's customer access networks and sharing exchange buildings for effecting such interconnection. Without regulatory intervention by the TA, progress of competition in the market would have been hindered. The intervention under sections 36A and 36AA is therefore necessary on public interest ground.

88. In fact, "interconnection" and "sharing of facilities" are internationally recognised means to promote competition in the network market. Annex 5 sets out in brief the relevant laws on interconnection and sharing of facilities in the United

States, Germany, Switzerland and the United Kingdom. Although CWHKT argues that "unbundling of local loop" is not "interconnection" but a taking of property, in Germany, for example, its Network Access Ordinance 1996 expressly provides that: "a carrier shall provide unbundled access to all network elements, including unbundled access to the local loop." The Australian Competition and Consumer Commission has also recently mandated access Telstra's local network by allowing competitors direct access to its cooper lines that connect customers to local telephone exchanges. In the US, the Telecommunications Act 1996 also expressly mandates incumbent local exchange carriers to provide access to network elements on an unbundled basis (section 251(c))[15]. The UK Office of Telecommunications (OFTEL) has also in its document entitled "Access to Bandwidth: Delivering Competition for the Information" (November 1999) concluded that BT should make its local loops available to other operators to allow them to compete directly with BT in providing higher bandwidth access. This will be delivered through a form of local loop unbundling.

89. Further, sections 36A and 36AA contain various provisions which serve to ensure that the restriction on property rights are proportionate. These include provisions that the TA should not make the determination unless he is satisfied that the parties to any arrangement for interconnection have been afforded a reasonable opportunity to make representations to him as to why a determination should not be made (existing section 36A(4)) that the TA's interconnection determination may include any technical, commercial and financial terms and conditions that the TA considers fair and reasonable (amended section 36A(3)), that a reasonable opportunity is given to the relevant parties to make representations before the TA forms an opinion and issues a direction regarding sharing of use of facilities (new section 36AA(2)), that the TA shall take into account relevant factors in considering a direction in the public interest to share a facility (new section 36AA(3)), and that the parties to the sharing of use of a facility shall endeavour to agree to conditions

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[15] In their book "Toward Competition Local Telephony" (MIT Press 1994), William J Baumol and J Gregory Sidak, made the following observation on the interconnection arrangement in the US (at p17) :

> *"Recently there has also been the growth of the arrangement called 'expanded interconnection', also referred to as 'collocation' in [Local Exchange Carrier] central offices, that has created a new form of competition in the transportation of traffic by rivals from the LEC's central office to a carrier's pertinent location. In September 1992, the FCC ordered a large class of LECs throughout the country to provide such expanded interconnection. This, too, will help undercut whatever market power remains in the local loop."*

providing for (without limitation) fair competition for the provision, use, or sharing of the facility (new section 36AA(4)). Actually, it is the existing practice of the TA to act reasonably and transparently in discharging his duties to determine interconnection and mandate sharing of facilities. For example, he has issued the "Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of the Telecommunication Ordinance" to set out his considerations and principles adopted in making a determination on interconnection. The guidelines set out the public interest considerations that the TA would take and the requirement that all licensees are fairly compensated for the relevant costs incurred in supplying interconnection facilities and services to other licensees. To further improve the Bill, we would codify such existing procedural safeguards by including express provisions on these. Details are set out in another paper "Policy Paper on Procedural Safeguards" submitted to the Bills Committee.

(2) Peaceful Enjoyment of Property without Interference

CWHKT's submission

90. In the Short Advice, CWHKT's counsel further put forward that property rights includes peaceful enjoyment of property without interference. He takes the view that it is an extremely narrow view of property right to argue that TA's power to order interconnection and/or sharing of facilities does not constitute a deprivation of property rights because the property rights over the facilities remain to be vested in the licensee notwithstanding the interconnection and sharing requirements.

Administration's response

91. Although the ECHR has held "deprivation" to include, *inter alia*, cases where there is a *de facto* deprivation in that the authorities interfere substantially with the enjoyment of possessions without formally divesting the owner of his title, real instances of *de facto* deprivation are very rare. As commented by one commentator, "[g]enerally, where ownership of property remains or some of expropriation, by way of sale or receipt of rents for example, the measure will not be regarded as a de facto expropriation or deprivation of property… but an interference with peaceful enjoyment of possession."[16] In the latter case, compensation is only one of the factors in assessing whether the arrangement satisfies the fair balance test. The substantial degree of interference with possessions required for a *de facto* deprivation

[16] Karen Reid, *A Practitioner's Guide to the European Convention of Human Rights* (London: Sweet & Maxwell, 1998), p 215.

may be illustrated by *Papamichalopoulos and others v Greece*.[17] In that case, the Greek navy constructed a naval base and officers' resort on the applicants' land, the ECHR found that although there had been no formal expropriation, their land was occupied, and being unable to sell, mortgage or even gain entry, they had lost all ability to dispose or make use of it. This, combined with the failure of attempts to remedy the situation, entailed sufficiently serious consequences to disclose a *de facto* expropriation incompatible with their right to the peaceful enjoyment of their possession.[18]

92. In the light of the above discussion, the TA's power under section 36A and section 36AA will not amount to a *de facto* deprivation, since the parties subject to the TA's power will not lose all their ability to dispose or make use of their telecommunications system/service or facilities. Hence, the Administration is of the view that the said sections do not raise any compensation issue under Article 105.

(3) Calculation of Compensation

CWHKT's submission

93. In CWHKT's view, if a licensee is to be deprived of the exclusive use of its private property through mandatory unbundling of network elements in accordance with section 36A, or compelled to share the use of its property in accordance with proposed section 36AA, then "fair compensation" must be paid to the licensee who loses the right to enjoy the unfettered use of its own property. CWHKT takes the view that neither section 36A as amended nor proposed section 36AA will compel the TA to determine that "fair compensation" must be payable to the operator offering or being required to grant access to its network elements or facilities sharing. The TA is given an absolute discretion as to whether any compensation is payable at all. In CWHKT's view, any taking of property rights must be subject to two requirements, namely (i) the existence of clear criteria for doing so; and (ii) a right to fair and equitable compensation.

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[17] (1993) 16 EHRR 440

[18] See also, for example, Mellacher v Austria, (1989) 12 EHRR 391, where the applicants were property owners who complained that the Austrian authorities had deprived them of a substantial proportion (up to 82.4% for some applicants) of their future income under existing tenancy agreements by operation of the 1981 Rent Act. The ECHR held that the measures taken did not amount to either to a formal or de facto expropriation but only a control of the use of property as there was no transfer of property or deprivation of the applicants' right to use, let or sell their properties (paras 43-4).

Administration's response

94. In the Administration's view, the proposed additional powers of the TA under sections 36A and 36AA will not have the effect of depriving property rights. Hence there is no absolute need for the Bill to spell out the guidelines and the basis of compensation as suggested by CWHKT's counsel. Nevertheless, as a matter of law and practice, for the TA's power of interconnection, section 36A(8) of the Ordinance provides that the TA may issue guidelines setting out the principles governing the criteria for any determination of interconnection. The TA has issued a number of TA Statements on interconnection, which are readily accessible in TA's non-charging website. In respect of the TA's power of giving a direction to share a facility under section 36AA, under sub-section (3) of the proposed section 36AA, there are a number of factors which the TA must take into account in considering whether to issue such a direction.

95. In respect of the basis for "fair compensation", Article 105 of the Basic further requires that any compensation shall "correspond to the real value of the property concerned at that time". Whilst we deny that the compensation requirement in Article 105 is applicable to the present case, even if it applied, it is envisaged in the Bill that a fair compensation should be paid to the licensee required to provide interconnection and share the facilities. This will be one of the essential terms to be determined by the TA under sections 36A and 36AA(6).

96. As the Joint Opinion has acknowledged, determining the costing models is a technical matter. From the experience of making interconnection determination, the course of actions that is likely 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 engage to advise; (b) charging principles will be formulated after taking into account views from the industry (with conflicting interests) and experts with a view to devising a mechanism for determining a fair compensation. In the case of interconnection, it is made clear in the "Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of the Telecommunication Ordinance (Cap 106) and the FTNS Licence" that one of the fundamental considerations for the TA is to ensure that all licensees are fairly compensated for the relevant costs incurred in supplying interconnection facilities and services to other licensees (see para 25 thereof). The objective is to devise a fair and reasonable method of compensation.

97. Though not strictly legally necessary, the Administration will consider to make amendments to the provisions requiring that charges in a determination under

section 36A **shall be** based on the relevant reasonable costs attributable to interconnection and, in determining the level, or method of calculation, of the relevant reasonable costs attributable to interconnection, the TA may select from among alternative costing methods what he considers to be a fair and reasonable costing method. Similar amendments would also be made to section 36AA to require that the terms and conditions for sharing as determined by the TA would include fair compensation to the concerned party.

THIRD PARTY REMEDY

CWHKT's submission

98. CWHKT has raised the following concerns in the paragraph headed "There is No Limit on Who Can Bring Private Lawsuits: There Could be Flooded with Frivolous Claims" of the First Submission:

- CWHKT repeats the argument that breaches of sections 7K to 7N are based on the "opinion" of the TA for which he has unlimited discretion.

- CWHKT suggests that the new section 39A be amended to grant a private right of action to any one who might "sustain loss or damage" as a result of anti-competitive conduct. It argues that the current drafting would open the floodgate to a flood of frivolous lawsuits, which would further clog the already congested court calendars, and unreasonably subject a licensee to the costs of defending such lawsuits, however frivolous or ill conceived they may be.

- CWHKT argues those sections 7L and 7N apply only to a licensee who is in a "dominant" position. CWHKT is therefore likely to bear the brunt of the lawsuits.

- CWHKT argues that there is no right of action against companies affiliated with its competitors. It complains that it frequently encounters difficulty in installing or maintaining essential telecommunications facilities in the buildings of companies affiliated with other licensees.

Administration's response

99. In reply to CWHKT's concerns in paragraph 97 above, the Administration's response is as follows -

- On the first point, as explained in the paragraph headed "Duty to give reason" above, the TA in forming an opinion has to give due consideration to all relevant factors (including all objective evidence) and to substantiate his opinion by detailed reasons. This is not an unlimited discretion and will not open any floodgates of litigation or deprive any aggrieved licensee of the civil remedy.

- On the second point, whilst the Administration is of the view that the court would have due consideration as to whether a claimant has substantiated his claim before he could launch an action under section 39A, the Administration has no in principle objection to such amendment along the lines of the definition in the UK's 1984 Act, i.e. by requiring proof of loss or damage for there to be a right of action.

- On the third point, as explained in the paragraph headed "The Price Control Regulations", Hong Kong's telecommunications sector is not in a stage of a full and open competition. In the experience of overseas jurisdictions, regulation, especially in respect of the "dominant" operator, is extremely important because of the fundamental objective of intensifying competition in a market in transition to full competition. During the initial phases of deregulation, the former monopoly still retains significant market power and this market power is generally constrained by some form of "dominant operators" regulation, as proposed by the Bill. These include the price control provisions (i.e. proposed sections 7F and 7G) and the competitive protection provisions (i.e. 7K, 7L, 7M and 7N). A right is granted to CWHKT to apply for declaration of non-dominance as and when the market has developed to such a stage that CWHKT has ceased to be a dominant operator in a relevant market.

- As to the last point, in fact anti-competitive practice in collaboration with affiliated companies has been taken into account by section 7K. In the scenario described by CWHKT, section 7K has provided that anti-competitive practices include receiving an "unfair advantage" from an associated person, which as defined in the Bill, includes affiliated companies, if, in the opinion of the TA, a competitor could be placed at a significant disadvantage. In fact, network operators have been recognised as "utilities" and are granted a statutory right of access under section 14(1) of the

Ordinance. This statutory right of access is also a kind of mechanism to foster competition and to enable customers to have unimpeded access to the full range of telecommunications services.

Office of the Telecommunications Authority
24 January 2000

FRAMEWORK OF OVERSEAS TELECOMMUNICATIONS REGULATORS
(Singapore, UK, Ireland, US, France, Switzerland, Canada and Australia)

Country	Regulatory Authority	Is the power vested in a single person, body, a committee or commission, etc?	What are the powers and functions of the regulator?	Are the regulator's decisions subject to appeal or judicial review?	What is the process by which the regulator makes decision?
Singapore	Telecom-munications Authority of Singapore (TAS)	TAS is a body corporate constituted under TAS Act 1992 and exists with perpetual succession, capable of suing and being sued in its corporate name. TAS is a statutory body under the Ministry of Communications.	TAS has the exclusive privilege for the operation and provision of telecommunication and postal systems and services in Singapore (sections 24 and 40 of TAS Act)	Under section 29(2) of TAS Act, any person who is aggrieved by any decision of TAS may, within 14 days after receiving a notice in writing of the decision, appeal to the Minister whose decision is final.	Policies for telecommunications and post are set by the Government with the advice of TAS. The TAS board consists of representatives from private sector, academic institutes, consumer groups, government ministers etc., to ensure that views from various sectors of the society are reflected in the development of telecommunications policies, regulation and legislation. TAS does not conduct public hearing or industry consultation during its decision making process.

Country	Regulatory Authority	Is the power vested in a single person, body, a committee or commission, etc?	What are the powers and functions of the regulator?	Are the regulator's decisions subject to appeal or judicial review?	What is the process by which the regulator makes decision?
United Kingdom	Office of Telecom-munications (OFTEL)	OFTEL was established under the Telecommunications Act 1984, and the power of the regulator is vested in a single person – the Director General of OFTEL.	Director General of OFTEL is given extensive powers under the Telecommunications Act to enforce licence conditions and initiate modification of licence conditions.	Decisions made by the Director-General of OFTEL are subject to judicial review, save for matters concerning competition, in which case, appeal may be lodged with the Competition Commission under the Competition Act 1998.	In respect of policy and matters such as modification of licence conditions and issues relating to dominance, for the sake of transparency and due process, the practice of the Director General of OFTEL is to make decision by firstly consulting the industry and consumers. Director General of OFTEL also consults the Department of Trade and Industry in respect of major policy decisions.
Ireland	Office of the Director of Telecom-munications Regulation (ODTR)	ODTR was established under the Telecommunications (Miscellaneous Provisions) Act 1996 and the power of the regulator is vested in a single person – Director of Telecommunications	Under the legislation, the Director of Telecommunications Regulation has an obligation to act independently and is responsible for development of operational policies for licensing, managing the radio frequency spectrum,	No appeal channel is established by the legislation and decisions of the Director of Telecommunications Regulation are subject to judicial review.	Consultation approach.

Country	Regulatory Authority	Is the power vested in a single person, body, a committee or commission, etc?	What are the powers and functions of the regulator?	Are the regulator's decisions subject to appeal or judicial review?	What is the process by which the regulator makes decision?
		Regulation.	licensing/setting standards and specifications for operators and regulating in accordance with licence terms/standards and specifications.		
United States	Federal Communications Commission (FCC)	FCC was established under the Communications Act 1934. FCC is directed by five commissioners who are appointed by the President. It is directly accountable to Congress.	FCC is responsible for regulating interstate and international communications (including broadcasting), by radio and by wire.	Appeal against the decisions of FCC may be lodged with the federal courts. Decisions made by FCC are also subject to review by federal courts, which have jurisdiction to reverse decisions made by FCC on various grounds, for example, if they are found to be "arbitrary and capricious".	All FCC actions are subject to the requirements of the Federal Administrative Procedure Act which sets forth procedural requirements designed to maximize transparency. FCC decisions are rendered in the form of a Report and Order, which explains the FCC decisions and its rationale.
France	Telecom-munications Regulatory Authority (ART)	ART was established on 1 January 1997 under the Telecommunications Act 1996. ART consists of five members appointed to their legal, technical	ART is entrusted with the duties of processing applications for telecommunications licenses, allocating frequencies and numbers, approving	Decisions of ART may be subject to an appeal or judicial review. Appeal shall not be suspensive.	ART adopts the consultation methods by conducting international consultation, ad-hoc consultation, through public consultation

Country	Regulatory Authority	Is the power vested in a single person, body, a committee or commission, etc?	What are the powers and functions of the regulator?	Are the regulator's decisions subject to appeal or judicial review?	What is the process by which the regulator makes decision?
		and economic expertise. The chairman and two other members shall be appointed by decree. The two other members shall be appointed by the chairman of the National Assembly and by the chairman of the Senate.	interconnections and referring to competition authority when there is a breach of competition rules.		exercises (e.g. licence typology, high speed local loop and access to submarine cables) to enhance transparency in decision-making.
Switzerland	Federal Communications Commission (SFCC)	SFCC was established under the Telecommunications Law 1997 as the licensing authority and market regulator. SFCC consists of five to seven members appointed by the Federal Council. FCC is an independent body that is not required to follow instructions from the Federal Council or the administrative authorities. SFCC may delegate authorities to the Federal Office for Communications (Office).	SFCC is responsible for performing the duties and making decisions pursuant to the Telecommunications Law 1997 and its implementing provisions. These include licensing, making interconnection determinations, approving national frequency plan and numbering plans.	Decisions made by the Office shall be open to appeal before Appeals Board and decisions taken by the SFCC shall be open to administrative appeal before the Federal Court governed by the Law on Administrative Procedure and by the law on Judicial Organization.	SFCC adopts a system of internal regulation allowing the president, with one other member, to make provisional measures and the commission to take decision by circulation to improve efficiency. Consultation will also be conducted for significant matters.

Country	Regulatory Authority	Is the power vested in a single person, body, a committee or commission, etc?	What are the powers and functions of the regulator?	Are the regulator's decisions subject to appeal or judicial review?	What is the process by which the regulator makes decision?
Canada	Canadian Radio-television and Telecom-munications Commission (CRTC)	CRTC is an independent federal agency with quasi-judicial status constituted under the Canadian Radio-television and Telecommunications Act 1985. CRTC may have up to 13 full-time and 6 part-time commissioners, to be appointed by the Governor in Council (Cabinet). CRTC is vested with administrative and quasi-judicial authority operating at "arm's length" from the Government.	Under the Telecommunications Act, CRTC is given a broad range of authorities to regulate broadcasting services and telecommunications common carriers that fall under federal jurisdiction.	Under the Telecommunications Act, decisions of CRTC are appealable to the cabinet. The cabinet must act within one year of the decision on its own motion or in response to an application. An appeal from a decision of CRTC on any question of law or of jurisdiction may be brought in the Federal Court of Appeal.	Decisions taken under the Telecommunications Act are on the basis of a public record subject to comments by the public. In suitable circumstances, public consultation and oral examination may be conducted.
Australia	Australian Communications Authority (ACA)	ACA is an independent regulator established under the Australian Communications Authority Act 1997. It comprises one Chairman, one Deputy Chairman, and at least one, but not more than three, other members.	ACA is responsible for managing the radio frequency spectrum, administering the licensing of carriers, and administering consumer and technical issues relating to telecommunications in Australia.	Under the Telecommunications Act 1997, ACA's decision may be subject to reconsideration by ACA and if the decision is affirmed or varied by ACA,	Under the Telecommunications Act, ACA adopts a combination of processes in making decisions. ACA conducts public enquiries and public hearings. It also issues

Country	Regulatory Authority	Is the power vested in a single person, body, a committee or commission, etc?	What are the powers and functions of the regulator?	Are the regulator's decisions subject to appeal or judicial review?	What is the process by which the regulator makes decision?
		ACA reports to the Minister for Communications.		applications may be made to the Administrative Appeals Tribunal for review of the decision.	consultation papers, receives submissions, convenes task working groups, advisory committees and consumer consultative forums.
	Australian Competition and Consumer Commission (ACCC)	ACCC is a commission which consists of 6 to 10 full time members, including a chairman and deputy chairman, plus a significant number of associate (part-time) members, including ex-officio associates from other regulators. ACCC is an independent statutory authority albeit budget funded.	ACCC is established to administer the Trade Practices Act 1974 and the Prices Surveillance Act 1983.	ACCC's adjudication decisions can be challenged in the Australian Trade Practices Tribunal. Many of its actions must be taken in court and then there is the normal court appeal process. ACCC is subject to the full range of administrative law remedies under Australian law.	ACCC is a multi-function regulator. It is an enforcement authority, an adjudicator, a prices surveillance authority, a consumer protection authority, a small business advocate and a public utilities regulator. In all these roles, it always consults the industry and, where appropriate, the Government. Many of its decisions are subject to consultation before the final decision is made.

PRICE CONTROL REGULATIONS OF OVERSEAS JURISDICTIONS[1]

(Australia, Canada, Germany, Ireland, Japan, UK and US)

Country	Price control	Filing of tariff
Australia	A new measure came into effect on 1 January 1998 to impose a price control mechanism on Telstra aimed at promoting greater parity in untimed local call prices between more competitive and less competitive markets. Under this scheme, the weighted average untimed local call price for residential/charity customers in rural Australia in 1998 is not to exceed the weighted average local call price for residential/charity customers in metropolitan Australia in 1997. Similarly, the weighted average untimed local call price for business customers in rural Australia in 1998 is not to exceed the weighted average local call price for business customers in metropolitan Australia in 1997. The above conditions applying to Telstra are currently under review.	The Australian Competition and Consumer Commission (ACCC) is able to direct carriers and carriage service providers to file tariff information with the ACCC if satisfied on reasonable grounds that they have a substantial degree of power in a telecommunications market. There is also a specific requirement for Telstra to file tariffs for its basic carriage services unless the ACCC has exempted a charge from this requirement. A tariff filing direction may contain requirements including: - a requirement that the carrier or carriage service provider give the ACCC a written statement setting out information about telecommunications charges as specified in the direction; - a requirement that the carrier or carriage service provider give the ACCC specified information about its intentions before imposing a new charge, varying a charge or ceasing to impose a charge; or

[1] Information is extracted from "Communications Outlook 1999 – Telecommunications: Regulatory Issues" compiled by Organization for Economic Co-operation and Development (OECD) which can be downloaded from http://www.oecd.org/dsti/sti/it/index.htm.

Country	Price control	Filing of tariff
		- a requirement that, in the event that the carrier or carriage service provider imposes a new charge, varies a charge or ceases to impose a charge, it give the ACCC specified information within a specified period.
Canada	According to the Telecommunications Act, subject to the Canadian Radio-television and telecommunications Commission (CRTC)'s power of forbearance, - no Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by CRTC that specifies the rate or the maximum or minimum rate, or both, to be charged for the service (article 25(1)) - every rate charged by Canadian carrier for a telecommunications service shall be just and reasonable (article 27(1)); - no Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage (article 27(2)).	According to the Telecommunications Act, a tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by CRTC and shall include any information required by CRTC to be included. (article 25(3))

Country	Price control	Filing of tariff
	CRTC has introduced, effective from 1 January 1998, a four-year price cap regulation regime for a particular basket of services provided by incumbent local exchange carriers consisting of basic residential, business and other services considered essential for interconnecting with the local exchange carrier. The CRTC has forborne from regulating competitive long distance, wireless and leased line services and the prices charged by new competitive local service providers.	
Germany	According to the Telecommunications Act 1996: - rates and rate-related components of general terms and conditions for the provision of transmission lines, voice telephony within the framework of Licence Classes 3 and 4, and other telecommunications services shall be subject to approval by the regulatory authority, provided the licensee has a dominant position according to section 22 of the Law against Restraints of Competition in the relevant market (article 25); - rates shall (a) contain no surcharges which prevail solely as a result of the provider's dominant position; (b) contain no discounts which prejudice the competitive opportunities of other companies in a telecommunication market; or (c) not create any advantages for individual users in relation to other users of identical or similar telecommunications services in the	According to the Telecommunications Act 1996, the regulatory authority shall publish once a year in its Official Gazette the relevant product and geographical markets in which dominant positions prevail. (article26)

Country	Price control	Filing of tariff
	relevant telecommunications market, unless there is evidence of an objectively justifiable reason therefor. (article24)	
Ireland	A price cap system applies to prices of services where there is insufficient competition (e.g. provision of PSTN line and ISDN lines, local dialed calls, internal dialed calls etc.). These services are grouped into a basket. The price cap system ensures that there will be an overall downward movement in the basket price level which should be at least equal to the annual percentage change in the Consumer Price Index – 6%. Service to competitors, i.e. interconnection and leased lines, must be cost-oriented.	
Japan	A price-cap will be applied to user charges for the services that NTT provides which are essential to the community, economy and which do not face significant levels of competition. These services include telephone service, ISDN and leased circuit services in the local telecommunications sectors.	A notification system is applied to telecommunication charge.
United Kingdom	All PTOs are free to set their retail tariffs as they wish (subject only to general legislation against anti-competitive activity), with the exception of the incumbent (BT).	

Country	Price control	Filing of tariff
	BT is free to set its retail tariffs as it wishes, subject to general requirements prohibiting undue discrimination and undue preference, and against unfair competition. And subject to a retail price control using the RPI-X% formula which applies only to services provided to the residential market.	
United States	Non-dominant carriers generally set their own rates. The rates of the BOCs and GTE are subject to price cap regulation.	Under the Telecommunications Act 1996, all local exchange carriers are required to file tariffs according to the regulatory guidelines established by the FCC for public inspection.

Annex 3

LEVEL OF PENALTIES IMPOSED IN OVERSEAS JURISDICTIONS

Jurisdiction	Legislation	Personal bringing action	Penalty/Relief
United States	Sherman Act	The district courts of the United States are vested with the jurisdiction to prevent and restrain violations of the Sherman Act. It is the duty of the US attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings to prevent and restrain violations.	(a) Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared to be illegal shall be deeded to be guilty of felony, and, on conviction thereof, shall be punished by fine not exceeding US$10,000,000 if a corporation, or, if any other person, US$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court; (b) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deeded guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding US$10,000,000 if a corporation, or, if any other person, US$350,000, or by imprisonment not exceeding three years, or by both punishments, in the discretion of the court.

Jurisdiction	Legislation	Personal bringing action	Penalty/Relief
	Clayton Act	Person injured	Any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the US in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of suit, including reasonable attorney's fee. The court may also award simple interest on actual damages suffered if it is just in the circumstances.
		Attorney General of States	Any attorney general of a State may bring a civil action in the name of such State, as parents partriae on behalf of natural person residing in such State, in any district court having jurisdiction of the defendant, to secure monetary relief of up to threefold of the total damage sustained, the cost of suit, including a reasonable attorney's fee.
United Kingdom			DGTel is empowered to enforce licence conditions by imposing provisional orders, subject to confirmation, an final orders, on a licensee whom the DGTel is satisfied to have contravened or is likely to contravene, any of the licence conditions. (section 16). DGTel may enforce compliance of the provisional or final order by apply for an injunction or interdict or for any other appropriate relief in civil proceedings. (section 18(8)

Jurisdiction	Legislation	Personal bringing action	Penalty/Relief
			Where a duty is owed to any person who may be affected by contravention of a provisional or final order: - any breach of the duty which causes that person to sustain loss or damage; - any act which, by inducing a breach of that duty or interfering with its performance, causes that person to sustain loss or damage and which is done wholly or partly for the purpose of achieving that result, shall be actionable at the suit or instance of that person in a civil proceeding. (section 18(6)
	Competition Act	Director General of Fair Trading.	The Director General of Fair Trading may fix penalty of not exceeding 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).
Australia	Trade Practices Act 1974 Prices Surveillance Act	ACCC If the Federal Court is satisfied that a person: has contravened, attempted to contravene or has been involved in a contravention of the competition rule, a tariff filing direction or a record-keeping rule, the court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the court	The pecuniary penalty payable by a body corporate is not to exceed: - in the case of a contravention of the competition rule for each contravention, the sum of $10 million and $1 million for each day that the contravention continued; or - in the case of a contravention of a tariff filing direction , $10 million for each contravention;

Jurisdiction	Legislation	Personal bringing action	Penalty/Relief
		determines to be appropriate.	- in the case of a contravention of a record keeping rule, $250,000 for each contravention. The pecuniary penalty payable by a person other than a body corporate is not to exceed: - in the case of a contravention of a record-keeping rule, $50,000 for each contravention; or - in any other case, $5000,000 for each contravention.
New Zealand	Commerce Act 1986	Commerce ? Commission If the court is satisfied on application of the Commerce Commission that a person: - has contravened or attempted to contravene any of the provisions of Part II of the Commerce Act; or - has aided, abetted, counseled, or procured any other person to contravene such a provision; or - has induced, or attempted to induce, any other person, whether by threats or promise or otherwise, to contravene such a provision; or	The court may impose pecuniary penalty as it may determine appropriate of not exceeding $100,000 in the case of a person not being a body corporate or $300,000 in the case of a body corporate, in respect of each act or omission.

Jurisdiction	Legislation	Personal bringing action	Penalty/Relief
		- has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or has conspired with any other person to contravene such a person. (section 8)	
European Commission	Treaty of Rome	EC Commission	In the breach of the anti-competition rules under Articles 85 and 86 of the Treaty of Rome, the EC Commission may, under article 15(2) of the EEC Council Regulation No. 17, imposes fines of : - from 1,000 to 1 million ECU; or - a sum in excess of 1 million ECU, but, below 10% of the turnover in the preceding business year of the entity participating in the infringement of the anti-competition rules. In reach of the procedures laid down in article 145(1) of the EEC Council Regulation NO. 17, a fine in an amount between ECU1000 and ECU5,000 can be imposed.

Annex 4

Extracted from the Australian Trade Practices Act

80A Order to disclose information or publish advertisement

(1) Without limiting the generality of section 80, where, on the application of the Minister or the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Part IVB or V, the Court may make either or both of the following orders:

(a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access;

(b) an order requiring that person or a person involved in the contravention to publish, at his or her own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

Annex 5

INTERCONNECTION AND SHARING OF FACILITIES OF OVERSEAS JURISIDCITIONS
(United States, United Kingdom, Germany and Switzerland)

Jurisdictions	Legislation	Interconnection	Sharing of Facilities
United States	Telecommunications Act 1996	Section 251 of the Telecommunications Act establishes a three-part hierarchy of interconnection obligations. It first addresses the interconnection obligations of all telecommunications carriers. It then applies a set of more detailed interconnection requirements applicable to all local exchange carriers (LECs). Finally, a third set of additional interconnection requirements is imposed only on incumbent LECs. Section 251(c)(2) mandates that incumbent LECs must interconnect to their local loop competitors "at any technically feasible" point within the LEC's network, providing each with a quality of service at least equal to that provided to any other party, including that provided to the LEC itself or its affiliates/subsidiaries, and on rates, terms and conditions that are just, reasonable and non-discriminatory. Section 252(d)(1) states that both interconnection and unbundled network elements are subject to the same pricing standard based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element.	Section 251(c)(6) requires incumbent LECs to allow a competitive LEC to collocate equipment necessary for interconnection or access to the network in order to provide telecommunications services. Where the incumbent LEC lacks sufficient space for such collocation of equipment, virtual collection must be provided. This section does not require the collocation of switching equipment or equipment necessary to provide enhanced services, such as Internet access. Carriers may only collocate equipment necessary for interconnection or access to the telecommunications network. Necessary equipment includes multiplexing and concentration equipment but does not include switching equipment.

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United Kingdom	EU directives/licence conditions	Interconnect charges are, in the first instance, a matter for commercial agreement between operators. Interconnect agreements should include provision for arbitration. Failing this, all licences provide (under EU directives) for the Director General of Telecommunications to resolve disputes. Publication of interconnection charge is only on the incumbent (BT).	Co-location is not mandatory in UK. It is open to operators to negotiate co-location if they wish. BT has in the past arranged co-location for some interconnecting operators – but this provision is now frozen.
Germany	Telecommunications Act 1996 and the Network Access Ordinance (Ordinance) issued by the Federal Ministry of Posts and Telecommunications under sections 35(5) and 37(3) of the Telecommunications Act	Each public telecommunications carrier shall undertake to make to other carriers of such networks as an interconnection offer, at their request. (section 36) Where no interconnection agreement has been made between public telecommunications carriers, the regulatory authority shall, after hearing the parties concerned, order interconnection. (section 37) Under the Ordinance, a public telecommunications carrier having a dominant position shall provide unbundled access to all network elements, including unbundled access to the local loop. The unbundling requirement shall not apply where the carrier can provide evidence that such requirement is not objectively justified in a given instance. (section 2)	Under section 2 of the Ordinance, a public telecommunications carrier having a dominant position shall by housing on its premises the equipment necessary offer for use at the location the transmission, switching or operational interface in non-discriminatory manner (known as physical co-location). If physical co-location is not, or no longer, objectively justified, the carrier shall undertake to provide use on equal economic, technical and operational conditions (known as virtual co-location)

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Switzerland	Telecommunications Law 1996	Providers of telecommunications services that have a dominant position in the market must undertake to provide interconnection for other providers without discrimination and in accordance with the principles of a transparent and cost-related price policy. They must state the conditions and prices separately for each of their interconnection services. If a provider who is required to provide interconnection and an applicant for interconnection cannot reach agreement within three months, the Federal Communications Commission (SFCC) shall, on a proposal from the Federal Office for Communications (Office), fix the conditions for the interconnection in accordance with the normal principles governing the market and the sector in question. SFCC may provide interim legal protection at the request of either party. The Office shall consult the Competition Commission to determine whether a provider has a dominant position. The Competition Commission may publish its opinion. (article 11)	The Office may, for reasons of public interest, in particular to take account of technical problems or the needs of development or protection of the countryside, the national heritage, nature or animals, require the holder of a licence for telecommunications services to accord to a third party, in return for appropriate compensation, the right to make joint use of its installations and the location of its transmitters, if they have sufficient capacity. In case the parties fail to reach an agreement, the provisions applicable to "interconnection" for resolution of such disputes apply mutatis mutandis. (article 36)