

立法會
Legislative Council

LC Paper No. CB(3)716/00-01
(These minutes have been
seen by the Administration)

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Bills Committee on Telecommunications (Amendment) Bill 2001

Minutes of meeting
held on Thursday, 26 April 2001 at 4:30 pm
in Conference Room B of the Legislative Council Building

- Members present** : Hon James TIEN Pei-chun, JP (Chairman)
Hon David CHU Yu-lin
Hon Eric LI Ka-cheung, JP
Hon CHAN Kwok-keung
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
- Members absent** : Hon Emily LAU Wai-hing, JP
- Public Officers attending** : Ms Eva CHENG
Deputy Secretary for Information Technology and
Broadcasting
- Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting
- Miss Linda SO
Assistant Secretary for Information Technology and
Broadcasting
- Mr M H AU
Senior Assistant Director (Regulatory), Office of the
Telecommunications Authority
- Mr Geoffrey FOX
Senior Assistant Law Draftsman

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Miss Shirley WONG
Government Counsel

Clerk in attendance : Mrs Betty LEUNG
Chief Assistant Secretary (3)1

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Mr Colin CHUI
Senior Assistant Secretary (3)2

I. Meeting with the Administration

Fourth leaver rule

Mr SIN Chung-kai considered that the auction should aim at selecting four licensees in a fair manner, which was the reason why in the second consultation exercise on third generation mobile services (3G) licensing the Administration had changed its stance to propose auction in place of selection by merit which it had proposed in the first exercise. He considered that the “fifth leaver rule”, whereby the auction would end when the fifth bidder left the auction, could achieve the aim. The use of the last bid offered by the fourth leaver before leaving the auction to determine the highest common royalty percentage appeared to maximise revenues. In comparing the amount of royalty payment and profits tax resulted from the two rules, the fourth leaver rule might give a higher royalty payment but lower profits tax. The aggregate amount of revenues collectable from the fourth leaver rule might therefore not be higher than that collectable from the fifth leaver rule. He therefore wondered whether it was wise to use the fourth leaver rule which aimed at securing the highest licence price. He also asked whether the Administration had compared the economic benefits, such as job benefits etc., that the two rules could bring to society.

2. Mr David CHU said he shared Mr SIN Chung-kai's view that the fourth leaver rule aimed at maximising revenues. He supported the fifth leaver rule because it could allow sufficient market competition, the extra licence price resulted from the fourth leaver rule vis-à-vis the fifth leaver rule would ultimately be borne by consumers, and the fourth leaver rule with the blind-auction design was unethical since the fourth leaver had to declare his intention to leave the auction before he was informed that he had in fact won.

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3. Mr YEUNG Yiu-chung considered that a high royalty payment might not necessarily lead to high tariffs while low royalty payment might not necessarily lead to low tariffs either. While agreeing that the licence price should be set at the “market price”, the Administration and the industry had different perceptions on how it was set, and whether it should be determined by the fourth leaver rule or the fifth leaver rule. He pointed out that the Democratic Alliance for Betterment of Hong Kong (DAB) had yet to take a position on which rule to support.

4. Mr Eric LI declared interest as an independent, non-executive director of SmarTone Telecommunications Holdings Ltd. He had reservations on the Administration's proposed blind-auction design to determine the 3G licensees. From the economic point of view, he said that the market price should be a price striking a right balance of supply and demand. A free market should have accessible information so that a price could be agreed upon by the supply and demand sides. Such agreed price would be fair to the parties concerned, including the Administration, the industry and the consumers. By denying bidders such access to information, the blind-auction design was not fair to them and might give rise to irrational bidding. The telecommunications industry required long-term stable investment. The current state of local telecommunications market was not conducive to such investment as all second generation mobile services (2G) operators were still in red in their business. Overseas investors might doubt the prospect of local telecommunications market on account of the fact that the Administration had intervened by prescribing the number of telecommunications licences to be issued. Taking account of the unique auction design, the minimum guaranteed payment for the first five years from the issue of licence, the development of local 3G market which might be mature and profitable only by 2003/04 and the open network requirement, prospective new entrants to the market might consider it better to adopt a wait and see attitude than to apply for a licence at this stage. The proposed use of the highest common royalty percentage would be unfair to the existing 2G operators who had already made the long-term investment, and would leave a negative message to these operators and the international community. He considered that the blind-auction design was not fair, open nor economically efficient.

5. Noting that the issue of 3G licences had been put on hold in Japan, Mr Howard YOUNG said that the 3G market was no longer a gold mine. He commented that high royalty payment might not necessarily lead to high tariffs but would increase the operating cost of the 3G licensees. He considered that the main objective of the auction was to issue the four 3G licences in a fair manner. If royalty payment resulted from the fourth leaver rule was higher than that from the fifth leaver rule and it was vice versa in relation to profits tax, it

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would not be necessary to adopt the former rule for revenue purposes. He would support that the fifth leaver rule be adopted.

6. The Chairman said that according to the respective written submissions from six telecommunications operators, viz. New World PCS Ltd. (LC Paper No.CB(3)623/00-01(06)), Peoples Telephone Company Ltd. (LC Paper No.CB(3)623/00-01(03)), Hutchison Telecommunications (HK) Ltd. (LC Paper No.CB(3)584/00-01(01)), SmarTone Mobile Communications Ltd. (LC Paper No.CB(3)623/00-01(02)), SUNDAY (LC Paper No.CB(3)623/00-01(04)) and Hong Kong CSL Ltd. (written submission tabled at the meeting and issued to absent member vide LC Paper No.CB(3)632/00-01(01)), the fifth leaver rule was preferable to the fourth leaver rule. They also expressed concern on the blind-auction design. He pointed out that except for Miss Emily LAU who was absent, Messrs CHAN Kwok-keung and YEUNG Yiu-chung, members of the DAB which had yet to take a position, he and the other members considered that the fifth leaver rule should be adopted.

7. In response, Deputy Secretary for Information Technology and Broadcasting (DSITB) said that the Administration did not regard the 3G market as a gold mine, nor did it aim at securing the highest licence price. The Administration had taken into account the changing market environment, the views and difficulties of the industry in raising capital in drawing up the proposed regulatory framework which included, inter alia, the use of royalty payment and a five-year rolling guarantee. The objective of the proposed fourth leaver rule was to select four winners at a licence price which was fair to the Administration, the public at large and the industry. The price resulted from the fifth leaver rule was not the market price, which should be the highest price all the four successful bidders were willing to pay. As such, the price should be set at the last bid of the fourth leaver before withdrawal from the auction. Securing the highest licence price was not the Administration's objective; otherwise a cash auction should be used instead of the royalty auction. The Administration would issue four 3G licences, but whether there were four takers would be a matter for the market. There could be mergers and acquisitions in the telecommunications industry to adapt to market development and the Administration was conducting a consultation exercise in this regard.

8. Regarding a comparison of the revenues collected from royalty and profits tax resulted from the fourth and fifth rules as raised by Mr SIN Chung-kai, DSITB said that such comparison was not necessary as the Administration's objective of the fourth leaver rule was not to maximise revenues.

9. On Mr SIN's other question of comparing the benefits to the

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society that could be brought about by the fourth and fifth leaver rules, DSITB said that such comparison might have a huge margin of errors and was not meaningful.

10. Mr Eric LI considered that the Administration's proposed fourth leaver rule was fair politically but not economically. The preservation of the identity and number of, and bids made by bidders in the auction was against free access to information in the market from the economic point of view. The rule was beneficial to the Administration but not to the potential bidders.

11. Mr David CHU asked whether ethical problems would arise in the auction design in which the outcome was determined after withdrawal of the last fourth bidder who was nevertheless successful. DSITB responded that the fourth leaver was only a technical description of the bidder whose last bid before leaving the auction was the market licence price. The Administration would consider using the confirmed last bid instead of the bid before leaving the auction.

Other issues

12. On the Chairman's question of the legislative timetable of the subsidiary legislation to be made under the Bill, DSITB responded that the subsidiary legislation could only be gazetted and introduced to the Council after enactment of the Bill. In order that the subsidiary legislation could be passed within this legislative session, the Administration tabled a tentative timetable for the Bill and the subsidiary legislation for consideration by Members as follows:

<u>Key Steps</u>	<u>Time</u>
House Committee to recommend resumption of second reading debate on the Bill	4 May
Resumption of second reading debate on and third reading of the Bill	16 May
Gazettal of subsidiary legislation under section 32I of the Telecommunications Ordinance as amended by the Bill	1 June

<u>Key Steps</u>	<u>Time</u>
Tabling of the subsidiary legislation	6 June
Expiry of the negative vetting period for subsidiary legislation (28 days + 7 days extension (if any))	11 July (last Council meeting in this legislative session)

13. In response to Mr SIN Chung-kai, DSITB said that the Administration might only make some technical changes to the draft version of the subsidiary legislation which had been sent to Members before its gazettal.

14. As the views of the written submissions (as mentioned earlier in paragraph 6 of these minutes) related to the subsidiary legislation, the design and process and the terms and conditions of the auction rather than the Bill, members agreed that the Bills Committee should concentrate on the scrutiny of the Bill and report to the House Committee on 4 May 2001 recommending:

- (a) the second reading debate on the Bill be resumed on 16 May 2001; and
- (b) a subcommittee be formed immediately under the House Committee to study the draft subsidiary legislation and the proposed auction design and process, and to meet with the industry.

15. In reply to Mr Eric LI, DSITB said that the Administration would respond to the written submissions of the six operators for the consideration of the subcommittee later.

Continuation of clause-by-clause examination of the Bill

(The Bill (issued vide LC Paper No. CB(3)395/00-01) and the summary of questions/comments and suggested amendments regarding the Bill from written submissions received by the Bills Committee together with the respective comments from the Legal Service Division and the Administration (LC Paper No. CB(3)554/00-01))

Clauses 2 and 3

16. DSITB went over LC Paper No. CB(3)592/00-01(02) (the paper) which, inter alia, responded to members' suggestion of proposing Committee Stage amendments (CSAs) to clauses 2 and 3 of the Bill to the effect that the Telecommunications Authority (TA) or Secretary for Information Technology and Broadcasting (SITB) must regard the relevant fees as a determining factor, where and when it was so provided for in the relevant regulation.

17. Mr SIN Chung-kai was concerned whether, without amendments to clauses 2 and 3 of the Bill, TA would, by virtue of the current drafting, be conferred a discretionary power to such an extent as to enable him to disregard and contravene the relevant subsidiary legislation by not issuing licences to the highest bidders in an auction. He asked whether a 3G licence applicant could successfully challenge TA if he did not follow the principle that the highest bidders were to be the successful bidders as provided for in the relevant subsidiary legislation in determining the applications. DSITB responded that the Bill which was primary legislation should contain general empowering provisions while the relevant subsidiary legislation would be specific to individual licensing exercise. In carrying out its functions under the Telecommunications Ordinance (the Ordinance), including issuing of licences, TA was obliged to follow all the provisions in the Ordinance as well as the subsidiary legislation. If TA did not follow the provisions of the subsidiary legislation in making decision on licence applications, the decision could be subject to judicial review.

18. The Chairman enquired whether in relation to 3G licence applications, TA must regard the fees as the only determining factor rather than a determining factor as provided for in clauses 2 and 3 of the Bill. SALD responded that the provisions in the Bill, which were general empowering provisions, should be read in conjunction with the relevant subsidiary legislation, which was specific to individual licensing exercise. For the 3G licensing exercise, the certainty that the highest bidders would be the successful bidders would be provided for in the subsidiary legislation. There might be other licensing exercises in which TA had to take into account other factors in addition to fees in determining licence applications. ALA3 said that TA, as a public officer appointed for the purposes of the Ordinance, was under a duty to comply with the subsidiary legislation made under it. This would mean that TA would in effect determine applications for the licence and for assignment of frequencies with regard solely to the fees arising or resulting from an auction. Non-compliance with the subsidiary legislation by TA could be subject to judicial review. Nevertheless, judicial review was only concerned with the procedures followed by TA in making the decision rather than the merits of the decision. In hearing an application for judicial review, the Court would not

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substitute its own decision in place of TA's decision. From the legal point of view, clauses 2 and 3 of the Bill, as drafted, could confer on TA a wide discretionary power to regard or disregard the fees in making his determination.

19. The Chairman was concerned that without an express requirement in clauses 2 and 3 that TA had to take account of the provisions of the relevant subsidiary legislation in determining licence applications, the discretionary power given to TA under the general empowering provisions might be too wide. In response, DSITB said that the method for determination of fees for licences relating to the use of spectrum would be prescribed by subsidiary legislation with which TA had to comply. The clauses merely sought to put it beyond doubt that TA had the power to regard the fees as a determining factor in the issue of licences and allocation of frequency bands respectively, which was not expressly provided in the Ordinance. Without such power TA might be subject to legal challenge if he did so.

20. Mr Howard YOUNG enquired whether the wording of clauses 2 and 3, i.e. TA “may” regard the fees as a determining factor, sought to give TA a discretion not to issue licence in case of unacceptable bid price or number of potential bidders. In response, DSITB reiterated that the provisions merely sought to empower TA to regard the fees as a determining factor so that it would not be ultra vires for TA to do so in the issue of licences and allocation of frequency bands. While the proposed arrangement (i.e. primary legislation to be general empowering provisions, with subsidiary legislation and notice made by TA to provide details specific to individual licensing exercises) was in order from the legal perspective and did not involve any policy issue, the Administration might, if members so requested, consider giving an undertaking in the Legislative Council when the Second Reading debate on the Bill was resumed that TA was bound by the provisions of subsidiary legislation, and in the case of 3G licencing exercise, TA must regard the fees arising from the auction exercise as the determining factor for granting the licences as provided for in the 3G-specific regulation, subject to compliance of terms and conditions of the auction.

21. Mr SIN Chung-kai stressed that in case of auction, TA must be required to regard the fees as the determining factor and such requirement should be clearly spelt out in the legislation. Clauses 2 and 3 might be amended to provide that in case of auction, TA “shall” regard the fees as the determining factor while in other cases, TA “may” regard the fees as a determining factor. Whilst agreeing with Mr SIN Chung-kai's view in principle, Mr Eric LI was concerned that the proposed amendments might have the unintended consequence of causing confusion to the bidders.

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22. Members also noted that PCCW-HKT had, inter alia, suggested to amend clauses 2 and 3 to the effect that fees should be the only determining factor in the issue of licences and allocation of frequency bands respectively.

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23. In response to members, DSITB undertook to request the Administration's legal adviser to attend the next meeting to respond to members' concern and suggestion on the need for amendments to clauses 2 and 3. Failing that, the Administration would revert to the Bills Committee in writing on the legal advice it received thereon.

Clause 5

24. DSITB explained the procedures for the Chief Executive (CE) in Council to exercise the power to cancel or suspend a licence on grounds of public interest, and the means of appeal against that decision by the relevant licensee. ALA3 pointed out that the requirement that the exercise of the power must be proportionate and reasonable as provided in section 34(4A) of the Ordinance was applicable to TA but not to the CE in Council. Such requirement was not part of the common law principles of natural justice. Members agreed to defer considering this point to the next meeting.

25. Regarding the Law Society of Hong Kong's suggestion to include an express provision in the Bill to the effect that operators would be no longer bound to continue with the payment for the licence once it was cancelled, members noted ALA3's comments and accepted the Administration's explanation of not accepting the suggestion.

Chinese version of CSAs

26. Members agreed that ALA3 should examine the legal and drafting aspects of the Chinese version of the Administration's proposed CSAs and advise whether they were in order.

II. Date of next meeting

27. Members noted the following arrangement for the next Bills Committee meeting:

	<u>Date</u>	<u>Time</u>	<u>Purpose</u>	<u>Remarks</u>
Sixth meeting	2 May 2001 (Wednesday)	12:45 pm to 2:15 pm	Meeting with the Administration	Lunch would be provided

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28. There being no other business, the meeting ended at 6:08 pm.

Legislative Council Secretariat

28 May 2001

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