

立法會
Legislative Council

LC Paper No. CB(1)2066/99-00
(These minutes have been seen
by the Administration and
cleared by the Chairman)

Ref : CB1/BC/18/98/2

Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Friday, 10 March 2000, at 8:30 am
in the Chamber of the Legislative Council Building

- Members present** : Hon SIN Chung-kai (Chairman)
Hon David CHU Yu-lin
Hon Eric LI Ka-cheung, JP
Hon Fred LI Wah-ming, JP
Hon Howard YOUNG, JP
Hon Mrs Miriam LAU Kin-ye, JP
- Non-Bills Committee** : Hon Ronald, ARCULLI, JP
Member attending
- Members absent** : Hon HO Sai-chu, SBS, JP
Hon MA Fung-kwok
Dr Hon Philip WONG Yu-hong
Hon YEUNG Yiu-chung
Hon CHOY So-yuk
- Public officers** : Ms Eva CHENG, JP
attending Deputy Secretary for Information Technology and
Broadcasting
- Mr M H AU
Senior Assistant Director of Telecommunications
- Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting

Miss Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Clerk in attendance : Miss Polly YEUNG
Chief Assistant Secretary (1)3

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Ms Anita SIT
Senior Assistant Secretary (1)8

I Papers issued since last meeting

Members noted that a paper "The Administration's response to the letter issued by the Assistant Legal Adviser regarding protection of personal data in relation to the proposed section 7I of the Bill" (CB(1)1147/99-00) had been issued on 9 March 2000. At the invitation of the Chairman, the Deputy Secretary for Information Technology and Broadcasting (DS/ITB) briefed members on salient points in the paper.

2. The Chairman enquired whether the Bill or the existing Ordinance would empower the Telecommunications Authority (TA) to reject a request by other Government departments (such as the Police) or regulatory bodies for information obtained by TA if such information contained personal data. The Administration replied in the affirmative. They elaborated that in accordance with the requirements under the Personal Data (Privacy) Ordinance (Cap. 486), any information containing personal data obtained by an authority by invoking a statutory provision should be used only for the purpose(s) prescribed in the provision. Hence, instead of seeking to obtain information containing personal data from TA, the other authorities should invoke the relevant statutory provisions to obtain such information directly from the party possessing the information for their law enforcement purposes.

II Meeting with the Administration

3. At the invitation of the Chairman, DS/ITB briefed members on the paper "Committee Stage Amendments" (CB(1)1138/99-00 issued on 8 March 2000).

*CSAs to Clause 2 - Proposed section 2
Interpretation*

4. On proposed section 2(2), Mr Ronald ARCRULLI enquired why a notice in the Gazette published by TA to vary the conditions of a class licence under section 7C(1) was not subsidiary legislation. In reply, the Senior Assistant Director, Office of the Telecommunications Authority (SAD/OFTA) advised that class licences were a new type of licence proposed in the Bill. One principal application of the class licensing system would be commonly used telecommunications appliances which were currently exempt from the licensing requirements under the Telecommunication Ordinance. Under the Bill, persons supplying telecommunications appliances covered by a class licence would be required to comply with the conditions of the class licence which would mainly include technical specifications. It was therefore necessary to empower TA to vary class licence conditions to keep them abreast of the prevailing technical standards and technology in the market. The provision under proposed section 7C(1) was in line with the existing arrangement whereby TA had the power to issue technical specifications governing the technical standards of telecommunications apparatus. SAD/OFTA further advised that at present, TA already had the power to attach special conditions to a licence if he considered these conditions necessary for fulfilling the object of the Telecommunication Ordinance. TA could also vary the special conditions of a licence on renewal of the licence. The Senior Assistant Law Draftsman (SALD) added that in other licensing regimes, the relevant authority had similar powers to stipulate licence conditions.

*CSA to Clause 3 - Proposed section 6A
Powers of Authority*

5. Regarding the status of the guidelines to be issued under the Ordinance/Bill, SALD advised that although these guidelines were not statutory in nature, there was a requirement in proposed section 6A(3)(b)(ii) that TA should not depart from these guidelines unless he had provided reasons in writing for such departure.

6. Mr Ronald ARCULLI pointed out that proposed section 6A(3)(b)(ii) had the implication that TA could depart from the guidelines issued under the Ordinance so long as he had provided reasons in writing. He queried the rationale for the provision and why TA should depart from guidelines instead of seeking to change guidelines when the guidelines were found not suitable for application.

7. In reply, SAD/OFTA explained that introducing changes to guidelines usually involved a lengthy process as TA would need to consult relevant parties on proposed changes. Hence, introducing changes to guidelines might not be practicable in circumstances where an immediate or speedy determination or decision was required of TA. He remarked that proposed

section 6A(3)(b)(ii) sought to confirm that TA should not depart from the guidelines issued under the Ordinance unless there was strong justification for doing so.

8. Mrs Miriam LAU expressed concern that TA was conferred too wide and unfettered powers by the Bill. She considered that the current drafting of the provisions relating to guidelines could not circumscribe TA's powers effectively since TA was the authority responsible for issuing guidelines and he was allowed to depart from those guidelines simply by stating the reasons in writing. She also pointed out that there was an apparent anomaly under proposed section 6A(3)(b)(ii) that on the one hand, TA was required by law not to depart from the guidelines, but on the other hand, TA might do so with written reasons.

9. Taking note of members' concern, SALD suggested that the drafting of proposed section 6A(3)(b)(ii) might be modified by qualifying the circumstances under which TA could depart from the guidelines issued under the Ordinance. DS/ITB agreed to consider such modification.

(Post-meeting note: The Administration has provided explanation in response to members' concern on the proposed section 6A(3)(b)(ii) vide paragraph 8 of paper CB(1)1378/99-00 issued on 13 April 2000.)

*CSA to Clause 3 - Proposed section 6C
Consultation*

10. Mrs Miriam LAU queried why proposed section 6C only sought to provide TA with the discretion, instead of imposing a statutory requirement on TA, to consult affected parties before performing any function or exercising any power under the Ordinance.

11. In reply, SAD/OFTA explained that there was a wide range of powers and functions which TA might exercise or perform under the Ordinance. Prior consultation might not be necessary and/or practicable in respect of certain powers and functions. For example, if the operation of a telecommunications apparatus had caused harmful interference to some important services, TA would need to issue an order expeditiously directing that the operation of the apparatus be halted. Under such circumstances, it would not be practicable nor appropriate for TA to consult the persons affected or members of the public prior to issuing the order. In fact, there were many other possible situations in which TA had to make speedy decisions or take speedy actions to perform his regulatory functions and mandatory prior consultation might not be conducive to such regulatory purposes.

12. DS/ITB supplemented that proposed section 6C had been introduced in response to Mr Howard YOUNG's concern raised at the meeting on 1 March 2000 when examining proposed sections 32G and 32H regarding the scope of

consultation on spectrum management matters. She recapitulated that Mr YOUNG commented that if TA only consulted the telecommunications industry before exercising his powers on spectrum management matters, the consultation would not be sufficient as some suppliers and users of the spectrum were outside the telecommunications industry. Therefore, the currently proposed section 6C provided that TA might consult affected persons or members of the public before exercising his powers or performing his functions. Drafted as such, the proposed provision would obviate the need to define all the relevant parties under each particular provision where consultation was required.

13. Mrs Miriam LAU recalled that Mr Howard YOUNG's concern was that TA should be bound to consult all parties which would be directly affected by TA's determination on spectrum management. She pointed out that proposed section 6C however did not impose a statutory obligation on TA to consult affected persons/parties.

14. In response, DS/ITB further explained that proposed section 6C was a general provision empowering TA to conduct consultation. There were other provisions in the Ordinance/Bill which imposed on TA a duty to consult affected parties before issuing certain guidelines or exercising certain powers. In fact, the Administration would propose a Committee Stage Amendment (CSA) to proposed section 32G(2) to the effect that TA should consult the telecommunications industry as well as other affected persons prior to his exercise of powers on spectrum allocation and spectrum utilization fees.

15. The Chairman pointed out that some powers of TA under the Ordinance/Bill were of a policing or law enforcement nature while some powers were concerned with setting out general principles to be applied in performing his statutory functions. For the former type of powers, he appreciated that it might not be practicable to require TA to consult affected persons prior to exercising his powers.

16. Mr Eric LI referred to one of his main concerns that under the Bill, there were not adequate checks on TA powers. He considered that imposing a statutory requirement on TA to consult affected parties in exercising certain powers would help circumscribe TA's powers. He suggested that TA's functions and powers under the Ordinance/Bill be suitably classified and that the requirement to consult should apply to his decisions and determinations of significance.

17. The Assistant Legal Adviser 3 (ALA3) suggested that for the sake of clarity, proposed section 6C might be drafted in such a way that the sections imposing a duty on TA to conduct consultation should be specified. She noted that under proposed sections 32D and 32G, it was mandatory for TA to consult affected persons on technical standards and spectrum management.

18. Taking note of members' comments, the Administration agreed to consider ALA3's suggestion of specifying under proposed section 6C the circumstances where consultation with affected parties was mandatory with reference to the relevant provisions in the Ordinance/Bill.

(Post-meeting note: The Administration has provided explanation in response to ALA3's suggestion in paragraph 9 of paper CB(1)1378/99-00(01) issued on 13 April 2000.)

*CSA to Clause 3 - Proposed section 6D
Guidelines*

19. Mrs Miriam LAU opined that the guidelines issued under the Ordinance/Bill should serve to circumscribe TA's powers and thus they should be statutory in nature. She recalled the Administration's repeated explanation that guidelines were operational in nature and required revision from time to time having regard to changing technology and market circumstances. She nevertheless opined that as there was a provision under proposed section 6A(3)(b)(ii) which allowed TA to depart from the guidelines issued under the Ordinance/Bill, there were no longer strong grounds for the Administration to maintain that these guidelines were administrative rather than statutory.

20. In response, SALD pointed out that "guidelines" by definition were not legislation and if any "guidelines" were to be codified into legislation, they would be statutory and should not be departed from. DS/ITB said that codifying the "guidelines" to be issued under the Ordinance into legislation would not be practicable nor appropriate. To elaborate, she said that if the guidelines for the determination of access fees referred to in proposed section 14(5A)(b) were to be made statutory, it would be necessary to prescribe in law the respective formula applicable in different scenarios of determination. However, in so doing, the independence and/or impartiality of the arbitration proceedings would be jeopardized. She stressed that the proposed provisions on issuing guidelines were largely modelled on the existing practices of how TA issued and implemented guidelines and these existing practices had all along worked effectively and were well received by the telecommunications industry.

*CSA to Clause 4 - Proposed section 7I
Information*

21. Referring to proposed section 7I(5), Mr Eric LI asked whether there was any similar legislative provision to absolve a person required by the Legislative Council or its committees to produce information from civil liability arising from the production of information. He said that the Public Accounts Committee had on some occasions encountered difficulties in obtaining information as the parties concerned had declined to provide information on the grounds that the information was the subject of a confidentiality agreement.

He considered that if the protection under proposed section 7I(5) was considered necessary to facilitate TA to obtain information, similar protection should be provided to persons supplying information to the Legislative Council or its committees to facilitate their inquiries.

22. In this connection, ALA3 recalled that there was a provision similar to proposed section 7I(5) in the Organized and Serious Crimes Ordinance (Cap. 455). She remarked that generally speaking, whether such a provision should be included in the legislation to facilitate an authority or a law enforcement agency to obtain information was largely a matter of policy.

23. DS/ITB pointed out that to enable TA to perform his regulatory functions effectively, it was necessary for TA to have the power to access to information which was the subject of confidentiality agreements. Otherwise, TA could hardly perform his regulatory functions to safeguard competition and to protect consumers' interests. SALD supplemented that even without the provision under proposed 7I(5), persons supplying information to TA should still be entitled to the same statutory defence. Proposed section 7I(5) only sought to state this explicitly in the legislation. He however concurred that proposed section 7I(5) would serve the purpose of preventing persons from evading TA's request for information on the grounds that the information requested was the subject of a confidentiality agreement.

CSAs to Clause 7 - Proposed section 14

Power to place and maintain telecommunications lines etc., on land, etc.

24. Referring to proposed section 14(1B)(d), Mrs Miriam LAU expressed concern that the technical requirements to be specified by TA in authorizing access might override the technical requirements of railway corporations and tunnel operators in respect of their own operations and facilities, in particular those requirements relating to public safety.

25. In reply, SAD/OFTA advised that the technical requirements to be specified by TA in authorizing access would only govern the manner and timing of the installation of the telecommunications equipment of the mobile network operator (MNO) concerned. TA would take into account the views of the land or facility owner concerned in specifying these technical requirements as TA was obliged to give the land or facility owner a reasonable opportunity to make representations under proposed section 14(1B)(c) before deciding whether an access authorization should be granted.

26. As regards MNOs' access to railway premises, DS/ITB advised that upon enactment of the Bill, TA would issue operational guidelines specifying the procedures and requirements that MNOs should follow in exercising the right of access to railway premises. A set of the draft guidelines (CB(1)806/99-00(02) issued on 17 January 2000) had been provided to the Bills Committee earlier on. It would be unequivocally stated in the guidelines that the relevant

railway corporation would be the sole authority in determining the technical specifications or standards that were relevant to the safety of rail operation in relation to the radiocommunication systems for installation in the premises. MNOs would be required to obtain the consent of the relevant railway corporation on their installation plan before exercising the access right granted by TA.

27. Mrs Miriam LAU was gravely concerned that while the Bill conferred on TA the power to specify the technical requirements in relation to MNOs' access to railway premises, there was no corresponding provision in the Bill to confirm that such technical requirements should be subject to the safety requirements of the railway corporations. Moreover, TA was at liberty to amend the aforesaid operational guidelines. Mrs LAU pointed out that as the railway corporations were ultimately responsible for public safety within the railway premises, it would be unfair to them if they were deprived the power to control the installations of MNOs within the railway premises which might affect public safety. Mr Eric LI shared the concern of Mrs Miriam LAU. He considered that the Administration should state clearly the respective powers and responsibilities of TA and the railway corporations in the aforesaid operational guidelines.

28. In response, DS/ITB stressed that the legislation governing the two railway corporations already stipulated that the corporations were the sole authority on matters relating to railway safety. TA would be acting against the law if the technical requirements he specified contravened the safety requirements of the railway corporations. DS/ITB further advised that the Administration had considered the option of adding a provision in the Telecommunications Ordinance to stipulate the respective powers of TA and the railway corporations in respect of the access of MNOs to railway premises. However, according to the legal advice given to the Administration, this arrangement was not desirable as it would give rise to confusion as to whether one statutory authority was subject to or prevailed over the other. Mrs Miriam LAU was not convinced and reiterated her concern that the proposed provision on TA's power to specify technical requirements in authorizing access did not provide the necessary safeguard for public safety.

29. Mrs Miriam LAU queried the appropriateness of imposing a requirement under section 14(5A)(b) that in any arbitration proceedings to determine access fees, regard should be given to the guidelines issued by TA under proposed section 6D(2)(b). She pointed out this provision might defeat the primary objective of ensuring impartiality of arbitration and opined that instead of imposing a requirement on the arbitrator to follow the guidelines to be issued by TA, the principles of determining access fees should be prescribed in the legislation for clear reference. In this connection, she sought clarification on whether the three factors of "cost, property-value and the benefits to be derived from the authorization" referred to in proposed section 14(5A)(a) would be duly interpreted along the lines set out in the paper "Principles for the

determination of Access Fees for mobile network operators for access to confined areas under proposed section 14(5) of Cap. 106 - Outline of consultation paper to be issued by the Office of the Telecommunications Authority under section 2(2) of Cap. 106" (CB(1)806/99-00(01) issued on 17 January 2000).

30. DS/ITB confirmed that the three factors quoted in proposed section 14(5A)(a) were proposed pursuant to the charging principles set out in the aforesaid paper. She however cautioned that the charging principles set out in the paper were not meant to be exhaustive and the Administration did not have any pre-conceived views as to which principle should apply under different scenarios of access fee determination. Instead, upon enactment of the Bill, TA would consult all relevant parties on the charging principles with a view to drawing up the guidelines for the determination of access fees.

31. Mrs Miriam LAU reiterated that the requirement in proposed section 14(5A)(b) that the arbitration proceedings should give due regard to guidelines issued by TA was not acceptable. As the views of telecommunications operators and those of land/facility owners on the applicability of different principles for different scenarios might be poles apart, she sought clarification on how TA would balance the interests of these parties in drawing up the guidelines to ensure that they were fair and reasonable.

32. In response, DS/ITB clarified that the primary purpose of the aforesaid consultation was to draw up a range of relevant principles for inclusion in the guidelines for determination of access fees. It would be up to the arbitrator to decide which principle or combination of principles should apply in a particular case of determination. She stressed that the overriding test for any determination was what was "fair and reasonable in all circumstances of the case" as prescribed in proposed section 14(5A)(a).

33. Mrs Miriam LAU further commented that neither the proposed provisions on access fee determination nor the Administration's explanation so far was clear on the extent to which the guidelines would prescribe the applicability of different principles in different scenarios and on how the arbitrator should apply the guidelines to arrive at a determination fair and reasonable in all circumstances of the case.

34. Mr Eric LI said that as the Bill already provided that the access fee would be determined through independent arbitration instead of by TA, he considered that it might not be necessary to prescribe in detail the application of the charging principles for the purpose of arbitration in the guidelines to be issued by TA. Instead, he considered that the arbitrator should be given due discretion and be entrusted with the duty of arriving at a fair and reasonable determination.

III Any other business

35. The Chairman reminded members that the next meeting had been scheduled for 15 March 2000. He also informed members that at the request of the Administration, the two meetings originally scheduled for 5 April 2000 for deliberation on the constitutional and legal issues arising from the Bill would need to be rescheduled to facilitate the attendance of the Administration's legal expert. The Clerk would consult members on the rescheduled dates after consultation with the Administration.

(Post-meeting note: Having consulted the Administration and members and with the consent of the Chairman, the two meetings for deliberation of constitutional and legal issues arising from the Bill were subsequently rescheduled to be held on 14 April 2000 starting at 8:30 am and 10:45 am.)

36. The meeting ended at 10:30 am.

Legislative Council Secretariat
25 September 2000