

立法會
Legislative Council

LC Paper No. CB(1)2068/99-00
(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 Wednesday, 10 May 2000, at 11:40 am
in Conference Room A of the Legislative Council Building

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

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Ms Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

Ms Phylis POON
Government Counsel

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 Meeting with the Administration
LC Paper No. CB(1)1520/99-00
LC Paper No. CB(1)1576/99-00(01)

Clause 23 - proposed section 36D
Authority may obtain information

Mr Eric LI stated the view of the Hong Kong Society of Accountants that when the Telecommunications Authority (TA) wished to obtain information from a non-licensee, the non-licensee should be given notice of the request and a reasonable opportunity to make representations. He stressed that unlike licensees, non-licensees did not opt into the regulatory regime and were not ordinarily subject to the regulation of the authority concerned. In providing information to a regulatory authority, non-licensees were in fact assisting the authority in its performance of regulatory functions and should not therefore be jeopardized. Referring to the Administration's argument that the proposed ex parte proceedings for TA to apply for a magistrate order to obtain information would avoid protracted proceedings and preserve the information, Mr LI pointed out that when the preservation of information was a major concern, the legislation usually provided for the relevant authority to apply to the court for an injunction order to protect information or for a warrant to enter into premises to obtain the required information. However, under proposed section 36D, the order to be issued by a magistrate would compel the third party to produce information within a specified period. This proposed section

was therefore not intended to deal with an emergency situation where preservation of information was at risk.

2. Mr Eric LI further said that the current drafting of section 36D was not acceptable as before TA instituted the ex parte proceedings to apply for a magistrate order, the non-licensee concerned would not be given prior notice of TA's request for information, nor the opportunity to make representations to challenge TA's request. The only recourse for the non-licensee was to seek judicial review to challenge the magistrate order at his own costs. Moreover, judicial review was restrictive in scope and thus would not provide an adequate redress channel for non-licensees. These statutory arrangements were unfair to non-licensees. He informed the meeting that Mr Ronald ARCULLI had suggested to him an alternative arrangement - "ex parte application on notice", which he considered might be more acceptable to the accounting profession. In brief, when applying to a magistrate for an order to obtain information from a non-licensee, TA should at the same time notify the non-licensee of the application. If the non-licensee objected to TA's application, he could make written representations or ask to be heard before the magistrate in open court. Mr Eric LI stressed that the additional requirement of giving notice to the non-licensee and allowing a specified period for making representations, if any, should not result in protracted proceedings.

3. Mrs Miriam LAU concurred with Mr Eric LI that non-licensees should have the right to be heard and that proposed section 36D was unfair to non-licensees, as the latter were not given any opportunity to challenge TA's request for information until and unless the non-licensee concerned resorted to judicial review after an order had been served on him. She noted from the paper "Points to note in discussing s 36D on the Telecommunications Authority's request for information from non-licensees" (CB(1)1576/99-00(01)) that the Director-General of Telecommunications of the United Kingdom (UK) might, by notice in writing, require any person to produce documents or furnish information. A person who refused or, without reasonable excuse, failed to comply with the notice should be guilty of an offence. She said that under this approach, the burden of proof of the non-licensee's non-compliance with the notice was on the authority, whilst under proposed section 36D, the non-licensee would have to prove his own innocence in the case of non-compliance with a magistrate order.

4. Mrs Miriam LAU suggested that while TA's application for a magistrate order might remain ex parte, the order issued by the magistrate should include an inter partes return date, say seven days later, for both parties to be heard before the magistrate. She said that this would provide the non-licensee an opportunity to be heard before the magistrate and would not lead to protracted proceedings.

5. The Acting Secretary for Information Technology and Broadcasting (SITB(Atg.)) stressed that the Administration's policy intent was to adopt a more restrictive provision for obtaining information from non-licensees than that adopted in UK, and therefore proposed that TA should satisfy the magistrate and obtain an order from him in the first place. The pre-requisite of a magistrate order would circumscribe TA's power to obtain information from third parties. She however added that the Administration was prepared to consider adopting the UK approach, which prescribed criminal sanction, if this approach was preferred by members. SITB(Atg.) further said that according to the advice of the Department of Justice, the present proposal was consistent with the established arrangement for obtaining information from third parties under other Ordinances. Therefore, if the statutory arrangement for TA to obtain information from non-licensees under section 36D was to deviate from the established arrangement, she would need to seek further legal advice before taking a definite position.

6. In reply to the Chairman's enquiry, the Senior Assistant Law Draftsman (SALD) said that he was not aware of any existing statutory provision akin to the aforesaid arrangement of "ex parte on notice" whereby notice was given to the party concerned when an authority made an ex parte application for a court order. The proceedings for an authority to apply for a court order to obtain information were usually ex parte under other existing Ordinances.

7. Mr Eric LI said that while he would need to further examine the UK approach with HKSA, he considered that quoting one or two legislative provisions of overseas jurisdictions to make a comparative analysis of whether the proposed provisions were balanced and reasonable could be precarious; whether a particular provision was balanced and reasonable should be assessed in the context of the whole piece of legislation having regard to the various checks and balances built into the legislation. He also pointed out that in making any comparison, legislative provisions aimed at regulating licensees must be distinguished from those applicable to third-party non-licensees.

8. Noting that under the UK legislation, a person who failed to comply with the authority's notice requiring production of information without reasonable excuse would be guilty of an offence, the Chairman said that he found the provision rather draconian and therefore had reservation on adopting the UK approach.

9. Mrs Miriam LAU clarified that she was not in favour of the UK approach per se, but would like to point out that even under the UK approach, the non-licensee was given an opportunity to make representations in court and the burden of proof of an offence vested with the authority.

10. Mr Eric LI said that according to his observation, there had been a marked increase in the Administration's legislative proposals seeking to

empower regulatory authorities to obtain information from third parties over the past two years. It also appeared that the Administration had not adopted a consistent approach in obtaining information from third-parties, as evidenced by the different requirements stipulated in various existing Ordinances and proposed legislation. He suggested that for members' reference, the Administration should provide information on comparable provisions in other local Ordinances relating to the authorities' power to require third parties to produce information. In this regard, the Chairman said that according to his understanding, the Broadcasting Bill and the Draft Securities and Futures Bill contained proposed provisions for such a purpose.

11. Mr Eric LI said that as far as he understood, under the relevant proposed provision in the Draft Securities and Futures Bill, the authority would first give notice to a non-licensee to request information and the latter was allowed to make representations to the authority. It was only when the non-licensee refused to provide information and the authority still considered the information necessary that the authority might make an application to the court for an order to require the non-licensee to produce the information. He remarked that the proposed arrangement in the Draft Securities and Futures Bill was still under debate and he found the related provision which sought to impose criminal sanction on the non-licensee for non-compliance with the authority's notice unacceptable.

12. SALD said that another option that might be worth exploring was to give the magistrate the discretion to decide whether the proceedings should be inter partes or ex parte. On hearing TA's application for an order, the magistrate might, if he considered that it was in the interest of justice, to adjourn the hearing and require that the non-licensee be notified and be given an opportunity to make representations. In response, Mr Eric LI stressed that as a matter of principle, third-party non-licensees should be given an opportunity to make representations before court proceedings were instituted, and that this right to be heard should be provided in legislation rather than left to the discretion of the court.

13. Mr Eric LI recapitulated that the accounting profession preferred the option along the lines of the "ex parte application on notice" arrangement. In essence, when making an application for a magistrate order, TA should at the same time notify the third party of the application and the third party should be given an opportunity to make representations in person or in writing to the magistrate. Mr LI further said that another arrangement which he would consider acceptable but less preferable was that before making an application to a magistrate, TA should first request the non-licensee to produce the information and allow the non-licensee to make representations to TA within a specified period if he did not wish to accede to TA's request. If TA, having considered the non-licensee's representations, still considered the information necessary, he might apply to a magistrate for an order to require the non-

licensee to produce the information. In making the application, TA should also submit the non-licensee's representations to the magistrate. If the magistrate considered it necessary to hear the non-licensee's views further, the magistrate should have the discretion to invite the non-licensee to state his case before him. Mr LI stressed that under the aforesaid arrangement, non-compliance with the notice issued by TA should not carry a criminal sanction.

14. The Assistant Legal Adviser 3 cited for members' reference that according to the judicial proceedings of the High Court, an order issued in response to an ex parte application should as a general rule contain a provision for the affected party to apply on notice for discharge or variation of the order and for the costs to be reserved. Members noted this arrangement.

15. SITB(Atg.) said that the Administration would need to further examine the various options suggested at this meeting as the subject had legal policy implications, and therefore she could not take a position at this meeting. She undertook to report to the Bills Committee the view of the Administration on the subject by the following week. She highlighted that the Administration would prefer to keep the proceedings for obtaining information from non-licensees ex parte. She also cautioned that to safeguard public interest and preserve the integrity of information, if TA was required to give notice to a non-licensee to request information before making an application for a magistrate order as suggested by some members, it would be necessary to include a provision to impose appropriate sanction for deliberate destruction or distortion of information required by TA. Mr Eric LI said that the accountancy profession would not object to such a safeguarding provision.

Clause 7 - proposed section 14

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

16. Mrs Miriam LAU said that while she welcomed the proposed CSAs regarding the interim fee arrangement, she considered that for the avoidance of doubt, it should be stated explicitly in the Bill that in the arbitration proceedings for determination of the final access fee, regard should not be given to the amount of interim fee specified by TA. SITB(Atg.) agreed to introduce the necessary CSAs.

Admin

II Any other business

17. Members agreed that the next meeting would be held on 16 May 2000 at 2:30 pm.

(Post-meeting note: The meeting was subsequently rescheduled to 18 May 2000 at 8:30 am.)

18. Noting that subject to complete scrutiny of the Bill, the Administration might wish to resume the Second Reading debate on 31 May 2000, the Chairman suggested that as Mr Eric LI had indicated that he would be out of town on 31 May 2000, it might be better for the Second Reading debate to resume on 7 June 2000 (i.e. the next Council meeting after 31 May 2000). Mr Eric LI however said that he would have no strong view on the date for the Second Reading debate if his concerns raised were satisfactorily addressed by the Administration. Members and the Administration thus agreed that subject to the Bills Committee's further deliberation on the Bill and on any further proposed CSAs, the Second Reading debate of the Bill would be resumed on either 31 May or 7 June 2000.

19. The meeting ended at 12:30 pm.

Legislative Council Secretariat
27 September 2000