

立法會
Legislative Council

LC Paper No. CB(1)689/99-00
(These minutes have been
seen by the Administration)

Ref : CB1/BC/18/98/2

Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Tuesday, 16 November 1999, at 4:30 pm
in the Chamber of the Legislative Council Building

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

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 Confirmation of minutes of meeting
LC Paper No. CB(1)218/99-00

The minutes of the meeting held on 28 September 1999 were confirmed without amendments.

II Papers issued since last meeting

2. Members noted that the following papers had been issued since the last meeting-

<u>Paper No.</u>	<u>Paper Title</u>
CB(1)190/99-00	Letter dated 20 October 1999 from Cable & Wireless HKT Limited with three pieces of "independent legal opinions" attached
CB(1)217/99-00} CB(1)226/99-00}	Further submissions from BOT tunnel operators dated 25 and 27 October 1999
CB(1)176/99-00	A summary of the Administration's response to queries raised by the Legal Service Division on the Bill

3. The Chairman referred to a letter dated 15 November 1999 from the Cable & Wireless HKT Limited (CWHKT) which was tabled to members (issued to members vide LC Paper No. CB(1)402/99-00 after the meeting). He sought members' views on CWHKT's request that the company be given an opportunity to make a presentation to the Bills Committee on major constitutional and legal issues arising from the Bill.

4. After discussion, members agreed that CWHKT should be invited to present its views on legal and constitutional issues arising from the Bill at the next meeting of the Bills Committee. As CWHKT had already addressed the Bills Committee on the policy issues arising from the Bill, the next meeting

with the company should focus on legal and constitutional issues only. Members also agreed that if other deputations also wished to present views on legal and constitutional issues arising from the Bill, they should also be given the opportunity. Members further concurred that about 30 minutes be allocated for the meeting with CWHKT at the next Bills Committee meeting.

5. The Deputy Secretary for Information Technology and Broadcasting (DS/ITB) said that while the Administration would attend the Bills Committee's meeting with CWHKT to hear the company's views, the Administration would need time to examine the issues raised by CWHKT. It would not be appropriate for the Administration to provide an immediate response at the meeting. The Chairman said that in line with the usual practice, the meeting with CWHKT would include a presentation by CWHKT followed by a discussion between members and CWHKT. The Administration would be requested to provide a detailed response in due course.

III Meeting with the Administration

The Administration's response to further submissions to the Bills Committee since last meeting

6. Members noted that the Administration had provided two papers, one (CB(1)358/99-00) in response to the submission from CWHKT dated 20 October 1999 and the other (CB(1)372/99-00(01)) in response to further submissions from operators of "build-operate-transfer" tunnels dated 25 and 27 October 1999. DS/ITB suggested that as the issues raised in these submissions pertained to various clauses in the Bill, to avoid duplication, the Bills Committee might proceed with the clause-by-clause examination of the Bill and make reference to the submissions and the Administration's response in the aforesaid papers when examining the relevant clauses. Members agreed to this approach.

Clause-by-clause examination of the Bill

7. The Chairman advised that members might also refer to the paper - "Summary of deputations' views and relevant comments on major clauses of the Telecommunication (Amendment) Bill" (CB(1)372/99-00(02)) so that deputations' views and the respective response of the Administration and the comments of the Bills Committee legal adviser could be duly considered in the course of discussion.

*Clause 1**Short title and commencement*

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8. DS/ITB advised that some provisions would not commence operation until enactment of the relevant subsidiary legislation. She undertook to provide the Bills Committee with information on these provisions and the respective transitional arrangements, if any.

*Clause 2**Section 1 - Short title*

9. On proposed section 1, DS/ITB advised that the proposed change from "Telecommunication Ordinance" to "Telecommunications Ordinance" was to tie in with the modern usage of the word "telecommunications".

*Clause 2**Section 2 - Interpretation*

10. Regarding the term "Authority" in the English version and the term "局長" in the Chinese version, Mr Fred LI enquired whether the term referred to an organization or a person. DS/ITB confirmed that all along, the term "Telecommunications Authority" (TA) under the Telecommunication Ordinance (the Ordinance) referred to a person. No change had been proposed to the meaning of the term in the Bill. The Senior Assistant Director (Regulatory)/Office of the Telecommunications Authority (SAD/OFTA) further explained that TA was the officer appointed under section 5 of the Ordinance which stipulated that the Chief Executive might appoint such public officer as he thought fit to be TA for the purposes of the Ordinance. It had been the practice all along that the incumbent Director-General of Telecommunications (DG of Tel), who headed the Office of the Telecommunications Authority (OFTA), was appointed as TA.

11. On the term "associated person", DS/ITB confirmed that this term was also used in the Television Ordinance. Regarding the term "basic service", SAD/OFTA advised that the proposed definition of "basic service" in the Bill had been adapted from relevant provisions in the existing licence for fixed telecommunications network services (FTNS).

12. On the reason for including a large number of definitions under proposed section 2, SAD/OFTA advised that as reference was made to these terms in the other proposed sections of the Bill, it was considered appropriate to specify their definition. He added that most of these terms were widely used in the telecommunications sector and their respective definition was not controversial.

13. On proposed section 2(2), DS/ITB advised that the objective of this section was to confer a general power on TA to issue guidelines other than those already prescribed in the Ordinance for the purpose of providing practical guidance in respect of any requirements under the Ordinance imposed on a person or class of persons.

Clause 3

Section 6A - Powers of Authority

14. On section 6A(1), members noted that CWHKT had expressed the view that the functions of TA should be clearly stipulated in the Ordinance. DS/ITB said that the services of the OFTA Trading Fund had already been stipulated in Schedule 1 of the Legislative Council Resolution on the establishment of the Trading Fund under the Trading Funds Ordinance (Cap. 430). TA's powers were spelt out in the Telecommunication Ordinance and his functions were restricted by the statutory powers conferred on him. As such, the Administration did not consider it necessary to set out explicitly the functions of TA in the Telecommunication Ordinance. The Assistant Legal Adviser 3 (ALA3) also advised that it was desirable but not legally necessary to stipulate TA's functions in legislation. She added that TA, as a public officer, was under a duty to act fairly and lawfully and his acts must be within the scope of the empowering provisions in legislation.

15. On proposed section 6A(3)(b), members noted that CWHKT was concerned that under this provision, TA was only required to provide written reasons for his determinations, directions or decisions, but not for his opinions, in exercising his powers under the Ordinance. DS/ITB pointed out that pursuant to the amendments, in case of a breach of any provision of the Ordinance or licence condition, TA might enforce the provision or condition by making a decision on the appropriate disciplinary measure, in which case TA would be obliged under section 6A(3)(b) to set out his reasons in writing. Accordingly, forming an opinion would not be a stand-alone action of TA. Hence, the Administration was of the view that it was not necessary to include the word "opinion" in proposed section 6A(3)(b).

16. In reply to Mr Eric LI's enquiry about the appeal channels provided for under the existing and the proposed legislation against TA's opinions, directions, determinations or decisions, ALA3 advised that no independent appeal mechanism was provided for in the existing and proposed legislation as the Administration would continue with the existing system whereby appeals against TA's decisions were by means of judicial review. She further advised that written reasons provided by TA for his opinions, determinations, directions or decisions would be useful information for judicial review as it would shed light on the fairness and lawfulness or otherwise of the decision-making process. Moreover, DS/ITB said that an aggrieved party could always apply for judicial review on the grounds that TA had not given due consideration to

all relevant factors in making the decision.

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17. In this connection, Mr Eric LI commented that as written reasons would serve a useful purpose in judicial review and remove doubt on the basis of TA's decisions, TA should be required to provide reasons in writing also for his opinions under proposed section 6A(3)(b). In response, DS/ITB agreed to consider including "an opinion" under section 6A(3)(b).

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18. Mr Eric LI further pointed out that in some circumstances, it might not be adequate for TA to only provide written reasons for his decisions without substantiating those reasons. He asked the Administration to consider improving the drafting of section 6A(3)(b) to the effect that TA, in providing written reasons, would also substantiate those reasons.

19. The Chairman enquired whether there was any provision in the existing and the proposed legislation to oblige TA to consult relevant parties before he made a decision of significance. Mr Eric LI considered that for the sake of accountability and transparency, there should be promulgated guidelines for TA to follow in exercising his statutory powers in the decision making process.

20. In response, DS/ITB advised that some proposed amendments in the Bill sought to codify the existing practice whereby TA would conduct consultation with relevant parties and provide affected parties with a reasonable opportunity to make representations before making a decision of significance. The detailed arrangements on expressing views or making representations were not prescribed in the Bill but relevant parties could express their views and make representations verbally or in writing. SAD/OFTA added that there were already promulgated guidelines for TA to follow in making determinations. Under these guidelines, TA was required to provide reasonable opportunities for affected parties to make representations. He stressed that failure on the part of TA to do so or to give due consideration to the views of affected parties might constitute valid grounds for judicial review against TA's decisions. In this connection, members noted that the guidelines issued by TA could be browsed on OFTA's website on the Internet.

(Post-meeting note: Members have been informed of the relevant website vide LC Paper No. CB(1)407/99-00 dated 19 November 1999.)

21. As to whether there were time limits for TA to make determinations, SAD/OFTA confirmed that no such time limits would be prescribed as the circumstances and complexity of individual cases of determination varied.

22. On proposed section 6A(4), DS/ITB cited the case that the policy decision to extend the moratorium on the issue of further FTNS licences was an example of a policy direction that the Secretary was empowered to make under this proposed section.

*Clause 3**Section 6B - Powers of Authority in relation to services with places outside Hong Kong*

23. DS/ITB advised that proposed section 6B sought to regulate any agreement or arrangement between a licensee with a supplier of international public switched services in a place outside Hong Kong the purpose or the effect of which was to substantially distort competition in the supply of external services between that place, or another place, and Hong Kong.

24. For elucidation, SAD/OFTA explained that the supply of external services involved two service operators, one licensed in Hong Kong and the other licensed in another country. Only the operator licensed in Hong Kong was subject to the regulation of the Ordinance. An example of arrangements which would substantially distort competition in the supply of external services was that payments for external services initiated in Hong Kong were made through internationally agreed settlement rates while external services initiated in another place were provided through international simple resale services. As the international settlement rates were usually higher than the rates charged for international simple resale services, this arrangement would result in an unbalanced payment from Hong Kong to another territory. Given that Hong Kong was an open economy, an overseas franchised company might establish a subsidiary or affiliated company in Hong Kong and adopt this kind of arrangement. On the other hand, companies in Hong Kong might not be able to do the same as many overseas jurisdictions did not open their telecommunications market to overseas companies. Hence, without the proposed provisions to confer powers on TA to regulate the aforesaid malpractice, the general interest of Hong Kong and that of the local telecommunications sector might be jeopardized.

*Clause 4**Section 7 - Issue of licences*

25. On the need to grant exclusive licences under proposed section 7(1), DS/ITB confirmed that the Administration did not envisage the granting of exclusive licences at this stage. While it was Government policy to further liberalize telecommunications market, the need, though remote, of granting an exclusive licence in future could not be precluded. Hence, proposed section 7(1) was an enabling provision to grant exclusive licences. DS/ITB acknowledged that circumstances under which an exclusive licence would be granted were not specified in the Bill as these circumstances, if arose, would be very exceptional and thus could hardly be prescribed in advance.

26. On proposed section 7(2), DS/ITB confirmed that the regulations which might be made by the Secretary for Information Technology and Broadcasting under this subsection would be subsidiary legislation subject to negative vetting

by LegCo. In reply to Miss CHOY So-yuk's enquiry on whether the Administration planned to introduce substantial changes to the licence conditions and licence fees for carrier licences upon enactment of proposed section 7(2), DS/ITB confirmed that the Administration would largely adopt the existing arrangements.

27. On the division of licensing responsibilities between the Secretary for Information Technology and Broadcasting and TA under proposed section 7, SAD/OFTA advised that for carrier licences other than exclusive licences, the Secretary would prescribe by regulation the general conditions and fees payable while TA would issue the licences according to the conditions and fees prescribed by the Secretary. For licences other than exclusive licences and carrier licences, TA might determine the licensing matters set out in proposed section 7(6).

28. On proposed section 7(7), SAD/OFTA confirmed that the aspects of licence conditions set out in section 7(7)(a) to (n) were in fact covered in existing licences. As regards the meaning of the term "a dominant licensee" in section 7(7)(m), SAD/OFTA referred to section 7L(2) which stipulated that a licensee was in a dominant position when, in the opinion of the Authority, it was able to act without significant competitive restraint from its competitors and customers.

Clause 4

Section 7A - Special licence conditions

29. On proposed section 7A, DS/ITB explained that as distinct from general licence conditions, special licence conditions were included in a particular licence or a particular type of licences only. An example of special licence conditions was a condition prescribing the level of performance bond required of a licensee.

Clause 4

Section 7B - Class licences

30. On proposed section 7B, DS/ITB advised that the new class licence system aimed to simplify the licensing procedures for certain telecommunications services and facilities while ensuring that providers of certain facilities and services were registered with TA under the class licence system, thus affording adequate protection to consumers. She added that TA would conduct public consultation before deciding on the telecommunications facilities and services for which a class licence should be created. SAD/OFTA added that services and facilities that might come under the class licence category were usually supplied in large quantities and the supply and use of them would not pose significant impact on other telecommunications facilities or services. Examples were wireless telephones for domestic use

and telephone cards. Providers of facilities and services that were regulated under a class licence would not need to apply for a licence but were required to comply with the relevant licence conditions. He added that the class licence system was also adopted in the United Kingdom and Australia.

Clause 4

Section 7C - Variation of class licence

31. Members did not raise any query on proposed section 7C.

Clause 4

Section 7D - Register of class licences

32. On proposed section 7D, DS/ITB said that while the registers of class licences would be made available on OFTA's website, to ensure accessibility of the registers by the general public, section 7D(3) would oblige TA to keep the registers available for public inspection during the normal business hours of OFTA.

Clause 4

Section 7E - Permits

33. On the reason for stipulating a six-month time limit for activities requiring a permit under proposed section 7E, SAD/OFTA explained that the activities with which this section was concerned were usually short-term and one-off in nature. Nevertheless, if the situation warranted, TA might issue another permit to enable the activity concerned to carry on for a further six-month period.

Clause 4

Section 7F - Tariffs

Section 7G - Price control

34. On proposed sections 7F and 7G, members noted that CWHKT had suggested that these proposed sections should be deleted as price control regulation was inconsistent with the current competitive environment. DS/ITB pointed out that the objective of the proposed sections was for ensuring effective competition in a market environment where there was a dominant operator which might be in a position to implement pricing strategies to make it untenable for other operators in the market to compete with it. DS/ITB also clarified that under proposed section 7F, a licensee was not required to seek TA or the Secretary's approval for its tariffs, but was required to publish its tariffs and the terms on which the telecommunications service was provided.

35. Mr Eric LI said that he did not have a strong view on proposed sections 7F and 7G given that some sectors of the telecommunications market had not been fully liberalized. He sought clarification on the term "by regulations" under proposed section 7G. DS/ITB confirmed that the regulations which might be made under proposed section 7G would be subsidiary legislation subject to the negative vetting procedure. In line with the existing practice, the Administration would brief the relevant Panel on any proposed regulation under this section.

36. The Chairman enquired about the circumstances under which proposed section 7G would be invoked. In reply, DS/ITB advised that the proposed section was only an enabling provision which might be invoked by the Secretary having regard to TA's advice on the market development or upon receipt of a complaint against a licensee's anti-competitive pricing strategies. As to why proposed section 7G(a) would only apply to a fixed carrier licensee in a dominant position, SAD/OFTA explained that "price control measures" included the requirement on a licensee to seek approval for its tariffs. All along, price control over fixed telephone services had been applied to the dominant FTNS operator by virtue of relevant provisions in the former Telephone Ordinance and the FTNS licence. As to whether there was still a need to impose price control measures on a dominant fixed carrier licensee, DS/ITB said that at present, domination still existed in the provision of local and external fixed telecommunications facilities. While section 7G(a) sought to confer power on the Secretary to implement price control measures by regulation, there might not be a need to do so when the fixed telecommunications facilities market was fully competitive. On whether proposed section 7G(a) would apply to international simple resale services, SAD/OFTA advised that the proposed section was targeted at fixed network operators only. Price control measures over external services operators might not be necessary as external telecommunications services were already fully liberalized. He also confirmed that at present, carrier licences had been granted for two categories of network operators, namely FTNS operators and mobile telecommunications network operators.

Clause 4

Section 7H - Accounting practices

37. On proposed section 7H, Mr Eric LI said that according to the Administration's response, OFTA had issued an Accounting Manual specifying in detail the accounting practices to be adopted by licensees. He reiterated that the Hong Kong Society of Accountants (HKSA) had not expected such an extent of regulation over the accounting practices of licensees by TA. However, it would not have a strong view on specifying the requirement in the legislation if the proposed arrangement was a codification of existing licence conditions and was well understood by the telecommunications industry. HKSA nevertheless considered that the term

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"accounting practices" in the phrase "consistent with accounting practices generally accepted" should be replaced by "accounting principles" to reflect more clearly that the accounting practices specified by TA should be consistent with the "accounting principles" determined by the accounting profession and generally accepted in the business sector. The Administration agreed to make the necessary amendment as suggested by Mr LI.

Clause 4

Section 7I - Information

38. Members noted that CWHKT had objected to the proposed section which it considered unnecessary and arbitrary within the meaning of the Basic Law and Bill of Rights Ordinance. As the company would be invited to the next meeting to present its views on constitutional and legal issues arising from the Bill, members agreed that examination of this section be deferred pending the meeting with CWHKT.

Clause 4

Section 7J - Inspection, etc., of facilities

39. DS/ITB pointed out that it was necessary for TA to conduct routine as well as ad hoc inspections of facilities to ensure compliance with licence conditions. Prior written notice would be given to the licensee concerned before an inspection was conducted. Members did not raise any query on this proposed section.

Clause 4

Sections 7K to 7N

40. As CWHKT had raised objection to certain proposed provisions on legal and constitutional grounds, members agreed that detailed deliberation of these sections be deferred pending the meeting with CWHKT.

41. Referring to proposed section 7L, the Chairman queried why quantitative criteria, such as a certain market share percentage, had not been specified in the legislation for determining whether a licensee was in a dominant position. In response, DS/ITB stressed the need for TA to take into account all relevant matters, including but not limited to the market share of a licensee, as set out in proposed section 7L(3) in determining whether a licensee was in a dominant position. In view that the market situation was subject to on-going changes and a quantitative threshold for defining a "dominant position" might need to be varied frequently to cater for changing market circumstances, specifying a quantitative threshold in the legislation would not provide the necessary flexibility for TA to respond to and cope with these changes. SAD/OFTA added that there were quantitative thresholds in the guidelines issued by TA for determining whether a licensee was in a dominant

position. In overseas jurisdictions, the level of competition and market share were the key factors which the telecommunications regulator would take into account in determining whether a licensee was in a dominant position.

IV Any other business

42. The next meeting of the Bills Committee was scheduled for 1 December 1999, starting at 10:45 am.

43. The meeting ended at 6:30 pm.

Legislative Council Secretariat

10 January 2000