

立法會
Legislative Council

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(These minutes have been seen
by the Administration and
cleared by the Chairman)

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Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Thursday, 17 February 2000, at 8:30 am
in the Chamber of the Legislative Council Building

- Members present** : Hon SIN Chung-kai (Chairman)
Hon HO Sai-chu, SBS, JP
Hon Fred LI Wah-ming, JP
Dr Hon Philip WONG Yu-hong
Hon Howard YOUNG, JP
Hon Mrs Miriam LAU Kin-ye, JP
- Non-Bills Committee** : Hon Ronald, ARCULLI, JP
Member attending
- Members absent** : Hon David CHU Yu-lin
Hon Eric LI Ka-cheung, JP
Hon MA Fung-kwok
Hon YEUNG Yiu-chung
Hon CHOY So-yuk
- Public officers** : Ms Eva CHENG
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 Confirmation of minutes of meeting and matters arising
LC Paper No. CB(1)903/99-00

The minutes of the meeting on 1 December 1999 were confirmed without amendment.

2. Referring to a submission from the "build-operate-transfer" (BOT) tunnel operators dated 15 February 2000 (CB(1)998/99-00), the Chairman requested the Administration to provide its response to the letter in due course. The Deputy Secretary for Information Technology and Broadcasting (DS/ITB) said that the Administration had already set out its views, vide its papers issued earlier on, on the two major points raised in the submission that the proposed provisions in the Bill constituted a deprivation of property under the Basic Law and were in breach of existing agreements between the Government and BOT tunnel operators. She however agreed to provide a further response to the submission.

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(Post-meeting note: The Administration has provided its response vide LC Paper No. CB(1)1122/99-00(02) dated 7 March 2000.)

3. The Chairman requested the legal adviser to the Bills Committee to give advice on the major differences and any new viewpoints raised in the latest

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submission of the BOT tunnel operators as compared to their previous submission provided on 15 December 1999, and the major areas of divergence of views between the BOT tunnel operators and the Administration.

(Post-meeting note: The Assistant Legal Adviser 3 (ALA3) has provided her comments vide paper CB(1)1354/99-00(01) - "Summary of deputations' views and relevant comments on major clauses of the Telecommunications (Amendment) Bill 1999" dated 11 April 2000.)

4. Mrs Miriam LAU said that the Bills Committee had not had any internal discussion on the legal and constitutional issues arising from the Bill so far. She suggested that the Bills Committee should deliberate on these issues in greater detail having regard to the legal issues raised by deputations and the views taken by the Administration. She also suggested that the Bills Committee should skip proposed sections 14 and 36AA in the first-round clause-by-clause examination of the Bill, pending further deliberation on the legal and constitutional issues. DS/ITB concurred that proposed section 14 might be examined at a later stage, but requested that proposed section 36AA should be examined in the first-round clause-by-clause examination as it was closely related to other sections of the Bill. The Bills Committee could revisit proposed section 36AA at a later stage if members so wished. Members agreed that the Bills Committee should deliberate on the legal and constitutional issues in greater detail and skip proposed section 14 in the first-round clause-by-clause examination of the Bill.

II Meeting with the Administration

Clause-by-clause examination of the Bill

5. The Chairman reminded members that the Bills Committee had started the clause-by-clause examination on 16 November 1999 and should proceed to examine proposed section 7I of Clause 4.

Clause 4 - proposed section 7I Information

6. The Chairman enquired whether the Telecommunications Authority (TA) would have access to the personal data of the customers of telecommunications licensees under proposed section 7I. In reply, DS/ITB said that proposed section 7I was a necessary provision to enable TA to perform his regulatory functions effectively. She confirmed that in rare circumstances, the information required by TA from licensees could contain personal data. For example, TA might need to obtain the contract documents between a licensee and its customers for investigation into suspected collusive price fixing by mobile network operators. She assured members that although the documents

produced by the licensee could contain personal data, TA would not use the data for any other purpose and would not disclose the data in his investigation report. She stressed that as in the case of other public officers, TA was bound to abide by the data protection requirements under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) in performing his functions.

7. The Senior Assistant Director, Office of the Telecommunications Authority (SAD/OFTA) said that any information requested by TA under this proposed section would only be used for performing TA's functions. TA would also abide by the requirements under proposed section 7I, including the provision of a reasonable opportunity for the person producing information to TA to make representations on a proposed disclosure of the information. According to past experience, it was very rare that the information requested by TA would need to include personal data, and TA had never disclosed any personal data in his investigation reports. If in the unlikely circumstances that TA decided to disclose information containing personal data having considered the representations made by the person supplying the information, TA would need to provide reasons in writing for the decision as required under proposed section 6A(3), and these reasons would form the basis for judicial review if TA's decision was challenged.

8. Mrs Miriam LAU considered that proposed section 7I did not afford adequate protection for the person supplying information and other affected parties, as making representations to TA was the only recourse for a person objecting to a proposed disclosure of the information he had produced to TA and ultimately, it was entirely up to TA to decide whether the information should be disclosed or not. She pointed out that a person divulging information which was a subject of a confidentiality agreement might incur civil liability and disclosure of information which was highly commercially sensitive could seriously jeopardize the well-being of the parties concerned.

9. The Chairman expressed concern on whether there was adequate protection for personal data privacy under the proposed provisions. He enquired whether in producing documents to TA, licensees could obliterate the personal data contained in the documents.

10. In response, the Senior Assistant Law Draftsman (SALD) advised that generally speaking, if confidential agreements, which were non-statutory in nature, could be regarded as valid grounds for refusing the production of information to regulatory authorities, the capability of the authorities to regulate the relevant industries would be seriously eroded, since people could simply arrange confidential agreements to cover all the information that they did not wish to release to regulatory authorities.

11. DS/ITB advised that in accordance with the relevant requirement under the PDPO, if TA was to contemplate any disclosure of personal data, he would

need to obtain the data subject's prior consent, apart from giving the person producing the information an opportunity to make representations as provided under proposed section 7I(4). Mrs Miriam LAU suggested that the requirement to obtain the data subject's prior consent for a proposed disclosure of information containing personal data should be explicitly stated in the Bill. In response, SALD confirmed that none of the proposed provisions in the Bill should prevail over the PDPO; all the protection that living individuals were entitled to under the PDPO should apply to the information obtained by TA under proposed section 7I.

12. ALA3 advised that PDPO was binding on the Government, and thus TA, as a public officer, was required to abide by the provisions under PDPO. It was also provided in PDPO that certain categories of personal data were exempt from the provisions of the data protection principles under PDPO. Proposed section 7I(3) provided that TA might disclose information supplied to him if he considered that it was in the public interest to disclose that information. However, "public interest" referred to in proposed section 7I(3) was not one of the grounds of exemption under PDPO. ALA 3 thus pointed out that proposed section 7I(3) might have the effect of making "public interest" an additional ground of exemption from the data protection principles under PDPO.

13. Taking note of ALA3's advice, SALD affirmed that proposed section 7I would not have the effect of empowering TA to disclose personal data in a way not in compliance with PDPO. In other words, if TA was to release information which identified a living individual on public interest grounds, he would still need to ascertain whether the disclosure fell within the scope of exemptions under PDPO or he would need to obtain the data subject's prior consent.

14. DS/ITB confirmed that it was not the Administration's policy intention that TA's power to disclose information under the Bill should prevail over the PDPO. TA must comply with the PDPO in releasing any information containing personal data. The requirement under proposed section 7I(3) that TA should act in the public interest was intended to circumscribe TA's power and had the implication that his actions and decisions should be compatible with existing legislation including PDPO.

15. SALD suggested that to allay members' concerns, Committee Stage Amendments (CSAs) might be proposed to put it beyond doubt that TA's request for information and disclosure of such information must be in accordance with the relevant requirements under PDPO. DS/ITB agreed to consider introducing such CSAs.

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16. ALA3 advised that under the Banking Ordinance (Cap. 155), there was a provision conferring power on the Hong Kong Monetary Authority to

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disclose information but the power was subject to the restriction that if the information would enable the identification of any living individual, the information should not be disclosed, or the information should be so processed such that the information would not enable the identification of any living individual. The Chairman requested the Administration to consider whether a similar provision should be included in the Bill.

17. The Chairman enquired whether TA or the person producing information to TA should have the responsibility to notify the data subject that his personal data had been produced to TA and whether the data subject would be given an opportunity to make representations to TA in the case of a proposed disclosure of information containing personal data. Mrs Miriam LAU shared the concern and asked whether the requirement to notify the data subject was provided in PDPO.

18. SAD/OFTA said that there should be a common understanding among members of the public that telecommunications service providers were subject to the regulation of TA. He re-affirmed that the information obtained by TA under proposed section 7I would only be used for performing his functions and for the purpose stated in his request for information.

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19. SALD considered that the kind of protection for personal data suggested by the Chairman went beyond that afforded by PDPO, and it might be more appropriate to pursue the issue, if members so wished, in the context of PDPO rather than the Bill in question. He however suggested that to provide greater protection to affected parties, CSAs might be proposed to the effect that a person would not be required to provide information to TA which he could not be compelled to give in evidence, or produce in civil proceedings before the Court of First Instance. DS/ITB agreed to consider proposing such CSAs.

20. ALA3 pointed out that if the information produced by a person to TA was the subject of a confidentiality agreement, the person producing the information might be held liable for breach of contract. She advised that under the Organized and Serious Crimes Ordinance (Cap. 455), there was a provision to absolve a person required by the authority concerned to produce information from civil liability arising from the production of information.

21. In response, SALD said that even without such a provision, the person required to produce information to an authority under relevant statutory provisions would be entitled to the statutory defence that since he was lawfully required by the authority to produce the information, he could not refuse to produce the information on the basis of a confidentiality agreement. SALD however concurred that to put it beyond doubt, it might be desirable to add a provision to the effect that a person disclosing information pursuant to TA's request under proposed section 7I would not be liable for civil liability arising

from the disclosure of such information.

(Post-meeting note: The Administration has proposed CSAs to proposed section 7I vide paper CB(1)1138/99-00 issued on 8 March 2000. Subsequent to the meeting, ALA3 has written to the Administration to seek clarification on the implementation of proposed section 7I. The letter was issued vide LC Paper No. CB(1)1039/99-00 dated 22 February 2000 and the Administration has provided its response vide paper CB(1)1147/99-00(01) dated 9 March 2000.)

*Clause 4 - proposed section 7J
Inspection, etc., of facilities*

22. On proposed section 7J(1), Mr Howard YOUNG enquired whether apart from the licensee concerned, TA would also give prior notice of his inspection to the owner/operator of the premises where the licensee's facilities were placed. Mr Ronald ARCULLI and Mrs Miriam LAU echoed the concern of Mr Howard YOUNG. They sought clarification as to how TA would exercise his power under proposed section 7J(1) when the facility to be inspected was placed in premises owned by a third party such as tunnel operators.

23. In reply, SAD/OFTA advised that if the facility of a licensee was installed in a third party's premises, on receipt of a written notice from TA, the licensee should make necessary arrangements with the third party according to the relevant rental agreement between them to ensure that TA could enter the premises to inspect the facility. He further explained that it was practically not possible for TA to make direct arrangement with the third party as there was no regulatory relationship between TA and the third party.

24. SALD referred to section 31 of the Telecommunications Ordinance which provided that "any person who wilfully obstructs the Authority or any public officer in the exercise of any power conferred upon him by this Ordinance shall be guilty of an offence.....". He said that TA had the power to inspect facilities installed in premises owned by persons other than licensees by virtue of this section.

25. Mr Ronald ARCULLI appreciated that it was not appropriate for TA to make direct arrangements with a third-party owner of premises given that there already existed a commercial agreement between the licensee concerned and the owner. He also concurred that licensees should well understand their obligations to TA, including the need to arrange for TA to inspect facilities installed at rented premises. He however cautioned that section 31 should not apply in the case that TA was unable to conduct inspection due to there being no appropriate agreement between the licensee and the premises owner and/or the lack of reasonable notice by the licensee to the premises owner; it should be the licensee rather than the premises owner who should be held responsible for

TA's inability to conduct inspection. Mrs Miriam LAU shared Mr ARCULLI's view. She also opined that TA's inspection should be conducted at reasonable times and should not cause undue disruption to the normal operations of the premises concerned.

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26. SALD clarified that his referral to section 31 was to highlight TA's powers to perform his functions under the Ordinance in an unobstructed manner. Given the strong connotation of the expression "wilfully obstruct" in section 31, the section only applied to persons who deliberately obstructed TA in performing his functions without any reasonable excuse. Taking note of Mrs Miriam LAU's concern, SALD suggested that a provision be added to the effect that inspection etc. of facilities under proposed section 7J must be done at reasonable times and in such a way as not to cause unreasonable disruption to the operation of the premises concerned. DS/ITB agreed to consider proposing CSAs to this effect.

(Post-meeting note: The Administration has proposed relevant CSAs vide CB(1)1138/99-00 dated 8 March 2000.)

27. Noting that proposed section 7J(1) empowered TA to inspect licensees' facilities installed in Hong Kong, the Chairman pointed out that some telecommunications service providers, such as paging service operators, had already moved their facilities out of Hong Kong while continuing to provide services in Hong Kong. He expressed concern that as the Bill did not confer on TA the power to inspect licensees' facilities installed outside Hong Kong, licensees could evade TA's regulation simply by placing their facilities outside Hong Kong.

28. In response, SALD said that while it was technically feasible to put in provisions to empower TA to inspect facilities installed outside Hong Kong, such provisions might not be enforceable in overseas jurisdictions. SAD/OFTA said that although TA was not empowered to inspect a licensee's facilities installed outside Hong Kong, TA could still regulate the licensee's services provided within Hong Kong through provisions under the Telecommunications Ordinance or relevant licence conditions. For example, TA might require a licensee to provide information to reveal how the licensee operated its facilities installed outside Hong Kong. DS/ITB stressed that in providing telecommunications services in Hong Kong, licensees were required to abide by the standards set out in the relevant licence conditions irrespective of the physical location of their facilities. She added that so far, TA had not encountered serious difficulties arising from the fact that certain facilities of licensees were placed outside Hong Kong. The Administration would consider empowering TA to inspect licensees' facilities placed outside Hong Kong when the need arose.

29. Mr Ronald ARCULLI shared the concern of the Chairman but

appreciated that in the absence of any memorandum of understanding on the mutual enforcement of telecommunications-related legislation, it might not be appropriate to include provisions that conferred on TA law enforcement power in overseas jurisdictions.

Clause 4 - proposed section 7K
Anti-competitive practices

30. Mr Fred LI enquired about the circumstances that would trigger TA's investigation into anti-competitive practices. He specifically referred to a scenario under which telecommunications operators agreed among themselves to raise prices at different times instead of simultaneously. In response, DS/ITB said that in any case of suspected anti-competitive conduct, TA would look into all the circumstances of the case, including but not limited to the timing of the act in question, to ascertain whether any anti-competitive conduct had been committed by a licensee or licensees. Proposed section 7I would enable TA to obtain information from different sources to facilitate his investigation.

31. Mrs Miriam LAU queried the need for the phrase "in the opinion of the Authority" in proposed section 7K(1). In reply, DS/ITB explained that it was necessary to empower TA to determine whether an act of a licensee was anti-competitive as it was not possible to provide an exhaustive list of anti-competitive practices in the legislation. Proposed section 7K(2) sought to set out some anti-competitive practices for reference but the list was not meant to be exhaustive. DS/ITB further said that when TA formed an opinion that a licensee's conduct was anti-competitive, he would be required to give reasons in writing under proposed section 6A. SALD added that TA might issue guidelines on how TA would determine whether a licensee's conduct was anti-competitive as provided under proposed section 7K(4).

32. In reply to the Chairman's enquiry about the need to qualify "restricting competition" by the word "substantially" in proposed section 7K(1), SAD/OFTA advised that the expression "substantially restricting competition" was commonly adopted in the competition law of overseas countries. In practice, many marketing activities had an effect of affecting competition. Hence, the extent of the effect was a critical factor in deciding whether an act should be regarded as anti-competitive to warrant regulatory action.

33. As to how proposed section 7K(1) would be applied in practice, Mr Ronald ARCULLI cited an example of a licensee putting up an advertisement declaring that the purpose of his pricing strategy of charging an exceptionally low tariff was to wipe all competitors out of the market. He questioned whether such an act of the licensee would be regarded by TA as in breach of proposed section 7K(1), given that the provision would apply to all licensees rather than only to dominant operators.

34. DS/ITB confirmed that proposed section 7K would apply to all licensees but pointed out that the provision was concerned with actual anti-competitive conduct of licensees rather than marketing bluff. In determining whether any conduct had the purpose or effect of preventing or substantially restricting competition, TA would need to examine the actual act(s) of the licensee in the light of a series of factors. She remarked that if a licensee was not in a dominant position, his act of charging an exceptionally low tariff might not necessarily have the effect of preventing or restricting competition, but might have the effect of promoting competition instead.

35. SAD/OFTA said that in the scenario depicted by Mr ARCULLI, TA would need to see what actions had been taken by the licensee and the purpose and effect of those actions. If the licensee was successful in gaining a significant share of the telecommunications market at some stage, TA might then declare that the licensee was in a dominant position of the market and thereafter, the licensee's actions would fall under the purview of proposed section 7L on "Abuse of position".

36. Mr Ronald ARCULLI did not fully subscribe to the view of the Administration on the application of proposed section 7K(1). He pointed out that although the Administration did not intend to render the type of marketing strategy depicted in his example as unlawful, the present drafting of the provision would have such an effect. The Administration took note of his concern.

*Clause 4 - Proposed section 7L
Abuse of position*

37. The Chairman asked whether any objective criterion, such as the percentage of market share, would be adopted by TA in determining whether a licensee was in a dominant position. In reply, SAD/OFTA advised that all along, TA took into consideration a series of factors including market share in determining whether a licensee was in a dominant position. For reference by the industry, TA had stated in the guidelines on licence conditions on fair competition safeguard that a licensee having a share of 75% or more in a telecommunications market would be assumed to be in a dominant position in the market whilst a licensee having a share of 25% or less would be assumed otherwise. These assumptions were however subject to verification having regard to other circumstances of the market.

38. In reply to the Chairman's enquiry about the interpretation of "predatory pricing" under proposed section 7L(5)(a), DS/ITB said that charging for a service at a rate below cost would not be considered as an anti-competitive practice unless the licensee concerned was in a dominant position of the market. She stressed that being in a dominant position was not itself a problem, but a

licensee must not abuse such a position by predatory pricing or other practices with the purpose or effect of wiping out competitors. SAD/OFTA added that there were precedents in many overseas countries where a dominant licensee used predatory pricing to wipe out its competitors and then raised prices to a level higher than that charged by its previous competitors. Hence, to protect consumers' interests, it was necessary to regulate predatory pricing.

39. The Chairman further enquired whether there was a definition of "predatory pricing" in existing legislation. In reply, SAD/OFTA acknowledged that there were definitions of the term in the legislation of some overseas countries but advised that the Administration was not inclined to define "predatory pricing" in the legislation as the meaning of the term varied under different circumstances and changed over time. Instead, TA would make reference to overseas precedents relating to "predatory pricing" when determining whether a pricing strategy should be regarded as "predatory pricing".

40. The Chairman reiterated that as there were definitions of "predatory pricing" in overseas countries, and "predatory pricing" was prescribed as an anti-competitive conduct under proposed section 7L(5), the Administration should consider providing a definition of the term in the Bill. In response, SAD/OFTA stressed that it would be very difficult to list out all relevant factors for determining "predatory pricing" exhaustively in legislation. Moreover, if such a definition was provided in law, it would be difficult to keep the definition abreast of changing market circumstances, as making amendments to legislation usually involved a lengthy process. DS/ITB added that TA would need to provide written reasons for his decision or determination relating to "predatory pricing" and this would serve as useful reference.

41. Members were concerned that without a definition of "predatory pricing" in the legislation, the application of the provision might be subject to arbitrary interpretation by TA. At the Chairman's request, the Administration agreed to provide the definitions of "predatory pricing" in overseas jurisdictions for members' reference and to consider whether a definition of "predatory pricing" should be included in the Bill.

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(Post-meeting note: The Administration has provided its response vide LC Paper No. CB(1)1119/99-00(01) dated 6 March 2000.)

*Clause 4 - Proposed section 7M
Misleading or deceptive conduct*

42. The Chairman expressed concern that relying on "the opinion of the Authority" as currently provided in proposed section 7M(1) to determine whether an act was misleading or deceptive was susceptible to arbitrary determination. He enquired whether this provision could be drafted in a more

objective manner. In response, SALD said that the drafting of proposed section 7M(1) was consistent with that of the earlier provisions in the Bill which conferred on TA the power to make determination on different matters. He drew members' attention to proposed section 7M(2) which provided that TA might issue guidelines as to how he would determine whether any conduct was misleading or deceptive.

43. Members noted that proposed section 2(2) provided that "without prejudice to the operation of any other provision of this Ordinance conferring power on the Authority to issue guidelines, the Authority may, for the purpose of providing practical guidance in respect of any requirements under this Ordinance imposed on a person or class of persons, issue such guidelines as in his opinion are suitable for the purpose".

44. Mr Ronald ARCULLI observed that while TA was empowered to form opinions or make determination under various proposed provisions in the Bill, not all these empowering provisions were subject to a provision that TA should issue guidelines on the matters in question. He thus enquired about the general basis on which TA's issuing of guidelines was considered necessary or appropriate. He suggested that as a general empowering provision was already included in the Bill, the reference to TA's issuing of guidelines under specific sections should preferably be deleted for clarity and tidiness of law drafting. He also alerted the Bills Committee of the need to consider the legal status of the guidelines, i.e. whether they would be legally binding on TA and/or licensees.

45. Mrs Miriam LAU considered that it might be necessary to specify that TA should issue guidelines under certain provisions, in particular those conferring on TA the power to form opinion, make determination or decision of significance, as these guidelines would provide a useful reference for licensees and affected parties as to how TA would make his decision.

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46. Taking note of members' views, the Administration agreed to consider deleting all references to TA's issuing guidelines under individual sections and consolidating such power under a general empowering provision which would also specify the sections for the purpose of which guidelines would have to be issued.

(Post-meeting note: The Administration has proposed CSAs regarding TA's issuing of guidelines vide LC Paper No. CB(1)1138/99-00 dated 8 March 2000.)

II Any other business

47. Members agreed that the next meeting would be held on Wednesday, 23

February 2000 at 8:30 am. The Chairman said that the Bills Committee would continue the clause-by-clause examination of the Bill at the next meeting. Where the Administration had decided to propose CSAs to certain clauses, the Bills Committee would also examine the CSAs in conjunction with the relevant clauses.

48. The meeting ended at 10:30 am.

Legislative Council Secretariat
August 2000