

立法會
Legislative Council

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(These minutes have been
seen by the Administration)

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Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Wednesday, 19 January 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 HO Sai-chu, SBS, JP
Hon Fred LI Wah-ming, JP
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Mrs Miriam LAU Kin-ye, JP
- Members absent** : Hon Eric LI Ka-cheung, JP
Hon MA Fung-kwok
Dr Hon Philip WONG Yu-hong
Hon CHOY So-yuk
- Public officers** : Ms Eva CHENG, JP
Attending Deputy Secretary for Information Technology and
Broadcasting
- Mr K S WONG
Senior Assistant Director of Telecommunications
(Acting)
- Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting

Miss Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

Mr Peter H H WONG
Senior Assistant Solicitor General/Basic Law

Mr Paul TSANG
Government Counsel/Basic Law

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 meetings and matters arising
(CB(1)581 and 689/99-00)

The minutes of the meetings held on 21 October and 16 November 1999 were confirmed without amendments.

II Papers issued since last meeting

2. Members noted that a further submission from the Hong Kong Society of Accountants dated 17 January 2000 had been issued vide LC Paper No. CB(1)821/99-00 dated 18 January 2000.

III Meeting with the Administration

Administration's response to constitutional and legal concerns raised by BOT tunnel companies.

3. The Deputy Secretary for Information Technology and Broadcasting (DS/ITB) briefed members on the paper - "Access right of mobile network operators into shielded areas - Response to the Lovell White Durrant on the policy considerations, legal and constitutional issues" (CB(1)820/99-00(01)). The Senior Assistant Solicitor General/Basic Law (SASG/BL) briefed

members on the paper - "Response to Lovell White Durrant's submission dated 10 December 1999 on the legal and constitutional issues" (attachment to CB(1)820/99-00(01)).

4. Mrs Miriam LAU said that as the aforesaid paper and attachment (English version) were only issued to members the day before the meeting, she needed more time to peruse the papers before taking a position on the views set out therein. She referred to paragraph 29 of the second paper (i.e. the attachment) and sought clarification on whether, in the Administration's view, Article 105 of the Basic Law should apply to the proposed provisions on right of access.

5. SASG/BL affirmed the Administration's view that the proposed provisions on right of access would not have the effect of depriving the property rights of the tunnel companies within the meaning of Article 105 of the Basic Law, and as such, no question of mandatory compensation should arise. He clarified that the reference to Article 105(2) of the Basic Law, which stipulated the measure, manner and time of compensation for lawful deprivation of property, in paragraph 29 of the second paper was intended to respond to the view set out in paragraphs 25 and 26 of the submission by Lovell White Durrant. The Administration's view was that even if it could be argued that the proposed provisions did give rise to the issue of compensation under Article 105 of the Basic Law, the proposed provisions in the Bill were not defective for not detailing the basis on which compensation should be calculated, because the Article already provided for the measure of compensation and the manner and time of its payment. Any further details of the said constitutional provision might be worked out by local courts.

6. As to the circumstances which would constitute deprivation of property, SASG/BL explained that in the jurisprudence developed by the European Court of Human Rights (ECHR), deprivation of property had been held to include cases where all legal rights of the owner were extinguished by operation of law or by the exercise of a legal power to the same effect. He also advised that deprivation of property had been held to include also cases where there was a de facto deprivation in that the authorities interfered substantially with the enjoyment of possessions without formally divesting the owner of his title. As far as the Bill was concerned, the exercise of the proposed provisions under clause 7 on the right of access would not amount to a formal deprivation nor a de facto deprivation of the property rights of the tunnel companies in permitting access to their tunnels and determining the relevant fee. Instead, clause 7 would have the effect of controlling or regulating these rights.

7. To follow up on the Administration's argument, Mrs Miriam LAU enquired whether the loss of income to the tunnel companies as a result of the control/regulation over their rights to permit access to tunnel areas and determine the relevant fees should be compensated with reference to the

jurisprudence developed by the ECHR. Mr YEUNG Yiu-chung also enquired whether the proposed provisions on right of access would give rise to the need for compensation.

8. SASG/BL advised that for cases in which control or regulation of property rights by public authorities was contemplated, the ECHR applied a "fair balance" test when considering whether the case complied with any rule under Article 1 of the First Protocol to the European Convention. Compensation in the case of control and regulation of property rights was one factor, along with others, to determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Hence, enactment of legislation with the effect of controlling or regulating certain property rights would not necessarily give rise to the issue of compensation if the need to strike a "fair balance" could be satisfied. The Administration considered that the proposed provisions on right of access were able to meet the fair balance test or the proportionality requirement in the light of the factors set out in paragraph 28 of the paper, which included the statutory requirements that a fee should be paid to the person having a lawful interest in the land and that any such fee to be determined by TA should be fair and reasonable in all the circumstances of the case.

9. To further elaborate the above view, SASG/BL referred to the case *Mellacher v Austria*, (1989) 12 EHRR 391, which was cited under footnote 14 in the paper. In this case, the operation of the 1981 Rent Act by the Austrian authorities had deprived the property owners concerned of a substantial proportion (up of 82.4%) of their future income. The ECHR held that the legislative measures taken did not amount to either a formal or de facto expropriation but only a control of the use of property. SASG/BL informed members that the ECHR did not consider compensation to the property owners necessary in this case.

10. In this connection, the Chairman recalled that legislation on rent increase control for pre-war and certain post-war domestic buildings in Hong Kong had been enacted some years ago. He enquired whether the issue of compensation had been raised in relation to the legislation which to a certain extent limited the landlord's right to increase rent. In reply, SASG/BL pointed out that the legislation referred to was enacted before the reunification, at which time constitutional protection of property as enshrined in the Basic Law did not exist. However, this example illustrated that enacting legislation to impose reasonable control or regulation over certain private properties in the public interest was acceptable under the pre-97 system. The aforesaid legislation continued to be in force after the reunification and implementation of the statutory rent control measures had not given rise to any compensation issue. SASG/BL further advised that this might be contrasted with the proposed provisions on right of access, where there was no statutory

requirement for compensation but a requirement for a fee to be paid by the licensee concerned to the person having a lawful interest in the land and the fee should be fair and reasonable in all the circumstances of the case.

11. The Chairman then referred members to the paper LS51/99-00 - "Legal analysis on proposed right of access, fee determination and facility sharing provisions of the Telecommunication (Amendment) Bill 1999" which was prepared by the legal adviser to the Bills Committee in response to some members' request at the last meeting. He invited questions from members on the paper.

12. Mrs Miriam LAU sought the Administration's view on the advice/suggestion in paragraph 25 of the paper that there should be a fee setting mechanism which would enable the tunnel companies concerned to receive a fair market price for allowing licensees to install radiocommunications apparatus in the tunnel areas, and that the fee might be determined by an independent person or body rather than by a public officer who was himself the regulator of the telecommunications industry.

13. In response, DS/ITB advised that the Bill already contained adequate checks and balances on TA's powers to authorize access and to determine access fees. Under proposed section 14(1B), TA's authorization of access was subject to the public interest test and a series of relevant factors to be taken into account such as the availability of alternative sites whilst proposed section 14(5) stipulated that the fee to be determined by TA should be fair and reasonable in all circumstances of the case. Besides, the Administration had undertaken to conduct thorough consultation on the guidelines for the determination of access fees which TA would issue under proposed section 14(6).

14. Mrs Miriam LAU did not subscribe to the above explanation and urged the Administration to seriously consider the suggestion that the access fee should be determined by an independent body or person other than TA. She considered that the fee determination mechanism must be seen to be fair and it would not be so if TA, being the industry regulator, was the authority to determine the fee. She stressed that there was a strong argument about TA's natural bias towards the telecommunications industry and its lack of sufficient knowledge on the operation of the other industries involved in making a fair determination. In response, DS/ITB reiterated the Administration's views and highlighted that as there were adequate checks and balances on TA's powers, the Administration considered it appropriate to designate TA as the authority to determine access fees under proposed section 14(5).

Outstanding issues related to proposed section 14

"Principles for the determination of access fees for mobile network operators for access to confined areas under the 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)).

15. DS/ITB briefed members on the paper.

16. In reply to Mr Howard YOUNG's enquiry on how the Administration would interpret the concept of opportunity cost under the cost-related charging principle set out in paragraph 6 of the paper, DS/ITB said that the Administration was inclined to adopt a broad interpretation of the cost-related principle which could take into account opportunity cost, such as the benefits that might otherwise be attainable by using the space, equipment, or establishments concerned for purposes other than radiocommunications installation.

17. Referring to the profit-sharing principle set out in paragraph 9 of the paper, Mr Howard YOUNG enquired whether it was technically feasible to make precise calculation on the incremental profits generated from the access by mobile network operators (MNOs) to confined areas. In reply, the Senior Assistant Director of Telecommunications (Acting) (SAD/OFTA(Atg.)) confirmed the technical viability of this arrangement and advised that some MNOs and owners of confined areas had adopted this methodology for calculating access fees. He further explained that given the existing mobile telecommunications technology, every incoming and outgoing mobile phone call could be discretely recorded by a designated radiocommunications station even when a customer was moving from one coverage area to another.

18. In reply to the Chairman's enquiry on whether the charging principles for determination of access fees would eventually form part of the legislation, DS/ITB clarified that the requirement of access fees to be determined must be "fair and reasonable in all circumstances of the case" as stipulated in proposed section 14(5) had already provided for an overriding principle which TA should adopt in determining access fees. In view of the varying circumstances of individual cases, the Administration considered it more appropriate that the charging principles to guide TA in the determination of access fees should be set out in the form of guidelines to be issued by TA under proposed section 14(6) after consultation with all interested parties.

19. Noting that the charging principles would carry no legislative effect, Mrs Miriam LAU expressed concern that TA would be given too much discretion in the determination of access fees as proposed section 14(5)(b) only required that the fee should be "fair and reasonable". She pointed out that it

would be entirely up to TA to decide which charging principle would be applied in different scenarios. For instance, TA might consider that the property valuation principle should apply in determining the fees for access into tunnel areas but under this principle, the access fees would likely be much lower than the current access fees payable by MNOs to tunnel companies. To allay worries about arbitrary determination by TA, she urged the Administration to consider incorporating into legislation details of the charging principles and the manner of their application.

20. In response, DS/ITB stressed that it would not be practicable to codify the charging principles into legislation as it was not possible to lay down exhaustively all charging principles and all possible scenarios to which the principles would apply. Such legislation would also be incompatible with the operation of the commercial sector which was subject to on-going changes. She explained that the three charging principles set out in the paper were not intended to be exhaustive, and suggestions and views on alternative principles and how the principles should be applied would be invited during the consultation exercise, which would be a highly transparent process as all the views received and TA's response to these views would be set out in detail in the consultation report.

21. Mrs Miriam LAU opined that the Administration should promulgate the guidelines before the enactment of the Bill, so that all interested parties had an unequivocal understanding on how TA would exercise its fee determination powers.

22. In response, DS/ITB said that there were calls in the community to implement some of the provisions in the Bill as a matter of urgency while the consultation exercise on the guidelines for determination of access fees would take time. To address concerns about the manner in which TA would exercise the power on fee determination, the Administration had presented to the Bills Committee the draft outline of the consultation paper on the guidelines and had undertaken to consult all interested parties concerned. She reiterated that the consultation process would be open and transparent.

23. Mrs Miriam LAU expressed dissatisfaction that members were asked to take a position on the proposed provisions on right of access without knowing how TA's power on the determination of access fees would be exercised. She was not convinced that there was insufficient time to conduct the consultation exercise on grounds of the urgency of the Bill. She recalled that at the first few meetings of the Bills Committee, some members had already urged the Administration to conduct the consultation with a view to promulgating the guidelines before the enactment of the Bill. Thus, the Administration should be able to complete the consultation exercise without causing undue delay to the legislative process if it had the serious intention to do so.

"Mobile network operators' exercise of statutory right of access under the proposed section 14(1A) of the Telecommunication (Amendment) Bill 1999 to premises of Mass Transit Railway Corporation (MTRC) and Kowloon Canton Railway Corporation (KCRC)" (CB(1)806/99-00).

24. DS/ITB briefed members on the paper.

25. Regarding the draft guidelines for MNOs on the exercise of statutory right of access to premises of MTRC and KCRC attached to the above paper, Mrs Miriam LAU expressed reservation on the reasons given by the Administration in paragraph 7 of the above paper for not making the guidelines statutory as requested by the two railway corporations. On the Administration's explanation that the guidelines were basically operational and required regular updating, Mrs Miriam LAU observed that as provided in paragraph 3.1 of the draft guidelines, TA was required to consult the interested parties before making amendments to the guidelines, which meant that any updating of the guidelines could not be concluded within one or a few days anyway. Mrs LAU understood that the two railway corporations had proposed to draw up a code of practice for inclusion into the Telecommunication Ordinance. She commented that if future amendments to the proposed code of practice were subject to the negative vetting procedure, the time required for amending a statutory code of practice would not be much longer than that required for updating the guidelines as presently proposed. Mrs LAU also sought elaboration from the Administration on its comment in paragraph 7 of the paper that making the guidelines part of the Telecommunication Ordinance might cause confusion as to whether one statutory body was subject to the other.

26. In response, DS/ITB confirmed that in updating the guidelines, TA would conduct consultation with all interested parties and they would be given reasonable time to respond to TA's proposals. The Administration envisaged that future updating of the guidelines would mainly be concerned with routine operational matters. As regards the proposal for a statutory code of practice in lieu of the proposed operational guidelines, the Administration's main concern was that as TA and the two railway corporations were the sole authorities empowered by respective Ordinances over the areas of telecommunications and railway operation, a statutory code of practice would in one way or another fetter either the discretion of TA in his area of regulation or the railway corporations in their areas of operation. This would thus give rise to confusion as to whether one statutory body was subject to the other under the Telecommunication Ordinance. In a situation involving two independent regulatory authorities each regulating a separate activity sector, the Administration considered that the most appropriate arrangement was to lay down a set of operational guidelines.

27. Mrs Miriam LAU did not agree with the Administration's stance, and pointed out that the right of access by MNOs to railway premises under proposed section 14 would involve the respective authorities on telecommunications and railways, and the act of one authority would inevitably impact on the other in the process. It was indeed the need to avoid possible confusion that the relationship between the authorities should be clearly set out in legislation. She was also concerned that according to paragraph 3.1 of the draft guidelines, it would be TA, but not the railway corporations, which would make the final decision on any amendment to the guidelines, including amendments to paragraph 2.4 which stipulated that MTRC/KCRC would be the sole authority on safety matters.

28. In response, DS/ITB acknowledged the need for an interface between TA and the two railway corporations in the course of MNOs exercising the right of access to the premises of the railway corporations, but the Administration considered it more appropriate to resolve the interface issues by way of operational guidelines. Legal advice from the Administration was that making such operational guidelines statutory under such circumstances was not appropriate. On the concern that TA would be at liberty to amend the guidelines affecting railway safety, DS/ITB assured members that TA had the duty to act in the public interest. If TA were to seek to amend the guidelines undermining the authority of MTRC/KCRC on railway safety matters, he would be acting against the public interest.

29. Mrs Miriam LAU maintained her view that there should be a statutory code of practice for purposes of ensuring railway safety and safeguarding against any arbitrary amendment by TA.

Outstanding issues related to proposed sections 7I and 35A

30. DS/ITB and the Assistant Secretary for Information Technology and Broadcasting briefed members on the paper - "Powers of Telecommunications Authority (TA) relating to obtaining/disclosure of information and inspection of accounts/documents, etc." (CB(1)830/99-00(01)).

31. Mr Fred LI enquired about the basis for TA's direction to require MNOs to provide information for the purpose of investigating into the recent incident of suspected price-fixing agreement, bearing in mind that the powers to obtain information were not provided in the existing Telecommunication Ordinance. In reply, DS/ITB confirmed that for the aforesaid investigation, TA had invoked his power to obtain information under the relevant license conditions. SAD/OFTA(Atg.) supplemented that proposed section 7I sought to codify the existing license conditions on TA's powers to obtain information. Under the existing regulatory regime, if the licensees refused to provide the information required by TA, they would be in breach of the relevant license conditions but not any statutory provision.

32. In reply to the Chairman's enquiry on whether there was any provision in the Bill requiring licensees to supply true and accurate information, DS/ITB advised that while there was no such provision in the Telecommunication Ordinance at present, proposed section 35A(7) in the Bill sought to introduce such a provision by stipulating the punishment for knowingly and without reasonable excuse providing false or misleading information.

33. Members noted that part of the paper dealt with certain constitutional and legal concerns arising from the meeting with the Cable & Wireless HKT Limited (CWHKT) on 1 December 1999. As members had been notified that the main purpose of this meeting was to consider the Administration's response to legal and constitutional issues raised by the BOT tunnel operators and the Bills Committee had not been made aware that some issues raised by CWHKT would also be discussed, the Chairman requested the Administration to note that the Bills Committee might raise questions on the paper at subsequent meetings when the relevant provisions were deliberated.

34. In this connection, Mrs Miriam LAU said that she would need more time to peruse the various papers for this meeting which were received by members only shortly before the meeting. At her request, the Chairman advised that if necessary, members could raise further questions on these papers at future meetings of the Bills Committee. The Administration took note of the advice.

35. The Chairman reminded members that the next meeting of the Bills Committee had been scheduled for 26 January 2000 at 8:30 am, and it had been agreed that the Administration would provide its detailed response to the constitutional and legal issues raised by CWHKT at the meeting.

36. The meeting ended at 9:55 am.

Legislative Council Secretariat
3 March 2000