

LC Paper No. CB(1)581/99-00
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by the Administration)

Ref : CB1/BC/18/98/2

Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Thursday, 21 October 1999, 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 Eric LI Ka-cheung, JP
Hon Fred LI Wah-ming, JP
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Mrs Miriam LAU Kin-ye, JP
Hon CHOY So-yuk
- Member attending** : Hon Ronald ARCULLI, JP
- Members absent** : Hon MA Fung-kwok
Dr Hon Philip WONG Yu-hong
- Public officers** : Ms Eva CHENG, JP
Attending Deputy Secretary for Information Technology
and Broadcasting
- Mr M H AU
Senior Assistant Director (Regulatory), Office of
the Telecommunications Authority
- Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting

Miss Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

- Attendance by Invitation** : Consumer Council
Mrs CHAN WONG Shui
Chief Executive
Mr Ron CAMERON
Head, Trade Practices Division
- 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
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I Confirmation of minutes of meeting
LC Paper No. CB(1)139/99-00

The minutes of the meeting held on 6 September 1999 from 8:30 am to 10:30 am were confirmed without amendments.

II Meeting with the Consumer Council

2. The Chairman said that a submission had been received from the Consumer Council (CC) subsequent to the last meeting on 6 October 1999. Upon issuance of the submission to members, a member had expressed interest in exchanging views with CC. In view of the member's request and the fact that CC had not had an opportunity to meet with the Bills Committee, he decided that CC should be invited to attend this meeting to present and exchange views with the Bills Committee.

3. The Chief Executive, Consumer Council (CE/CC) presented the views of CC as set out in its submission tabled at the meeting (CB(1)167/99-00(01)). She highlighted the following points-

- (a) CC supported the proposed amendments in the Bill which sought to strengthen the competition safeguards for the telecommunications sector.
- (b) In the absence of general competition legislation in Hong Kong, and given the Government's decision to adopt a sector specific approach to deal with competition issues, CC supported the role of the Telecommunications Authority (TA) in arbitrating disputes on access by mobile phone operators (MPOs) to facilities when such access was essential for achieving ubiquitous coverage of mobile telecommunications network. This proposed role of TA was similar to its existing role in arbitrating access disputes in relation to other 'bottleneck' monopolies of telecommunications networks. Overseas competition regulators such as the Australian Competition and Consumer Commission were also entrusted a similar role.
- (c) A major concern of CC was that in the absence of a Government appointed expert body to take up the arbitration in case of disputes, there was hardly any representation of the wider consumer interest.
- (d) On the concern about TA's intervention into commercial dealings involving parties not ordinarily subject to TA's regulation, CC considered that there were adequate checks built in the proposed amendments to ensure that TA would intervene only when the two parties concerned could not come to an agreement on access through normal commercial negotiation, and that the public interest test and other statutory requirements were met.
- (e) CC considered that a mechanism for appeal should exist for parties dissatisfied with TA's decisions. CC suggested that a Competition Appeal Body be created with a clearly defined role. There should be clearly detailed time limits for lodging and hearing appeals to prevent abuse of the appeal mechanism. The right of review should be limited to TA's decisions on competition related matters, while decisions on telecommunications standards and technical issues should remain the sole province of TA, as in the case of other jurisdictions.

4. Mr Howard YOUNG recapitulated some deputations' concern that TA might be inclined to make decisions to protect telecommunications operators at the expense of landlords and operators in other sectors. He sought CC's view on the suggestion of appointing independent private arbitrators, instead of TA, for determination in case MPOs and landlords/facility operators failed to reach

an agreement on access. He added that the arbitrator to be appointed should be agreed between the two parties in dispute, or decided by the Government if the two parties could not agree on the appointment.

5. In response, the Head, Trade Practices Division, CC (H(TPD)/CC) advised that in CC's view, it was not appropriate to appoint a commercial entity, such as the Hong Kong Institute of Arbitrators, to arbitrate in disputes on access by telecommunications operators as these disputes involved consumer interests and public policies which were outside the scope of commercial contracts. CC considered that in the absence of a competition authority to oversee cross-sector competition issues, TA was the appropriate body to assume the arbitration role as it possessed the required knowledge and expertise in competition issues in the telecommunications industry and was entrusted the role to protect consumer interests as far as regulation of the telecommunications industry was concerned.

6. The Chief Executive, CC (CE/CC) stressed that the issue of access by mobile phone operators (MPOs) involved public interest. There was a clear necessity of interpolating a Government appointed authority, which had the mission of protecting and promoting public interest, to resolve disputes relating to access by MPOs. CC however would not oppose to the appointment of a private arbitrator in the first instance if that was agreed between the parties in dispute. CC considered that the power of TA to determine access was a reserve power as TA would exercise the power only when an agreement on access could not be reached through normal commercial negotiation.

7. Mrs Miriam LAU opined that in a fair arbitration, balanced consideration should be given to the interests of the parties involved. While TA was obliged to give primary consideration to public interests, it might be inclined to protect the interests of the telecommunications sector at the expense of or without giving due regard to the commercial interests of landlords/facility operators. She remarked that under the proposed amendments on access, there was no guarantee that TA's determination would be fair to landlords/facility operators.

8. In response, CE/CC said that in performing its regulatory functions, TA's mission was to protect and promote public interests. When performing the arbitration role, TA should give primary consideration to public interests. Nevertheless, CC reckoned that it was not ideal to appoint a sector specific regulator such as TA to undertake arbitration involving parties which were ordinarily outside its regulatory purview. Thus, CC had proposed the enactment of general competition legislation and the establishment of a competition authority to oversee cross-sector competition issues.

9. Mrs Miriam LAU pointed out that it was expressly stipulated in the existing build-operate-transfer (BOT) contracts between tunnel operators and the Government that BOT tunnel operators were entitled to charge utilities for

access to tunnel areas for installations, and the proceeds from the access fees would be taken into account as part of the operating revenue of the tunnels. The proposed amendments to section 14 would empower TA to intervene into negotiation between MPOs and tunnel operators and determine access fees. She asked whether CC would consider that the enactment of the proposed legislative amendments would constitute a breach of the BOT contracts by the Government.

10. In response, H(TPD)/CC said that CC's main concern was that there should be effective safeguards to protect consumer interests at large. In some jurisdictions with general competition legislation, obstructive acts by owners of essential facilities could be challenged on the basis of such legislation, and the Court was usually conferred the power to quash existing contract provisions if the provisions were incompatible with competition and consumer interests. He elaborated that obstructive acts by essential facility owners in the case of access by MPOs might be a prima facie refusal of access or constructive refusal in that an excessive monopoly rent was demanded or that the terms and conditions were set in such a way to make it untenable for a particular MPO to compete in the market.

11. Mrs Miriam LAU sought CC's comments on ways to ensure that consumers would benefit from a reduction in access fees charged on MPOs if the proposed access provisions were passed. In response, CE/CC said that market competition forces would provide the best safeguards for consumers. As the mobile telecommunication service market was highly competitive at present, CC believed that reductions in access fees for MPOs would lead to reasonable reductions in subscription charges for consumers.

III Meeting with the Administration

Right of access (section 14)

12. The Deputy Secretary for Information Technology and Broadcasting (DS/ITB) introduced the paper - "The Administration's response to the BOT tunnel operators' submissions dated 20, 22 and 30 September 1999 and 13 October 1999 and the Consumer Council's submission dated 8 October 1999" (CB(1)141/99-00(01)).

13. Addressing Mrs Miriam LAU's concern on whether TA would give reasonable opportunities to BOT tunnel operators to make representation in determining access into BOT tunnels, the Senior Assistant Director (Regulatory)/Office of the Telecommunications Authority (SAD/OFTA) assured members that in exercising the power to authorize access and determine the level of access fees under proposed section 14, TA would definitely give reasonable opportunities for the concerned parties to make

representations with a view to making a fair and reasonable determination.

14. Mrs Miriam LAU enquired whether and how the Administration would factor the element of a reasonable return on the investment by landlords/facility operators into the charging models for determining access fees. She remarked that the wayleave right possessed by BOT tunnel operators was unique and therefore the valuation method used for commercial premises in general might not be applicable. In reply, DS/ITB confirmed that the Administration was prepared to consider various charging models to take account of a reasonable rate of return on the investment by landlords/facility operators. The Administration recognized the unique nature of the investment and operation mode of BOT, and thus would duly consider views and suggestions from BOT tunnel operators, as well as professional advice where necessary, on the appropriate charging model(s) for these tunnels.

15. Mrs Miriam LAU queried the appropriateness of consulting the public, instead of the tunnel operators, on the specific issue of the charging models to be adopted. She opined that the Administration should adopt a reasonable and balanced approach in formulating/deciding on the charging models. In response, DS/ITB assured members that in the public consultation exercise, all interested parties and stakeholders would be invited by TA to express their views. At the same time, views received from members of the public would also be taken into consideration.

16. On whether the suggested charging models in paragraph 7 of the discussion paper had already covered all the principles/approaches used to determine access fees under the existing access agreements between MPOs and BOT tunnel operators, SAD/OFTA said that the existing access fees into BOT tunnels were negotiated between individual MPOs and BOT tunnel operators. It did not appear that individual BOT tunnel operators were using a standard approach or formula for determining access fees charged on different MPOs. Members noted that relevant information on this subject had been provided to the Bills Committee vide paper CB(1)1860/99-00(01) earlier on.

17. In reply to Mr LI Wah-ming's enquiry on whether the Administration considered the existing access fees charged by BOT tunnel operators reasonable, DS/ITB said that the Administration had not formed a view on the issue, as TA had yet to decide on the charging principles and models after consultation with relevant parties. She added that the charging principles and models to be formulated would not override existing commercial agreements on access.

18. Mr Ronald ARCULLI questioned whether the proposed access provisions would override the existing BOT agreements between the Government and BOT tunnel operators. In reply, DS/ITB said that under the respective Ordinances on BOT tunnels, there was a provision stipulating that

the tunnel company could levy charges for utility installations in tunnel areas. The proposed amendments to section 14 only provided a mechanism to enable mobile service coverage in shielded public places when no agreement could be reached between the MPOs and landlords/facility operators concerned through commercial negotiation. Authorization of access by TA would be subject to the public interest test being met, the payment of a fair and reasonable fee and other considerations under proposed section 14.

19. Mr ARCULLI said that he was not satisfied with the Administration's answer and was gravely concerned that the proposed amendments might override existing agreements between the Government and tunnel operators, bearing in mind that mobile phone services had already been launched when the Government entered into some of the existing BOT agreements.

Request for information (sections 35A and 36D)

20. DS/ITB briefed members on the paper - "The Administration's further response on the new sections 35A and 36D relating to the Telecommunications Authority's request for, and inspection of records, documents and accounts" (CB(1)141/99-00(03)).

21. Mr Eric LI said that the Administration had not directly addressed members' concerns expressed at the last meeting about the need to circumscribe TA's powers conferred by proposed sections 35A and 36D. He was not convinced of the arguments put forward by the Administration but considered that further debate on the issue at this stage might not be fruitful given the Administration's intransigence on its stance. He indicated that he might pursue his concerns on these sections further during the clause-by-clause examination of the Bill.

22. In response, DS/ITB stressed that the Administration was prepared to consider views from members. In this connection, she informed members that according to her knowledge, the proposed provisions in the draft Securities and Futures Bill conferring powers to the Securities and Futures Commission (SFC) to obtain information mainly sought to improve SFC's regulatory power over licensees' financial position and accounting integrity. As TA's regulatory functions were of a different nature and purposes, the Administration considered that it might not be appropriate to draw direct reference from those provisions in the draft Securities and Futures Bill.

Spectrum utilization fee

23. DS/ITB took members through the paper - "The Administration's response on the new section 32I relating to the spectrum utilization fee" (CB(1)141/99-00(02)).

24. The Chairman enquired whether proposed section 32I also covered coaxial cable spectrum, as he understood that congestion of in-building coaxial cable spectrum also occurred in some existing buildings in Hong Kong. In reply, SAD/OFTA advised that proposed sections 32G and 32I only covered radio spectrum; coaxial cable spectrum was not covered. The primary intention of proposed section 32G was to confer TA the power to manage radio frequency spectrum as it had no such statutory power at present. Utilization of in-building coaxial cable spectrum was a matter of interconnection among cable networks within buildings. At present, TA had the power to manage coaxial cable spectrum for television broadcasting under the Television Ordinance and TA might include conditions governing the use of coaxial cable spectrum and other cable networks in public telecommunications services (PTS) licences. Moreover, under proposed section 36A in the Bill, TA might determine the terms and conditions of interconnection, including the technical standards for interconnection, among telecommunications networks. He also advised that TA had issued a statement in August 1999 on the allocation and regulation of coaxial cable spectrum. At this stage, the Administration considered it not appropriate to levy fees for the use of coaxial cable spectrum.

25. In this connection, DS/ITB advised that in the invitation letters to PTS providers for licence application for new services, it had been specified that priority would be given to those service providers who could provide guarantee on the efficient use of cable spectrum through advanced technologies, such as digitization of signals. DS/ITB also informed members that TA would conduct a consultation exercise in year 2000 on the licensing criteria and procedure for the third generation mobile phone services.

26. Mr David CHU enquired about the regulatory framework for satellite services and facilities. SAD/OFTA advised that in essence, a licence was not required for installing equipment in individual premises to receive satellite signals intended for reception by the general public. For transmission or reception of satellite signals not intended to be available to the general public, the facility/service provider was required to obtain a telecommunication service/facility licence for the purpose. Operators of Satellite Master Antenna Television systems for provision of satellite television service to households within buildings were required to obtain a public satellite television system licence.

Numbering plan (section 32F)

27. The Principal Assistant Secretary for Information Technology and Broadcasting briefed members on the paper - "The Administration's response on the new section 32F relating to the management of a numbering plan" (CB(1)167/99-00(02)). She clarified that according to the Office of the Telecommunications Authority (OFTA) Trading Fund Resolution passed in

May 1995, proceeds generated from the disposal of special numbers must be channeled to the OFTA Trading Fund. Proposed section 32F would empower TA to set up a special fund for holding the proceeds for charity or telecommunications-related activities.

28. Noting the existing arrangement whereby proceeds from auctions of special numbers such as vehicle licence numbers were transferred to the Lotteries Fund for general charitable purposes, Mr LI Wah-ming commented that it would be consistent with the existing arrangement and might be more cost-effective in administrative terms to also transfer the proceeds from auctions of special phone numbers to the Lotteries Fund. In response, DS/ITB advised that the proposed provisions on the numbering plan were drawn up having regard to the majority view received during the two rounds of consultation on the proposed legislative amendments.

29. Mr HO Sai-chu shared Mr LI's view and opined that the subject of how the proceeds should be managed might not have been specifically brought up in the consultation process. While he would not object to auctioning special phone numbers, he did not agree that research and education on telecommunications should be funded by those proceeds. He commented that most people might be ready to pay a higher price for special numbers at auctions if the proceeds would be used for general charity purposes.

30. In reply to Mr LI Wah-ming's enquiry about the estimated proceeds from future auctions of special phone numbers, SAD/OFTA informed members that since 1997 when consultation on the proposed legislative amendments commenced, TA had reserved some special numbers for disposal under the proposed numbering plan. It was estimated that the cumulative proceeds from auctioning the special numbers in reserve would be in the region of ten million. He advised that the special numbers would be disposed of in phases having regard to market response.

31. The Chairman said that the Bills Committee would further deliberate on this issue to see if a consensus on the use and management of the proceeds from auctioning special numbers could be reached. DS/ITB responded that the Administration would be ready to consider any consensus view of the Bills Committee on the issue.

Admin

IV Any other business

32. The Chairman informed members that he had received a letter from Cable & Wireless HKT Limited (C&WHKT) with three pieces of "independent legal opinion" attached thereto. He reported that in gist, C&WHKT had strong views on some of the proposed provisions. It also said that the Administration had not adequately addressed its concerns. The Chairman

sought members' views on the way forward.

33. Mr Eric LI noted that all along, C&WHKT and indeed, some other deputations and the Administration held different views on certain proposed amendments in the Bill. To enable the Bills Committee to obtain a fairer assessment of their respective views, he suggested that the legal adviser to the Bills Committee should be requested to provide her independent advice and comments on legal issues over which there were conflicting views. Other members concurred with the suggestion.

(Post-meeting note: The letter from C&WHKT and the three pieces of legal opinion attached thereto have been issued to members vide LC Paper No. CB(1)190/99-00 dated 22 October 1999. On the instruction of the Chairman, the Administration was requested to provide a detailed response to the specific legal concerns raised in C&WHKT's submission. The Administration's reply was issued vide LC Paper No. CB(1)358/99-00.)

34. After discussion, members requested the Secretariat to prepare a summary of deputations' views on major clauses of the Bill. The legal adviser to the Bills Committee and the Administration would provide their legal opinions on or response to the issues raised in the clauses. The Chairman advised that for ease of reference, the summary should be in the form of a table. Where detailed views had already been provided, the relevant description in the table should be kept concise.

(Post meeting note: A summary of deputations' views and relevant comments on major clauses of the Telecommunication (Amendment) Bill 1999 has been issued vide LC Paper No. CB(1)372/99-00(02) dated 15 November 1999.)

35. The next meeting of the Bills Committee was scheduled for 16 November 1999, starting at 4:30 pm.

36. The meeting ended at 10:30 am.

Legislative Council Secretariat
22 December 1999