立法會
Legislative Council

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Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Wednesday, 26 January 2000, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon SIN Chung-kai (Chairman) Hon David CHU Yu-lin Hon HO Sai-chu, SBS, JP Hon MA Fung-kwok Hon Howard YOUNG, JP Hon YEUNG Yiu-chung Hon Mrs Miriam LAU Kin-yee, JP Hon CHOY So-yuk
Members absent	**:**	Hon Eric LI Ka-cheung, JP Hon Fred LI Wah-ming, JP Dr Hon Philip WONG Yu-hong
Public officers Attending	**:**	Ms Eva CHENG, JP 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 Richard Fowler, QC
Adviser to the Office of the Telecommunications Authority

Ms Jenny CHUNG
Legal Adviser of the Office of the 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 Meeting with the Administration

At the invitation of the Chairman, The Deputy Secretary for Information Technology and Broadcasting (DS/ITB) briefed members on the paper - "The Administration's response to the Cable & Wireless HKT (CWHKT)'s submissions on the legal and constitutional issues arising from the Telecommunication (Amendment) Bill 1999" (CB(1)883/99-00(01)). She remarked that the paper had been cleared by Mr Richard Fowler, Q.C. who was one of the leading legal practitioners in the United Kingdom (UK) in the field of competition and European law. She also emphasized that the proposed provisions in the Bill would satisfy the public interest test and the proportionality requirement from the public policy perspective and were in conformity with the Basic Law and the Hong Kong Bill of Rights Ordinance. She also briefed members on the paper - "Policy paper on the Procedural Safeguards" (CB(1)873/99-00(01)), advising that whilst the Bill had already provided the necessary statutory checks and balances on the powers of the Telecommunications Authority (TA), the Administration was prepared to strengthen these checks and balances by formalizing some existing administrative practices of TA into legislation.

2. Mr Richard Fowler then explicated the Administration's response to the legal and constitutional issues raised by CWHKT from the legal perspective.

The salient points of his submission were as follows -

(a) As far as scrutiny by the courts on the powers of TA were concerned, the decisions of TA were subject to proper scrutiny of the courts by way of judicial review. The opportunity for judicial review would be enhanced as a result of the Committee Stage Amendments (CSAs) to be proposed by the Administration to impose on TA the obligations to give affected parties reasonable opportunities to make representations and to provide reasons in writing for his opinions or decisions. On judicial review, the courts would have the opportunity to review the legality of TA's decisions and whether all relevant factors had been duly considered, although the court could not review the merits of TA's decisions, or substitute its own decision for that of TA. As to whether judicial review was adequate in fulfilling Articles 10 and 14 of the International Convenant on Civil and Political Rights (ICCPR) as enshrined in the Hong Kong Bill of Rights, the UK Government had come to a similar view as the Hong Kong Special Administrative Region (HKSAR) Government. The UK Government had formed the view that regarding the decisions of the telecommunications regulator on licensing and determination of interconnection and sharing of facilities, it would suffice to have an appeal procedure whereby the court could review the legality and materiality of fact but not the merits of the regulator's decisions. The operation of this procedure was substantially the same as that of judicial review.

(b) There were two reasons as to why this limited power of review by the courts was capable of fulfilling the requirements of Article 6 of the European Convention or Articles 10 and 14 of the ICCPR, which the UK Government had had to take into account when devising an appeal mechanism in relation to the telecommunications regulator. Firstly, what was being dealt with was a regime of licensees who enjoyed special rights under their licences and at the same time, had to fulfil certain obligations. So far as the existing licensees under the Telecommunication Ordinance were concerned, they were already subject to conditions in their respective licences which were codified in the present Bill. Counsel for CWHKT argued that this fact was irrelevant as a licence was an agreement between two parties whereas legislation involved the issue of constitutionality. However, the criticism regarding the constitutionality of the Bill was based on its effects on the rights of licensees: in that context it was highly relevant that the rights in question were already circumscribed by the terms of the licence. Secondly, according to the jurisprudence developed by

the European Court of Human Rights (ECHR), the requirements for a fair hearing under Article 6 of the European Convention on Human Rights could be fully satisfied by way of judicial review in relation to issues of policy considerations or decisions of administrative expediency. This was because there was no clear right or wrong decision and the regulator was in the best position to determine these issues. As long as the administrative procedures through which the regulator arrived at his decision were sufficiently transparent with suitable checks and balances, then a review procedure by the court with a scope similar to that of judicial review should be adequate.

(c) On issues related to the proposed provisions on financial penalties raised by CWHKT, it should be noted that despite the ten-fold increase in the level of fine, the increase would not in itself change the administrative nature of the penalty to a criminal nature. The view that the imposition of financial penalties by TA under proposed section 36C involved a decision on criminal matters was not correct as the penalties were only reinforcing the administrative decisions TA had taken under the relevant licence conditions or provisions in the Ordinance. A characteristic of criminal penalties, as identified by the ECHR, was that they applied to the public at large or members of a large group. In the present case, however, their application was limited to those who opted to become and remain licensees. A licensee could opt out of being a licensee and thus opt out of the regulatory regime provided for in the Bill. Counsel for CWHKT argued that the proposed provisions on financial penalties would in effect remove the majority of safeguards as currently provided under the Telecommunication Ordinance. While the Administration did not agree with this view, it would nevertheless introduce CSAs to remove doubt and make explicit the requirements on TA to give affected parties reasonable opportunities to make representations and to give reasons for opinions and decisions of significance. Moreover, TA's decisions on financial penalties would be subject to challenge by way of judicial review.

(d) On the concerns raised by CWHKT about TA's powers to obtain information under proposed sections 7I, 35A and 36D, it should be noted that such powers were similar to those of the Director General of Telecommunications in the UK under comparable legislation. Where a non-licensee was required to provide information, proposed section 36D expressly provided that a warrant issued by a magistrate was required. As far as licensees were concerned, the powers under proposed sections 7I and 35A were necessary to enable TA to monitor and enforce compliance

with licence obligations in exchange for rights granted by the licence. As regards the concern about disclosure of confidential information obtained from a third party, the rights of a third party were adequately safeguarded by proposed section 7I(4) which gave the licensee or person supplying the information the opportunity to make representations about a proposed disclosure by TA. If the licensee or person was subject to any obligation of confidentiality, he could also make representation pursuant to those obligations. If, having considered all relevant factors including the representations, TA still decided to proceed with disclosure and a party was aggrieved, the aggrieved party could challenge TA's decision by way of judicial review.

(e) Regarding the proposed provisions on interconnection and facility sharing, the powers conferred on TA by the Bill were similar to the powers currently available under the relevant legislation in UK and in other jurisdictions which were also required to observe similar human rights standards. The proposed provisions in the Bill did not involve potential deprivation of property for the purposes of Article 105 of the Basic Law, nor a deprivation of property for the purposes of Article 1 of Protocol 1 of the European Convention. What was involved was certain interference with the use, but not deprivation, of property. The proposed provisions on facility sharing expressly provided that before making any direction for facility sharing, TA must take into account inter alia the capacity required by the licensee. Hence, sufficient capacity in the facility concerned would still be available for use by the licensee for his own purposes. Accordingly, the question of payment of compensation in accordance with Article 105 of the Basic Law would not arise.

3. Noting that the Administration had agreed to introduce CSA to oblige TA to give reasons for an opinion apart from direction, determination and decision, Mr Howard YOUNG considered that this might not be sufficient as the Bill did not provide for an independent channel other than judicial review for appeal against TA's opinions and decisions. As this concern had been raised by some members at previous meetings, Mr YOUNG enquired whether the Administration had any new proposal in this regard.

4. In response, DS/ITB advised that the relevant CSA was intended to put beyond doubt and to formalize the existing practice of TA to give reasons in writing for his opinions. While this statutory requirement would enhance transparency of TA's decision-making process, it would also enhance the opportunity for judicial review as the written reasons provided by TA would also reveal the factors TA had considered and how he had arrived at the opinion

and/or decision. For illustration of TA's practice of giving written reasons in forming an opinion, she cited the recent report issued by TA on the investigation into the suspected price-fixing agreement among mobile phone operators. In the report, TA had set out in detail the materials used for the investigation, questions directed to the operators and their answers, and the reasons and analyses leading to his conclusions. As such, any affected party who wished to challenge TA's decisions would have no difficulty in ascertaining the basis of such decisions. DS/ITB also re-affirmed the Administration's position that with the procedural safeguards already provided in the Bill and those to be introduced by CSAs, judicial review was adequate from both the policy and legal viewpoints to meet the relevant requirements under the Bill of Rights. She also recapitulated Mr Fowler's advice that the procedure of judicial review for appeals against TA's decisions was similar to the appeal system in UK in relation to the decisions of the Director-General of Telecommunications.

5. Mr Richard Fowler further advised that the requirement to give written reasons would ensure that the decisions of the regulator would be subject to proper scrutiny by the courts. On judicial review, the court would be entitled to review the regulator's opinions or decisions as a matter of law (i.e. whether he had erred in law or acted according to law) and as a matter of fact (i.e. whether he had taken into account relevant considerations and whether the evidence on which he relied was sufficient to support his conclusion).

6. Mrs Miriam LAU recapitulated Mr Fowler's advice that judicial review was sufficient for redress against TA's opinions and decisions because, firstly, telecommunications licensees opted to become and remain licensees and secondly, the regulator was in the best position to determine matters of policy and administrative expediency. She then sought Mr Fowler's view on whether judicial review would still be adequate in situations where TA's opinions or decisions were not directed at licensees and/or the telecommunications sector but at other parties in another policy area.

7. In response, Mr Fowler pointed out that the regulator's decisions straddling over one policy area should not affect the basic principle for matters of policy and administrative expediency. The court was simply not in a position to substitute its view for the regulator's decision. If TA had not duly taken into account policy concerns outside his policy purview, his decisions would be subject to judicial review by the court.

8. Mrs Miriam LAU commented that as the court on judicial review could not substitute TA's decision on the merits of the case, judicial review might be even more cumbersome and time-consuming than an independent appeal mechanism. She elaborated that for example, an appeal was brought against a determination made by TA in respect of the charges to be paid for interconnection on grounds that TA had applied the wrong principles in the

determination. Whilst the court on judicial review could decide that TA had acted wrongly on the matter, it could not set a different set of charges it deemed appropriate. As such TA would have to go through the decision making process again and make another determination on the charges. This would inevitably take time and the second determination might again be challenged by way of judicial review.

9. In response, Mr Richard Fowler advised that under the UK appeal procedure introduced recently to deal with decisions on the compensation to be paid for interconnection, it would be necessary on review for the court to consider whether the regulator had taken into account the relevant considerations. If the court came to the view that the regulator had failed to do so, the court could quash the regulator's decision and then remit it back to the regulator for amendment in the light of the judgement of the court. The way the appeal procedure operated in the UK was the same as the judicial review procedure in Hong Kong. He acknowledged the possibility of a determination made after the judicial review to be challenged by judicial review again, but pointed out that this was a proper legal process under the rule of law and would serve to induce more vigorous efforts on the part of the regulator to take into account the right considerations in making his determinations.

10. Referring to Mr Fowler's comment that licensees opted to become licensees and they could opt out of the regulatory regime if they wanted to, Mr Howard YOUNG considered that this argument was only appropriate for new licensees who opted to become licensees after enactment of the Bill. He expressed concern that the proposed legislation would impose on existing licence licensees new obligations which were beyond the scope of the existing conditions and would thus in effect move the goalpost for existing licensees.

11. Mr Richard Fowler clarified that his argument referred to by Mr YOUNG was addressing the broad picture in relation to CWHKT's submission about the irrelevance of the fact that the proposed new provisions were substantially reproducing provisions already included in existing licences. He agreed that in certain existing licences granted under the Ordinance, there was no condition on issues such as interconnection and facility sharing currently included under the Bill. To some extent, this involved imposing new conditions but within a very limited arena and should not give rise to any human rights concern.

12. Referring to paragraph 54 of paper CB(1)883/99-00(01) in which the Administration stated that TA might be challenged to have acted ultra vires if the information demanded under proposed section 7I was not "information relating to the licensee's business that the TA reasonably require to perform his functions", the Chairman enquired how a licensee or an affected party could ascertain whether TA had acted ultra vires bearing in mind that the functions of

TA were not explicitly set out in the Bill. In reply, DS/ITB said that as a matter of law, the rule governing ultra vires act had restricted the functions of TA to the statutory powers conferred on him by the Ordinance. It would not be possible to stipulate exhaustively all the statutory functions of TA and it would be inevitable to include a "catch-all" provision to include "such other functions as were imposed on him under this Ordinance or any other enactment". She further advised that to ascertain whether TA had certain statutory functions, one might refer to Schedule 1 of the Legislative Council Resolution in the establishment of the OFTA Trading Fund, to proposed section 6A in the Bill for general powers of TA, and to other relevant sections in the Ordinance/Bill for TA's powers on specific subject matters. The Senior Assistant Director/Office of the Telecommunications Authority (SAD/OFTA) supplemented that in practice, when TA directed a licensee to provide information, TA would need to provide in writing the reasons for the direction with reference to the relevant statutory provision(s) or licence condition(s) pursuant to or for the purpose of which he exercised his powers.

13. Referring to paragraph 3 (c) and (d) of the paper on procedural safeguards (CB(1)873/99-00(01)), in which the Administration stated that they would introduce CSAs to impose a duty on TA to issue guidelines and to conduct consultations before exercising certain powers conferred by the Bill, Mrs Miriam LAU queried that if the CSAs only sought to provide that TA "may" issue guidelines and "may" conduct consultations, which meant that issuing guidelines and conducting consultations would be discretionary rather than mandatory, those CSAs would not have the effect of strengthening the checks and balances on TA's powers.

14. In response, SAD/OFTA advised that he said CSAs would require that in exercising certain statutory powers, such as the power to mandate interconnection and facility sharing, TA would be obliged as appropriate to issue relevant guidelines after consultation with relevant parties. However, for other regulatory functions which were routine and non-controversial in nature, it would not be practicable to impose a general requirement on TA to conduct consultation and to issue relevant guidelines before exercising such powers.

15. In this connection, DS/ITB confirmed that in respect of TA's power to determine the fee for access to shielded areas under proposed section 14 and the power to determine the terms and conditions for the shared use of facilities under proposed section 36AA, the Administration would introduce CSAs as appropriate to oblige TA to issue guidelines for the determinations and that such guidelines could only be issued after consultation. The relevant CSAs would be worded along the line of "The Authority **shall** issue guidelines…." and "The Authority **shall** conduct consultation …..".

16. The Chairman enquired whether there was any established practice and/or provisions in the Ordinance/Bill to require TA to give affected parties reasonable opportunities to make representations on matters related to mergers and acquisitions in a telecommunication market, and if so, whether TA was obliged to accede to the request by the affected parties to make such representations in the form of public hearings.

17. In reply, DS/ITB advised that there were no express provisions in the Ordinance/Bill or in existing licences to regulate the transfer of shareholding of licensee companies. In these cases, TA would need to consider whether the merger or acquisition or other forms of changes in shareholding would constitute an anti-competitive act which would require TA to take action. If TA formed an affirmative view, he would need to consider relevant factors including representations by affected parties. DS/ITB informed members that whilst there were various channels for affected parties to make representations to TA, it was not an established practice or a standard requirement for TA to hold public hearings to receive representations of affected parties.

18. Mrs Miriam LAU said that as the Administration's paper responding to concerns raised by CWHKT (CB(1)883/99-00(01)) was only issued to members the day before the meeting, she would need more time to peruse the paper and might wish to seek clarification on certain issues arising from the paper at a later date. In response, DS/ITB said that Mr Fowler would return to UK shortly. However, if members would like to raise questions further on the paper, they might do so in writing and if necessary, the Administration would invite Mr Fowler to respond in writing. In reply to the Chairman, Mr Richard Fowler confirmed that he supported all the legal viewpoints set out in the paper.

19. Mrs Miriam LAU enquired about the progress of the consultation on the charging principles for TA's determination of access fees under proposed section 14. She reiterated her view that the charging principles should preferably be incorporated into the Bill. If not, they should be finalized before resumption of the Second Reading debate of the Bill. In reply, DS/ITB

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advised that the Administration had already written to relevant parties to collect their views on the charging principles. She undertook to report to the Bills Committee on the views collected at a later date. She added that whilst the Administration would try to finalize the major charging principles before resumption of the Second Reading debate of the Bill, consultation on details of the guidelines for determination of access fees would be carried out after the enactment of the Bill in order not to hold up the legislative process of the Bill.

II Any other business

20. Members agreed that the next three meetings of the Bills Committee

would be held on 17 February, 23 February and 1 March 2000, all starting at 8:30 am. The Bills Committee would resume the clause-by-clause examination of the Bill at the next meeting.

21. In reply to the Chairman, DS/ITB said that the Administration would need some time to prepare the CSAs which it had agreed to introduce. As such, the CSAs might not be ready for presentation to the Bills Committee when the relevant clauses were examined by the Bills Committee at the next few meetings. However, she undertook to let the Bills Committee have early sight of the CSAs as far as practicable.

22. The meeting ended at 10:00 am.

Legislative Council
10 April 2000