

立法會
Legislative Council

LC Paper No. CB(1)1995/99-00
(These minutes have been seen
by the Administration and
cleared by the Chairman)

Ref : CB1/BC/18/98/2

Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Thursday, 27 April 2000, at 10:45 am
in the Chamber of the Legislative Council Building

- Members present** : Hon SIN Chung-kai (Chairman)
Hon HO Sai-chu, SBS, JP
Hon Eric LI Ka-cheung, JP
Hon Fred LI Wah-ming, 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 MA Fung-kwok
Dr Hon Philip WONG Yu-hong
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon CHOY So-yuk
- Public officers** : Ms Eva CHENG
attending Acting Secretary for Information Technology and
Broadcasting
- Mr K S WONG
Acting Senior Assistant Director of
Telecommunications

Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Ms Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

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

Outstanding issues arising from previous meetings

*Clause 16 - PART VC
Appeals relating to 7K, 7L, 7M AND 7N*

The Acting Secretary for Information Technology and Broadcasting (SITB(Atg.)) briefed members on the paper - "Committee Stage Amendments on an appeal mechanism for competition issues" (CB(1)1433/99-00(01)).

2. The Chairman suggested and the Administration agreed to consider modifying the title "Telecommunications Appeal Board" to reflect more accurately that the proposed Appeal Board would only deal with competition issues under proposed sections 7K to 7N.

(Post-meeting note: The Administration has proposed to modify the title to "Telecommunications (Competition Provisions) Appeal Board" vide paper CB(1)1520/99-00 dated 4 May 2000.)

3. On the purpose of appointing a deputy chairman or more than one deputy chairmen to the appeal board, SITB(Atg.) advised that the deputy chairman/chairmen would deputise the chairman during the latter's absence.

The chairman and the deputy chairman/chairmen could preside at separate hearings of the Appeal Board.

4. As regards the number of deputy chairman/chairmen to be appointed to the Appeal Board, SITB(Atg.) advised that initially, one deputy chairman would be appointed when the Appeal Board was set up. However, under the relevant proposed provisions, there was the flexibility to appoint two or more deputy chairmen to the Board if the circumstances required. The Senior Assistant Law Draftsman (SALD) referred members to proposed section 32M(2) which provided that "the Chief Executive shall appoint a person to be the Chairman of the Appeal Board and such other persons as he thinks fit to be Deputy Chairmen of the Appeal Board".

5. Regarding proposed section 32M(9) which provided that the remuneration of the chairmen, deputy chairmen and panel members of the appeal board should be paid at a rate determined by the Financial Secretary, SITB(Atg.) advised that this provision was drawn up with reference to comparable provisions on appeal boards in other ordinances.

6. On proposed section 32N(1), SITB(Atg.) confirmed that this proposed section sought to provide for any telecommunications licensee or any member of the public aggrieved by a decision of the Telecommunications Authority (TA) referred to in subsections (a) and (b) of proposed section 32N(1) to appeal to the Appeal Board even if the licensee or person was not the direct subject of the decision or sanction.

7. Noting that proposed section 32N(2) and (3) provided that decisions of TA would not be subject to suspension except for the penalties and remedies imposed under proposed section 36C, the Chairman enquired whether TA would be liable in any action for damages if his decision was subsequently quashed by the Appeal Board. In reply, SALD said that under common law principles, if a regulatory authority had acted in good faith and in accordance with the law in making his decision, he should not incur any civil liability. He understood that there were explicit provisions in some ordinances to provide safeguards to this effect. At the Chairman's request, the Administration agreed to consider whether it was necessary/ preferable to state explicitly in the Bill that if TA's decisions were quashed by the Appeal Board, TA would not incur any civil liability if in making his decision, he had acted in good faith and in accordance with the law.

(Post-meeting note: The Administration has proposed Committee Stage Amendments (CSAs) to add a new section 39B "Immunity" to the Bill vide paper CB(1)1520/99-00 dated 4 May 2000.)

8. On the basis for setting 14 days as the time limit for lodging an appeal under proposed section 32N(4), SITB(Atg.) advised that reference had been made to comparable provisions in the Administrative Appeals Boards

Ordinance (AABO). The Administration considered the 14-day period sufficient having regard to the market nature of the telecommunications sector.

9. On proposed section 32O, the Chairman enquired about the arrangement if, before the conclusion of an appeal hearing, the chairman or deputy chairman presiding at the appeal hearing became indisposed. In reply, SALD advised that the relevant arrangement would be set out in the rules governing the practice and procedure of the Appeal Board. Generally speaking, the appropriate arrangement would be to adjourn the hearing until the presiding chairman or deputy chairman was available to continue the hearing. If it was not possible for the presiding chairman or deputy chairman to continue the hearing, the hearing to be presided by another chairman/deputy chairman would have to commence afresh. In this connection, SITB(Atg.) advised that the rules relating to the practice and procedure of the Appeal Board would be subsidiary legislation to be made by the Secretary for Information Technology and Broadcasting and would be subject to the scrutiny of the Legislative Council.

10. Regarding proposed section 32O(1)(b), SITB(Atg.) confirmed that the chairman or deputy chairman presiding at a hearing of the Appeal Board should have an original vote. In the case of an equality of votes, the chairman or deputy chairman should have a casting vote. She also advised that according to proposed section 32M(3), the chairman and deputy chairman of the Appeal Board should be persons eligible for appointment as a High Court Judge.

11. On the award of the costs involved in an appeal, SITB(Atg.) advised that under proposed section 32O(1)(d)(v), the Appeal Board might award the costs to either the person making the appeal or TA or to both parties as was just and equitable in all the circumstances of the case.

12. On proposed section 32P which provided that subject to section 32Q, the determination of an appeal by the Appeal Board or any order as to costs made by the Appeal Board should be final, the Administration confirmed that while the Appeal Board might refer any question of law arising in an appeal to the Court of Appeal for determination as provided under proposed section 32Q, the party aggrieved by the decision of the Appeal Board might challenge the decision by way of judicial review.

13. On proposed section 32R, Mr Ronald ARCULLI expressed concern that while the proposed Appeal Board was not a judicial body, it appeared that the requirements under this proposed section were too onerous on the party required to attend and give evidence before the Board. In particular, he pointed out that the expressions "without reasonable excuse" and "to answer truthfully and completely" were vague and subject to arbitrary interpretation. He also expressed concern on whether there were provisions to safeguard the legal privileges of the witness(es) before the Appeal Board and the confidentiality of personal data. In response, SALD advised that proposed section 32R mirrored

the relevant provisions in the AABO and so far, he was not aware of any legal problem that had arisen from those provisions in the AABO. SITB(Atg.) also referred members to proposed section 32S(2) which provided that a witness before the appeal board should be entitled to the same privileges and immunities as if he were a witness in civil proceedings in the Court of First Instance.

14. As to whether the immunity provided under proposed section 32S(2) also covered legal professional privilege, Assistant Legal Adviser 3 advised that privileged documents were covered by the said provision. These documents included documents that might incriminate or expose the witness to a penalty, and documents that were subject to legal professional privilege and/or public interest privilege.

15. Mr Eric LI said that generally speaking, he considered the proposed provisions on the Appeal Board acceptable. On the requirements to give evidence and produce documents under proposed section 32R, he said that the Hong Kong Society of Accountants (HKSA) would accept the provision if there were procedural safeguards to ensure that where the document(s) required to be provided to the Appeal Board was the subject of a confidentiality agreement, the Appeal Board, upon the request of the witness, would not disclose the information to any other party. In this connection, SITB(Atg.) reiterated that the rules governing the practice and procedure of the Appeal Board would be subsidiary legislation subject to the scrutiny of the Legislative Council.

*Clause 1(2) - sections 1(2) and 1(3)
Commencement of the Bill*

16. The Principal Assistant Secretary for Information Technology and Broadcasting (PAS/ITB) briefed members on the paper - "Commencement of the Bill" (CB(1)1459/99-00(01)). Members did not raise any query on the paper.

*Clause 7 - section 14
Power to place and maintain telecommunications lines, etc., on land, etc.*

17. SITB(Atg.) briefed members on the paper - "Interim Fee Arrangement under Section 14" (CB(1)1459/99-00(02)).

18. Mrs Miriam LAU said that she supported the proposed interim fee arrangement in principle. She however stressed that the payment of an interim fee to the land and facility owner concerned should be a necessary condition for TA's authorization of early access by mobile network operators (MNOs). The interim fee might be mutually agreed between the two parties concerned or be determined by TA if the two parties could not agree on the interim fee. She therefore considered that there should be an explicit provision in the Bill to the

effect that pending final arbitration of the access fee and where the MNO concerned wished to gain access, an interim fee must be paid by the MNO to the land or facility owner concerned before exercising any right of access authorized by TA. SITB(Atg.) agreed to take into account Mrs Miriam LAU's view in drawing up the relevant CSAs.

Clause 18 - proposed section 35A

Inspection of records, documents and accounts

19. Mr Eric LI said that HKSA had expressed concern that under proposed section 35A(1), working papers of accountants which were at the licensee's premises at the time of the inspection by TA might also be copied or taken away by TA. He suggested that proposed section 35A(1) be modified to make it clear that TA might only inspect or make copies of the documents belonging to the licensee concerned, but not the documents belonging to other persons even though those documents were found at the licensee's premises at the time of the inspection.

20. In response, SITB(Atg.) explained that the Administration had examined this concern but considered modifying proposed section 35A(1) as suggested by Mr LI might give rise to abuse as the licensee concerned might claim that the documents found in his premises did not belong to him and therefore, he could not be required to hand over his own documents to TA. She however confirmed that requests for documents belonging to third parties such as accountants would be made in accordance with the procedural requirements under proposed section 36D instead of under proposed section 35A.

21. At Mr Eric LI's request, the Administration agreed to confirm at the Second Reading debate of the Bill the different legislative intent of proposed sections 35A and 36D and give an assurance that if any working papers of accountants were mistakenly copied or taken away by TA when conducting an inspection under proposed section 35A, those documents or copies of documents would be returned to the accountant concerned and would not be used by TA for any purpose.

Admin

Clause 19 - proposed section 36A

Authority may determine terms of interconnection

22. Mrs Miriam LAU referred to proposed section 36A(3C)(b) and sought clarification on whether this provision would confer on TA the power to determine the terms and conditions of interconnection that could override those in existing agreements on interconnection. In reply, SITB(Atg.) advised that TA's primary consideration was whether the determination would be in the public interest. If there was already an agreement on interconnection, it would be very difficult to satisfy the public interest test if TA were to make a direction for interconnection or for TA to determine the terms and conditions of interconnection to override on existing mutual agreement. In this regard, she

referred members to a statement issued by the Office of the Telecommunications Authority on 27 January 2000 whereby TA decided not to determine interconnection terms when a commercial agreement between the parties concerned already existed.

Admin

23. Mrs Miriam LAU pointed out that although the Administration had confirmed the policy intent and the on-going practice that TA would not mandate interconnection terms where there existed a commercial agreement between the parties concerned, proposed section 36A(3C) might have the effect of conferring TA a statutory power to do so. In response to Mrs LAU's suggestion, SITB(Atg.) undertook to confirm the understanding at the Second Reading debate of the Bill to allay any concern in this regard.

*Clause 23 - proposed section 36D
Authority may obtain information*

24. PAS/ITB briefed members on the paper - "The Administration's further response to the concerns on the new section 36D relating to the Telecommunications Authority's request for information from non-licensees" (CB(1)1473/99-00(01)).

25. Mr Eric LI pointed out that as the paper was only tabled at this meeting, he needed more time to peruse the paper and discuss it with HKSA. He therefore would not take a position on the views set out in the paper at this stage. He said that according to his understanding, the application for a court order to compel production of information under some ordinances were inter partes. The accountancy profession was thus concerned about whether the Administration had adopted a consistent approach in requiring third parties to provide information to facilitate the performance of statutory regulatory functions.

26. In response, SITB(Atg.) pointed out that proposed section 36D did not target at the accountancy or any other professions. It was a necessary provision to empower TA to obtain information from non-licensees to facilitate his investigation into suspected breaches of the Ordinance or license conditions. She stressed that the proposed section was a balanced provision as TA had to apply to a magistrate for an order to obtain information from a non-licensee, and hence, the court would be the ultimate authority to decide whether or not the non-licensee should be required to produce the information. She pointed out that giving the non-licensee an opportunity to challenge TA's application before the magistrate might result in protracted proceedings and jeopardise TA's investigation.

27. SALD advised that the application by a regulatory authority for a court order to compel the production of information was usually ex parte among existing regulatory regimes. To allay the concerns expressed by members, the Administration had already proposed CSAs to circumscribe the scope of the

proposed section to cover only information that was relevant to TA's investigation of breaches or suspected breaches, and to safeguard the non-licensee concerned against any civil liability arising from disclosing information in confidential agreements under proposed section 36D. He added that inter partes proceedings for the request of information from non-licensees would protract the evidence gathering process of TA and might give rise to problems relating to preservation of evidence.

28. Mr Eric LI pointed out that since the proceedings under proposed section 36D were ex parte, not inter partes, the non-licensee concerned would not have the opportunity to explain his case in open court before the magistrate made a decision to grant the order or otherwise. He opined that unlike telecommunications licensees who had opted into the regulatory regime, third-party non-licensees should not be subject to such onerous requirements as imposed by proposed section 36D. It was also unfair that the only course of redress available to the non-licensee was to seek a judicial review on the magistrate's decision on issuing the order. HKSA considered that the third-party non-licensee should be given a reasonable opportunity beforehand to respond to TA's demand for information. On preservation of evidence, he recalled that in the case of the draft Securities and Futures Bill, the Administration's proposal to address the concern about possible destruction or distortion of evidence was for the authority to apply for a search warrant to enter into premises to gather evidence. To ensure fairness for third-party non-licensees, he urged the Administration to critically re-examine the appropriateness of ex parte proceedings under proposed section 36D.

Admin

II Any other business

29. At the Chairman's request, the Administration agreed to provide a full set of CSAs to the Bill for members' perusal by 3 May 2000. The Chairman further advised that if members, having perused the CSAs, considered that the Bills Committee should convene a further meeting, they should inform the Clerk on or before 8 May 2000. He suggested that subject to the need for further deliberation, the Bills Committee would report to the House Committee on 19 May 2000 with the recommendation to resume the Second Reading debate on 31 May 2000. Members and the Administration agreed to the suggestion.

(Post-meeting note: Two further meetings of the Bills Committee were held on 10 and 18 May 2000. The Bills Committee submitted a written report to the House Committee on 26 May 2000 and the Second Reading debate of the Bill was resumed on 7 June 2000.)

30. The meeting ended at 12:13 pm.

Legislative Council Secretariat
2 August 2000