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19 July 2010

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Dear Mr Loo,

Communications Authority Bill (the Bill)

Thank you for your letter dated 25 June 2010 on the above subject. I hereby provide the responses to the various issues raised in your letter.

Clause 4 – Functions of the Communications Authority (CA)

The statements referred to in paragraph 3(e) of the Legislative Council Brief are known policy objectives that the Government remains committed to. For the purpose of deciding what should be included in the Bill, however, we have adopted a rigorous approach by including only

provisions that are essential for prescription in law. The exact mission of the CA will depend on its state of development - the initial focus would be getting itself established and coping with set-up issues, and soon after that, reviewing the legislative framework for the broadcasting and telecommunications sectors. The CA should be allowed flexibility to determine what its exact public missions should be having regard to its own state of development and the overriding commitment for the CA to further the development of the communications market in Hong Kong. These are matters that can be pursued outside the context of the Bill.

Clause 5 – Incidental Powers

Retaining section 9(2) of the Broadcasting Authority Ordinance (BAO) and other provisions conferring incidental powers (e.g. section 6A(1) of the Telecommunications Ordinance (TO)) is not in conflict with the concerned provisions in the Bill. Indeed, the arrangement would help to make it clear in the BAO/Broadcasting (Miscellaneous Provisions) Ordinance (B(MP)O) that the powers conferred on the CA in respect of broadcasting matters under section 9(1) of that Ordinance are not exhaustive when we look at the BAO/B(MP)O in isolation. The same applies to the TO in respect of powers conferred on the CA in respect of telecommunications matters under section 6(A)1 of the TO when we look at the TO in isolation. As such, we do not intend to repeal the concerned sections in the current exercise.

Nevertheless, we consider that there is room to review the arrangement in the comprehensive review of the TO, the Broadcasting Ordinance (BO) and the BAO/B(MP)O to be conducted after the establishment of the CA.

Clauses 8 and 9 – Members of the CA

Members who are public officers

We anticipate that the appointment of the public officer provided in clause 8(1)(b) of the Bill will be made by post. The Director-General of Communications (DG Com) is an ex-officio member appointed to the

CA by virtue of post as well. The appointment of these two public officers will be different from appointing non-official CA members (i.e. those appointed under Clause 8(1)(a)) who would be appointed ad personam. In case the post holder resigns from office, or is temporarily absent or incapacitated to act, arrangements will be made within the Administration (e.g. by posting or acting arrangements) so that the public officer can continue to serve the CA. As such, we are of the view that there is no need to apply the provisions in clauses 8(6) - 8(8) to public officers. The arrangement is in line with that for statutory bodies established recently such as the West Kowloon Cultural District (WKCD) Authority (see Clause 6(1) of Schedule of Cap. 601).

The requirement of "ordinarily resident in Hong Kong"

We note that the definition for "ordinarily resident in Hong Kong" has become a common term. We are therefore of the view that the term can be left undefined in the Bill. We are aware that a number of more recently enacted ordinances, when referring to the membership of statutory bodies, also do not give a definition of "ordinarily resident" as well, e.g. the Chinese Medicine Ordinance (Cap. 549) and the Mass Transit Railway Ordinance (Cap. 556) which stipulate respectively that members of the Chinese Medicine Council and the majority of directors of the board of the MTR Corporation Limited should be ordinarily resident in Hong Kong.

Criteria of appointing CA members

Not stipulating the criteria in the appointment of CA members and the chairperson and vice-chairperson in the Bill is consistent with the practice of most statutory bodies in Hong Kong (e.g. WKCD Authority, the Securities and Futures Commission), the members of which are appointed by the Chief Executive (CE). As a matter of administrative law, the CE is required to exercise his power of appointment in a reasonable manner and to appoint only suitable candidates.

Clause 11 – Transaction of business by circulation of papers

From the drafting angle, clause 11(3) of the Bill already has the meaning of requiring the resolution passed to be signed on and in the form of one document or identical copies of the same document.

Clause 13 – Disclosure of interests

Power of directing signatures to be counted

The power under clause 13(4) set out in clause 13(5) of the Bill refers to the power of the chairperson to direct a member's signature to be counted even if the member has made a disclosure of interest. We are of the view that the present drafting in clauses 13(4) and 13(5) is clear enough to set out the relevant power.

Application of Clause 13(6)

Clause 13(7) provides that non-compliance with the requirements of clause 13 (i.e. to disclose interests) by an **individual** member does not affect the validity of proceedings. Clause 13(7) does not override clause 13(6).

Clause 14 – Director-General

Clause 14(4) of the Bill should be considered in its totality. The clause is intended to provide for the role of DG Com in the meetings of the CA to report the implementation of CA's decisions. While the CA may discuss the work of a committee appointed by it, the reporting duty should better rest with the concerned committee rather than the DG Com. We could anticipate that the DG Com will be prepared to report on the implementation of the committee's decisions made by delegated authority under clause 17(1)(a) at the CA's meetings but we do not see a need to mandate in the Bill that the task should be carried out by DG Com.

Clause 19 - Payments

The Office of the Communications Authority (OFCA) will manage the OFCA Trading Fund and the new general revenue head established for its functions in relation to the control of obscene and indecent articles, film classification and newspaper registration. Managing a new general revenue head by OFCA is purely an administrative arrangement. It is indeed feasible for one single department to manage both a trading fund and a general revenue head concurrently. For example, the Electrical and Mechanical Services Department manages the Electrical and Mechanical Services Trading Fund and its relevant general revenue head. The operation of the Obscene Articles Tribunal under the Judiciary will not be affected by the Bill.

Clause 20 – Transfer of custody of records etc.

TELA's documents on entertainment licensing not to be further transferred to CA/OFCA

We are aware of the public expectation that data, records, etc., especially those involving personal data, should be well protected. It is our intention to restrict the transfer of data, records and documents to cases where it is necessary. As the CA or OFCA will not need to use the data, records, etc. which are transferred to another department (i.e. the Home Affairs Department that will take up the records in relation to entertainment licensing functions of TELA), we have come to the view that such records need not be further transferred to the CA or OFCA, as provided in clause 20(4) of the Bill.

All transferees to take up rights and obligations

The rights and obligations are transferred as the data, records and documents are transferred. All transferees (including the first and further transferees) will take up the rights and obligations. The Privacy Commissioner for Personal Data can exercise powers in clause 20(7) of the Bill on both the first and further transferees.

The term “undertakings”

The term “undertakings” is a general word used to cover the ventures, enterprises, tasks or functions that have been undertaken by the former authorities and former departments. We are of the view that the term does not require further definition.

Clause 21 – Prohibition against disclosure of confidential information

“Adviser” and “professional adviser”

Clause 21(1) of the Bill serves to cover the types of persons who may gain access to confidential information. As they may include advisers on general matters, it is more appropriate to use a general term of “adviser”. As for clause 21(2)(d), its purpose is to allow the disclosure of information under specific circumstances, i.e. to professional advisers. In this respect, the clause is couched in a more specific term.

From the drafting angle, it would be unnecessarily restrictive to further define who a “professional adviser” is. The practice is in line with other ordinances such as the Securities and Futures Ordinance (see section 378 of Cap. 571) and the Financial Reporting Council Ordinance (see section 51 of Cap. 588).

Communications to the CA or OFCA

From the drafting angle, we maintain the view that “與管理局或通訊辦的通訊” can adequately reflect the intention of “communications to the Authority or OFCA”.

Disclosure of information on genuine belief

Clause 21(2)(l) of the Bill provides that the criminal offence on disclosing confidential information would not be applicable to public officers who believe that the disclosure is required by the law or made in accordance with or incidental to the officer’s official duties. Clause

21(4)(a) of the Bill provides defence to a person charged with such offence who believes that the disclosure of confidential information was made with lawful authority or without knowing that the information is confidential. In both circumstances, the relevant persons have to genuinely believe in their acts. We consider that such genuine belief will be subject to a test of credibility in the court, which may not accept a belief that is totally unreasonable.

Clause 22 – Amendment to the TO

The consideration behind clause 22 of the Bill is to make clear that for orders issued by the CE under section 33(1)(b) of the TO, investigations into the compliance or otherwise of these orders would also be initiated by the CE and in accordance with the conditions he imposes. Without this clause, it would not be clear under what circumstances the CA could investigate into matters relating to section 33(1)(b) of the TO.

Clause 23 – Provisions relating to the OFCA Trading Fund

Amending the Office of the Telecommunications Authority (OFTA) Trading Fund Resolution through the Bill

We now propose to amend the OFTA Trading Fund Resolution in the Bill to take forward the exercise of enacting the Bill and the OFCA Trading Fund Resolution together, instead of moving a separate resolution for the latter. There are various precedents for amending a Trading Fund Resolution through a Bill, e.g. the amendment to the OFTA Trading Fund Resolution through the Unsolicited Electronic Messages Bill in 2007.

“Title” for OFCA Trading Fund

We understand that the “title” that appears in Cap. 430D (i.e. “OFFICE OF THE TELECOMMUNICATIONS AUTHORITY TRADING FUND”) is a term for reference and not part of the legislation. This “title” can be amended editorially after the enactment of the Bill.

Radio Television Hong Kong (RTHK) Charter

The RTHK Charter will be signed by the Chief Secretary for Administration, the Director of Broadcasting and the Chairman of the BA. The Charter will set out, among other things, the role of the BA for the regulation of RTHK programming. After the establishment of the CA, the role and functions of the BA as the regulator of the broadcasting industry will be taken over by the CA. Insofar as the Charter is concerned, the operation of the Charter will not be affected except that the name of BA will be updated to become the CA.

Chinese Text

OFCA Trading Fund

We are amenable to the suggestion of amending “通訊事務管理局營運基金” to “通訊事務管理局辦公室營運基金” in respect of the Chinese name of the Trading Fund.

The use of “委任” and “委出”

It is a drafting convention to use the term of “委任” to denote the appointment of a person to a post, e.g. appointment as a committee member, whereas “委出” is adopted for the appointment of committees. The term “委出委員會” has been adopted in many other ordinances, e.g. Schedule 2 of the Deposit Protection Scheme Ordinance (Cap. 581) and section 7 of the Electoral Affairs Commission Ordinance (Cap. 541).

However, “委任的...委員會” in clauses 2 and 24(1) of the Bill will need to keep to the rendition of “委任” as the provisions are cross-referring to section 10 of Cap. 391 where “委任” will continue to be adopted.

Schedule – Telecommunications Regulations (Cap. 106A)

The regulations and schedules in Cap. 106A referring to the powers to grant licences, etc. as mentioned in clauses 39 to 41, 44 and 45 of the Schedule to the Bill cover the requirements for the forms, validity

periods, fees, etc. of certain licences. These have become obsolete or fallen into disuse, and the relevant requirements are now either stipulated in the Telecommunications (Carrier Licences) Regulation (Cap. 106V) and the Telecommunications (Examination, Certification and Authorisation of Radiocommunications Personnel) Order (Cap. 106W), or are published by the TA under the power in section 7(6) of the TO. As the relevant provisions in Cap. 106A carry references to the TA, and such references, if retained, would have to be amended to refer to the CA, retaining them may cause confusion to the public, giving them the impression that these powers will continue to be exercised by the CA. We therefore take the opportunity to repeal them in this exercise.

Schedule – Broadcasting Authority Ordinance (Cap. 391)

Minimum membership of the Broadcast Complaints Committee

In respect of section 10(1) of the BAO, unlike the BA which at present has a minimum of 9 members, the CA will have a minimum of 7 members. We therefore consider it necessary to reduce accordingly the minimum number of members required for forming the Broadcast Complaints Committee.

Investigative functions under the BAO

The “Authority” in section 22(1) of the BAO will be amended to mean the CA. As the arrangements of making investigations provided in section 22 of the BAO should continue to apply to the functions of the existing BA only, it is necessary to qualify the term “functions” to exclude the CA’s functions other than those of the existing BA. From the drafting angle, the term of “under this Ordinance” to be added after “functions” covers all functions referred to in section 9(1) of the BAO.

Penalties payable to the Government

It is our intention, as enshrined in clause 19(5) of the Bill, for all fines and penalties imposed by the CA to be paid to the general revenue. Amending section 24 and 25 of the BAO in the proposed manner (i.e.

directing penalties and fines to be paid to the Government) follows this intention and will avoid any doubt as to where the fines and penalties will go.

Schedule – Amusement Game Centres (Appeal Board) Regulation (Cap. 435A)

The form as well as its notes in Schedule 3 of Cap. 435A are intended for reference by members of the public who may not refer to the contents of Cap. 435, and the abbreviation scheme in the former would have effect only in the form. While there is a need in Cap. 435 to use “the appointed public officer” in order to differentiate the term from other types of public officers mentioned therein, there is no need to do so in the forms in Schedule 3 of Cap. 435A. “The public officer” is the appropriate wording to be used in that context.

Schedule – Legislative Council Ordinance (Cap. 542)

From the drafting angle, we maintain the view that the wording in clause 25(6) of the Bill is enough to cover licences granted by the TA.

Schedule – Broadcasting Ordinance (Cap. 562)

Directions relating to technical standards under section 24 of the BO

The existing provisions of section 24(1) to (3) of the BO do not require the publication of directions issued by the TA which are related to technical standards. The amendments to section 24(3) seek to preserve this position.

Clause on safeguarding confidential information in the BO

The arrangement in section 27(1)(a) of the BO is intended to cover information received by the BA which is connected to the functions under the BO (including the functions related to BO under the BAO). The Bill will change references to the BA in section 27(1)(a) of the BO to the CA and thus widen the scope of the provision. It is therefore

necessary to restrict the scope of the information referred to in section 27(1)(a) to exclude the information received by the CA in performing its functions under other ordinances.

Financial penalties

In relation to the amendments to section 29 of the BO, please see the explanation given above on the intention of making financial penalties payable to the Government.


(Kevin LAI)

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cc

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