

**President's ruling on
Committee stage amendments to the
Telecommunications (Amendment) Bill 2009
proposed by Hon Emily LAU Wai-hing and Hon LEE Wing-tat**

Hon Emily LAU Wai-hing and Hon LEE Wing-tat have separately given notice to move Committee stage amendments (“CSAs”) to the Telecommunications (Amendment) Bill 2009 (“the Amendment Bill”), if the motion for the Second Reading of the Bill is agreed to at the meeting of the Legislative Council (“LegCo”) of 20 January 2010. Before considering the admissibility of the proposed CSAs under the Rules of Procedure (“RoP”), I invited the Administration to comment on the CSAs, and the two Members to offer their response. The Administration’s comments and the Members’ response are summarized in the **Appendix**. I have also sought the advice of Counsel to the Legislature.

Relevant rules in RoP

2. In commenting on the Members’ proposed CSAs, the Administration has referred to the following rules in RoP:

- (a) Rule 57(4)(a) which provides that an amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates; and
- (b) Rule 57(6) which provides that an amendment, the object or effect of which may, in the opinion of the President, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong may be proposed by a Member, if the Chief Executive (“CE”) consents in writing to the proposal.

The Amendment Bill

3. According to the LegCo Brief on the Amendment Bill, under the Telecommunications Ordinance (“TO”) (Cap. 106), CE in Council may grant a licence for the maintenance and operation of sound broadcasting services, after considering recommendations made by the Broadcasting Authority (“BA”). In order to enhance the transparency of the existing licensing regime, the Administration has promulgated a set of licensing criteria adopted by CE in Council. At the same time, the Administration is seeking to prescribe this set of licensing criteria by law, and to empower BA to issue guidelines indicating how it proposes to perform its function of making recommendations on sound broadcasting licence applications to CE in Council, through the Amendment Bill.

Hon Emily LAU's proposed CSAs

The proposed CSAs

4. Counsel advises that Ms LAU's proposed CSAs seek to amend clause 3 so as to add an additional licensing criterion to the proposed section 13C(4) of the Amendment Bill (i.e. the proposed new section 13C(4)(aa)) so that CE in Council must have regard to the opinion of the public, including but not limited to that expressed at public hearings, in exercising the discretion whether to grant a sound broadcasting licence.

5. In connection with the new licensing criterion, Ms LAU also proposes to add a new section 13P to provide that BA shall hold a public hearing in connection with:

- (a) the issue of a licence and refusal to grant a licence (i.e. the proposed new section 13P(1)); and
- (b) the amendment or renewal of a licence unless it is satisfied that such a hearing is not required in the public interest (i.e. the proposed new section 13P(2)).

6. Counsel also points out that nothing in the long title of the Amendment Bill, its provisions, explanatory memorandum and LegCo Brief suggests that the scope of the Bill includes amendment or renewal of sound broadcasting licences. As regards item (b) of the long title "to specify the matters to which the Chief Executive in Council must have regard in exercising the discretion whether to grant sound broadcasting licences", Counsel advises that under TO, the "granting" of a licence is a separate and independent matter from the "amendment" and "renewal" of such licence. Therefore, the granting of a licence mentioned in item (b) of the long title does not include any amendment or renewal of the licence.

The Administration's views

7. The Administration is of the view that imposing a mandatory requirement for BA to hold public hearings in respect of an amendment or renewal of a licence (i.e. the proposed new section 13P(2)) falls outside the scope of the Amendment Bill, which is only concerned with applications for sound broadcasting licence, but not amendment or renewal.

8. The Administration has not raised any objection on the ground of scope to the proposed new sections 13C(4)(aa) and 13P(1).

9. The Administration considers that all the proposed CSAs would have charging effect because there is expenditure involved in the organization of public hearings arising from rental for equipment, publicity cost, provision of simultaneous interpretation service, hiring of security guards, etc. The Administration indicates that a rough estimate of the resource requirement for organizing one territory-wide public hearing exercise is around \$610,000.

The Member's response

10. Hon Emily LAU considers that item (b) of the long title of the Amendment Bill should not be interpreted narrowly to mean that the scope of the Bill is limited only to “applications for sound broadcasting licence” and “grant of licence”. In granting radio licences, CE in Council is assured that BA has the power to amend or renew the licences under TO. Thus, it would not be accurate or reasonable to state that amending or renewing the licence is not one of the factors to be taken into account when considering whether to grant a licence. In fact, amending or renewing a licence is an integral part of the licensing system.

11. Ms LAU also argues that BA is required to hold a public hearing in connection with the amendment or renewal of a licence only when such hearing is required in the public interest. The Administration has failed to give due regard to this when calculating expenses for organizing public hearings. Ms LAU considers that the resources required to organize public hearings must be less than the estimated \$610,000 and should be negligible.

Hon LEE Wing-tat's proposed CSA

The proposed CSA

12. Counsel advises that Hon LEE Wing-tat's proposed CSA seeks to provide in TO a right of appeal to the Court of First Instance (“CFI”) from a decision of CE in Council to issue, amend, renew or refuse to grant a sound broadcasting licence.

13. Counsel points out that nothing in the long title of the Amendment Bill, its provisions, explanatory memorandum and LegCo Brief suggests that the scope of the Bill includes a right of appeal to CFI.

14. Counsel also advises that the CSA relates to an appeal from a decision of CE in Council, whereas the proposed new section 14A applies only after CE in Council has made a decision. It does not relate to a matter to which CE in Council must have regard in exercising the discretion whether to grant sound broadcasting licences.

The Administration's views

15. It is the Administration's view that the proposed CSA is outside the scope of the Amendment Bill because none of the matters referred to in the long title and explanatory memorandum of the Amendment Bill, the provisions of the Bill as well as LegCo Brief are concerned with appeals against the licensing decision of CE in Council. There would be a fundamental shift in the purpose of the Amendment Bill and TO in that the ultimate responsibility for deciding on a grant of the licence would be shifted from the executive to the Judiciary.

16. The Administration also argues that it is reasonable to assume that the expenditure involved in shifting the ultimate responsibility for deciding on a grant of licence from the executive to the Judiciary would not be negligible, and that apart from the costs to be incurred by the Judiciary, the Government would incur legal costs in preparing for and attending the court hearings. The Administration's very rough estimate is that an appeal case to CFI would involve a legal cost of about \$280,000 to the Government. The proposed CSA should therefore have charging effect.

The Member's response

17. Hon LEE Wing-tat argues that item (b) of the long title of the Amendment Bill "to specify the matters to which the Chief Executive in Council must have regard in exercising the discretion whether to grant sound broadcasting licences" must not be interpreted so narrowly that the scope of the Bill is limited only to "applications for sound broadcasting licence" and "grant of licence". Mr LEE also argues that the proposed appeal mechanism is an integral part of the licensing system as a whole. It would not be sensible for CE in Council not to consider possible court challenges in deciding whether to grant a licence; hence his CSA is within the scope of the Amendment Bill.

My opinion

Hon Emily LAU's proposed CSAs

18. The Administration submits that all the CSAs proposed by Hon Emily LAU have charging effect, while certain CSAs are outside the scope of the Amendment Bill. For an amendment to be admissible, it must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates. I will therefore first give my opinion in this respect.

19. Ms LAU's proposed CSAs make it mandatory under the proposed new section 13P for BA to hold a public hearing in connection with:

- (a) the issue of a licence and refusal to grant a licence (i.e. the proposed new section 13P(1)); and
- (b) the amendment or renewal of a licence unless it is satisfied that such a hearing is not required in the public interest (i.e. the proposed new section 13P(2)).

20. In addition, Ms LAU proposes a new licensing criterion in that CE in Council must have regard to "the opinion of the public, including but not limited to that expressed at the public hearings held pursuant to section 13P" in exercising the discretion whether to grant a licence (i.e. the proposed new section 13C(4)(aa)).

21. I accept the advice of Counsel to the Legislature that nothing in the Amendment Bill's provisions, long title, explanatory memorandum and LegCo Brief concerns amendment and renewal of a licence. The granting of a licence is a separate and independent matter from the "amendment" or "renewal" of such licence. I am therefore of the opinion that Ms LAU's proposed new section 13P(2) is not within the scope of the Amendment Bill and is not relevant to the subject matter of the Bill under Rule 57(4)(a) of RoP.

22. As I have already formed the opinion that Ms LAU's proposed new section 13P(2) is not relevant to the subject matter of the Amendment Bill, I shall not deal with whether this proposed CSA has charging effect under Rule 57(6) of RoP.

23. As regards the other CSAs proposed by the Member referred to in paragraphs 19(a) and 20 above, the Administration submits that a rough estimate of the resource requirement for organizing one territory-wide public hearing exercise is around \$610,000.

24. It has been established through the rulings of my predecessor¹ that proposed amendments of this nature would have charging effect within the meaning of Rule 57(6), if the proposed statutory function to be undertaken is one which is not provided under existing law and the President is satisfied that the performance of that new function will require the spending of an amount of public money that is not nominal or negligible.

25. As Ms LAU's proposed new section 13P(1) would make it mandatory for BA to hold a public hearing in connection with the issue of a licence or refusal to grant a licence, which is not required under existing law, and the cost of holding such hearing cannot be regarded as nominal or negligible, I am of the opinion that the proposed new section 13C(4)(aa) and new section 13P(1) have charging effect and may be moved only with the written consent of CE.

26. If Ms LAU fails or does not wish to obtain CE's written consent, I am prepared to rule her proposed new section 13C(4)(aa) admissible provided that the words "including but not limited to that expressed at the public hearings held pursuant to section 13P" are deleted.

Hon LEE Wing-tat's proposed CSA

27. I will first give my opinion on whether Hon LEE Wing-tat's proposed CSA is within the scope of the Amendment Bill. Mr LEE's proposed CSA seeks to provide a mechanism for appeal to CFI against a decision of CE in Council to issue, amend, renew or refuse to grant a licence. I accept Counsel's view that nothing in the Amendment Bill's provisions, long title, explanatory memorandum and LegCo Brief suggests that the scope of the

¹ Ruling on the Committee stage amendments to Independent Police Complaints Council Bill proposed by Hon James TO Kun-sun and Hon LEE Wing-tat; Ruling on the Committee stage amendments to Race Discrimination Bill proposed by Hon Margaret NG; and Ruling on the Committee stage amendments to District Council Bill proposed by Hon Cyd HO.

Amendment Bill includes a right of appeal to CFI. Even if I accept Mr LEE's argument that CE in Council should consider whether it would face court challenges in deciding to grant or refuse to grant a licence, I do not see the relevance of introducing an appeal mechanism which applies only after CE in Council has made a decision. I am therefore of the opinion that Mr LEE's proposed CSA is not within the scope of the Amendment Bill and is not relevant to the subject matter of the Bill under Rule 57(4)(a) of RoP.

28. As I have already formed the opinion that Mr LEE's proposed CSA is not relevant to the subject matter of the Amendment Bill, I shall not deal with whether this proposed CSA has charging effect under Rule 57(6) of RoP.

Ruling

29. Having considered the Administration's comments, the Members' response and the advice of Counsel to the Legislature, I rule that:

Hon Emily LAU's proposed CSAs

- (a) the proposed new section 13P(2) is not relevant to the subject matter of the Amendment Bill and is not admissible under Rule 57(4)(a) of RoP;
- (b) the proposed new section 13P(1) has charging effect under Rule 57(6) and may only be moved with the written consent of CE; the proposed new section 13C(4)(aa) also has charging effect and may only be moved with the written consent of CE, or with the words "including but not limited to that expressed at the public hearings held pursuant to section 13P" deleted; and

Hon LEE Wing-tat's proposed CSA

- (c) the proposed new section 14A is not relevant to the subject matter of the Amendment Bill and is not admissible under Rule 57(4)(a).

(Jasper TSANG Yok-sing)
President
Legislative Council

18 January 2010

Telecommunications (Amendment) Bill 2009

Summary of Hon Emily LAU Wai-hing's and Hon LEE Wing-tat's proposed Committee stage amendments,
the Administration's comments and the Members' response

CSAs	Administration's comments	Member's response
(a) Hon Emily LAU		
To amend clause 13C(4) and to add a new clause 13P	<p>The proposed CSAs would impose a mandatory requirement for BA to hold public hearings in respect of the amendment or renewal of a licence. In this regard, the proposed CSAs fall squarely outside the scope of the Amendment Bill, which is only concerned with applications for sound broadcasting licence, but not amendment or renewal. This is supported by references to “applications” and “grant of licence” in the long title of the Amendment Bill, the substance of the Bill itself, and the explanatory memorandum as well as the LegCo Brief.</p> <p>In addition, the proposed CSAs, by mandating BA to hold public hearings in respect of application, amendment or renewal of sound broadcasting licences, would have charging effect (which should require the written consent of CE by virtue of Rule 57(6) of RoP) because there is expenditure involved in the organization of public hearings arising from rental for equipment, publicity cost, provision of simultaneous interpretation service, hiring of security guards, etc. A rough estimate of the resource requirement for organizing each</p>	<p>Item (b) of the long title of the Amendment Bill “to specify the matters to which CE in Council must have regard in exercising the discretion whether to grant sound broadcasting licences” should not be interpreted narrowly to mean that the scope of the Bill is limited only to “applications for sound broadcasting licence” and “grant of licence”. In granting radio licences, CE in Council is assured that BA has the power to amend or renew the licences under TO. Thus, it would not be accurate or reasonable to state that amending or renewing the licence is not one of the factors to be taken into account when considering whether to grant a licence. In fact, amending or renewing a licence is an integral part of the licensing system; hence, her proposed CSAs are within the scope of the Amendment Bill under Rule 57(4) of RoP.</p> <p>BA is required to hold a public hearing in connection with the amendment or renewal of a licence only when such hearing is required in the public interest. The Administration has failed to give due regard to this when calculating expenses for organizing public hearings. The resources required to organize public hearings must be less than the estimated \$610,000 and should be negligible.</p>

CSAs	Administration's comments	Member's response
	territory-wide public hearing exercise is around \$610,000.	The mechanism for granting radio licences is defective, unfair and not in line with best international practice. It favours applications from big business enterprises and does not give due regard to the development of community radio, which enhances the freedom of expression and freedom of speech. Therefore, the Administration should take urgent steps to reform the system of granting radio licences and open up the airwaves to the public.
(b) Hon LEE Wing-tat		
To add a new clause 14A	<p>The proposed CSA is clearly outside the scope of the Amendment Bill because none of the matters referred to in the long title and explanatory memorandum of the Amendment Bill, the provisions of the Bill as well as the LegCo Brief are concerned with appeals against the licensing decision of CE in Council. There would be a fundamental shift in the purpose of the Amendment Bill and TO in that the ultimate responsibility for deciding on a grant of the licence would be shifted from the executive to the Judiciary.</p> <p>It is also reasonable to assume that the expenditure involved in shifting the ultimate responsibility for deciding on a grant of licence from the executive to the Judiciary would not be negligible, considering that the annual salary of a Judge of CFI of the High Court is over \$2.2 million, not including other fringe benefits. The appeal will occupy a Judge's time and unless additional resources are provided, court waiting time is going to be extended. There will also be</p>	<p>Item (b) of the long title of the Amendment Bill "to specify the matters to which CE in Council must have regard in exercising the discretion whether to grant sound broadcasting licences" must not be interpreted so narrowly that the scope of the Bill is limited only to "applications for sound broadcasting licence" and "grant of licence". In addition, the proposed appeal mechanism is an integral part of the licensing system as a whole. It would not be sensible for CE in Council not to consider possible court challenges in deciding whether to grant a licence; hence his CSA is within the scope of the Amendment Bill under Rule 57(4) of RoP.</p> <p>The Administration has failed to consider that the actual number of applications for a licence and that the existing granted licences are quite low. The Administration's calculation as to the estimated expense is obviously not based on attainable past statistics. Even without an appeal mechanism as proposed in his CSA, the judicial review system is in place for appeal cases. The resources mentioned by the Administration, if not used in the new appeal mechanism, would be used in judicial review cases. Therefore, his proposed CSA</p>

CSAs	Administration's comments	Member's response
	<p>overhead costs and consumption of registry support at the High Court. For an appeal case to CFI, the Administration would expect the court to spend roughly two to five days for hearing of the merits of the case and calling for expert evidence where necessary. Apart from the costs to be incurred by the Judiciary, the Government would incur legal costs in preparing for and attending the court hearings. Depending on the complexity of the case, the number and experience of the solicitors/counsel engaged and other relevant matters, the Administration's very rough estimate is that an appeal case to CFI would involve a legal cost of about \$280,000 to the Government. The proposed CSA should therefore have charging effect which would require the written consent of CE by virtue of Rule 57(6) of RoP.</p>	<p>only leads to negligible charging effect.</p>

Abbreviations

the Amendment Bill	Telecommunications (Amendment) Bill 2009
BA	Broadcasting Authority
CE	Chief Executive
CFI	Court of First Instance
CSAs	Committee stage amendments
LegCo	Legislative Council
RoP	Rules of Procedure
TO	Telecommunications Ordinance (Cap. 106)