

立法會
Legislative Council

LC Paper No. CB(2) 2598/99-00
(These minutes have been seen by
the Administration and cleared
with the Chairman)

Ref : CB2/BC/12/99

Bills Committee on Broadcasting Bill

Minutes of Meeting
held on Tuesday, 2 May 2000 at 2:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Mrs Selina CHOW LIANG Shuk-ye, JP (Chairman)
Hon Cyd HO Sau-lan
Hon Ronald ARCULLI, JP
Hon MA Fung-kwok
Hon Emily LAU Wai-hing, JP
Hon Andrew CHENG Kar-foo

Members Absent : Hon David CHU Yu-lin
Hon SIN Chung-kai
Hon YEUNG Yiu-chung
Hon CHOY So-yuk
Hon FUNG Chi-kin

Public Officers Attending : Mr Eddy CHAN
Acting Deputy Secretary for Information Technology
and Broadcasting (1)

Mr Eddie MAK
Principal Assistant Secretary for Information Technology
and Broadcasting (A)

Ms Ava CHIU
Assistant Commissioner for Television and Entertainment
Licensing (Broadcasting)

Mr Geoffrey A FOX
Senior Assistant Law Draftsman, Department of Justice

Ms Cynthia LEE
Government Counsel, Department of Justice

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2) 2

Staff in Attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Miss Betty MA
Senior Assistant Secretary (2) 1

Action

I. Meeting with the Administration

(2:30 pm - 3:30 pm)

[Paper Nos. CB(2)1783/99-00(01) and CB(2)1824/99-00(02)]

Suspension and revocation of licence

[Paper No. CB(2)1783/99-00(01)]

The Chairman said that the Administration had provided a written response to members' suggestion that public hearings should be held in the consideration of suspension of licence.

2. At the invitation of the Chairman, Acting Deputy Secretary for Information Technology and Broadcasting (DS(ITB)(Ag)) explained the provisions in the Bill concerning the suspension and revocation of licence. He said that for the consideration of revocation of licence under clause 31, the Broadcasting Authority (BA) should conduct an inquiry in accordance with clause 32. The BA should conduct public hearing(s) as part of the inquiry. As regards suspension of licence, BA was only empowered to suspend a licence for a period not exceeding 30 days under clause 30. As BA had to take action against a contravention in a relatively short period of time, the Administration considered that BA should be given the flexibility to decide whether a public hearing should be held having regard to the circumstances of each case. DS(ITB)(Ag) said that the proposed procedures for suspension of licence were in line with those in overseas jurisdictions. The broadcasting authorities of

Action

Australia, United Kingdom (UK) and the United States did not hold public hearings for suspension of licence.

3. In reply to members, DS(ITB)(Ag) said that there was no precedent on suspension of licence in Hong Kong.

4. The Chairman asked whether the licensee concerned was allowed to make representations before a decision was made by BA on suspension of licence. Miss Emily LAU agreed with the Chairman that it was important that a licensee should be given an opportunity to make representations. If no public hearing was to be held, BA should give reasons for such decision. She opined that the Bill should specify the procedures for making a decision on suspension of licence.

5. DS(ITB)(Ag) clarified that there was no objection in principle for BA to conduct public hearings for suspension of licence. However, BA would take into account the circumstances and seriousness of each case in deciding whether a public hearing should be held. He also confirmed that the licensee could make representations to BA.

6. Miss Emily LAU considered that the Bill should expressly require BA to conduct public hearing(s) for suspension of licence unless there were specific reasons for not doing so. Ms Cyd HO echoed similar concerns.

7. Mr Ronald ARCULLI remarked that a licensee subject to suspension of licence might not want a public hearing if sensitive commercial secrets would have to be disclosed. He therefore suggested that consideration could be given to adopting the UK practice of shortening the licence period as a penalty. DS(ITB)(Ag) responded that proposed sanctions were modelled on existing provisions in the Television Ordinance and it would not be appropriate to introduce a substantial policy change to the regulatory regime at this stage.

8. The Chairman concluded that members generally agreed that public hearings should be held for suspension of licence under clause 30 except on application by the licensee where commercial secrets were involved. At the request of the Chairman, DS(ITB)(Ag) agreed to further consider members' proposal.

Admin

Financial penalties for television programmes service licensees
[Paper No. CB(2)1824/99-00(02)]

9. At the invitation of the Chairman, DS(ITB)(Ag) briefed members on the Administration's policy considerations in respect of the financial penalties for licensees. He said that the Bill did not differentiate financial penalties that might be imposed on breaches relating to programme content requirements and those relating to competition provisions. As the economic value of the broadcasting

Action

sector was much smaller than that of the telecommunications sector, the Administration was of the view that a fixed-amount penalty system as proposed in the Bill would be more appropriate for the broadcasting sector.

10. The Chairman asked about the consideration and criteria for imposing financial penalties on licensees. She pointed out that a fixed penalty would have little deterrence if the programme could attract substantial revenue.

11. DS(ITB)(Ag) responded that a substantial increase in the maximum financial penalty had been proposed in the Bill and this should provide sufficient deterrent effect. With regard to the criteria for imposing financial penalties, DS(ITB)(Ag) said that BA would take into consideration the severity of the breach and the overall effect on the community when deciding the level of financial penalty. Since domestic television programmes were accessible to the general public, it would be difficult to assess the number of viewers of a particular programme for the purpose of determining the level of the financial penalty. However, BA would impose heavier penalty for repeated contravention.

12. Mr MA Fung-kwok said that while he agreed that the operation of television programme service market was different from that of the telecommunications market, he considered that the proposed financial penalties could not provide sufficient deterrence against anti-competitive behaviour.

13. Mr Andrew CHENG shared the same concern and urged the Administration to re-consider the proposal of pegging the financial penalty at a certain percentage of the revenue of the programme in question.

14. DS(ITB)(Ag) reiterated that the economic value of the broadcasting sector was much smaller than that of the telecommunications sector, and that the proposed maximum penalty at \$1 million was acceptable to the broadcasting industry.

15. Mr Ronald ARCULLI noted from Annex A of the Administration's paper that there were only 23 out of 824 cases in the past ten years where financial penalties were imposed. He considered that the level of penalty must be based on the affordability of the licensee. In this connection, he opined that the maximum penalty of \$1 million was appropriate for the purpose.

16. Mr Andrew CHENG and Ms Cyd HO disagreed with Mr ARCULLI, pointing out that Annex A of the Administration's paper only referred to sanctions relating to breaches of the programme content requirements. They considered that fixed or progressive financial penalties were not appropriate for contravention of competition provisions.

Action

17. Miss Emily LAU said that she was inclined to support a differential financial penalty scheme for breaches of programme content requirements and competition provisions.

18. DS(ITB)(Ag) responded that the economic value of the telecommunications industry warranted a higher level of financial penalty which would be determined by the Court of First Instance upon application by the Telecommunications Authority. If a substantial increase in financial penalty was to be proposed for a television service licensee, it would be necessary to upgrade the authority for imposing the sanction from BA to the Court of First Instance.

19. Mr Andrew CHENG said that he saw no objection for the Court to determine the financial penalties.

20. Senior Assistant Law Draftsman (SALD) advised that BA was empowered under clause 27(6) to impose financial penalties on licensees. If the decision was to be made by the Court, amendments would have to be made to the Bill to provide the revised procedures.

21. In view of the concerns expressed by members, the Chairman requested the Administration to give further consideration to the suggestion of pegging the financial penalty to the economic gain or revenue of the programme concerned. DS(ITB)(Ag) agreed to consider.

Admin

22. Mr Ronald ARCULLI asked whether the licence period should be curtailed, instead of imposing a financial penalty. DS(ITB)(Ag) commented that this would be a more severe penalty and would likely pose operational difficulties on the licensees if the licence period was shortened unexpectedly. Nevertheless, he agreed to give consideration to the suggestion.

Admin

23. In response to Miss Emily LAU, DS(ITB)(Ag) said that the Administration would provide a separate response to the submission from the Consumer Council [Paper No. CB(2) 1504/99-00(04)] which proposed making compensation to aggrieved persons in respect of an anti-competitive conduct of a licensee.

Admin

Licensee to make a correction or an apology

24. Miss Emily LAU enquired about the implementation of clause 29 which imposed a new requirement for a licensee to make correction or apology in the television programme. The Chairman asked whether the licensee would be required to make the correction or apology at a time specified by BA.

25. SALD advised that BA could specify reasonable conditions such as the time and form of the correction or apology to be made by a licensee.

Action

Admin

26. In this connection, the Chairman suggested that clause 29(1) should be amended so that BA could specify the time for the licensee to make a correction or an apology. The Administration noted the suggestion.

Appeal mechanism for suspension and revocation of licence

27. Responding to the Chairman, DS(ITB)(Ag) said that a licensee aggrieved by the decision of BA could appeal to the Chief Executive in Council (CE in C).

28. In response to Miss Emily LAU, DS(ITB)(Ag) said that while public hearings would not be held in considering an appeal, the appellant's written representations would be considered and CE in C would explain its decision afterwards. Moreover, any person aggrieved by the outcome of his appeal to CE in C could seek judicial review of the decision.

Admin
ALA3

29. Some members expressed doubts as to whether CE in C's decision was judicially reviewable. The Chairman therefore asked the Administration to provide information on the parameters for judicial review. She also requested ALA3 to advise at a future meeting whether a decision of BA or CE in C in respect of suspension or revocation of a licence under clauses 30 to 34 was judicially reviewable.

(Post-meeting note : An information paper entitled "Judicial review of decisions made by the Chief Executive in Council" prepared by ALA3 was circulated to members under Paper No. LS 131/99-00.)

**II. Clause-by-clause examination
(from clause 5 onwards)
(3:30 pm - 4:30 pm)**

30. The Bills Committee continued clause-by-clause examination starting from clause 5 of the Bill.

Clause 5 - Offence of providing broadcasting service without licence

31. Members did not raise any queries.

Clause 6 - Unauthorized decoders

32. DS(ITB)(Ag) said that it was an offence under clause 6 to import, manufacture, sell, offer for sale or let for hire an unauthorised decoder.

33. Referring to a deputation's suggestion that re-export and use of unauthorised decoders should also be an offence, DS(ITB)(Ag) said that the

Action

Admin

clause sought to regulate import of unauthorised decoders rather than export of decoders. He agreed to provide a written response to address the deputation's concern on re-export of decoders.

34. Responding to Miss Emily LAU, DS(ITB)(Ag) said that the same level of penalty was proposed for an offence for the import and sale of unauthorised decoders in clause 6 and for the provision of broadcasting service without a licence in clause 5 because both offences were equally serious.

35. The Chairman sought clarification on the defence provision under clause 6(3). ALA3 advised that the drafting of clause 6(3) was similar to other legislation that the prosecution had to prove there was a prima facie case in the first instance, and the defendant could then produce evidence to the contrary to displace the presumption of knowledge. SALD agreed with ALA3's interpretation. He said that the defendant had to prove to the court that he did not know that the decoders were unauthorised.

36. Miss Emily LAU and Ms Cyd HO asked about the different procedures for entering and searching the premises concerned under clauses 6(4) and 6(5). SALD explained that under clause 6(5), the authority would need a warrant issued by the magistrate to enter and search domestic premises, while no warrant was required for an authorised officer to enter and search business premises under clause 6(4) if there were reasonable grounds to believe that illegal trading of unauthorised decoders had taken place. At the request of Miss Emily LAU, SALA agreed to check with the Telecommunications Authority the grounds and examples for exercising the authority under clause 6(4).

Admin
SALA

37. On the search of domestic premises under clause 6(5), SALD said that the magistrate must be satisfied that there were reasonable grounds for believing that an offence relating to unauthorised decoders had been committed before a warrant was issued for the purpose of clause 6(1).

38. In reply to Miss Emily LAU on the power to break open any door of a place to be searched, DS(ITB)(Ag) said that the power under clause 6(7) would only be exercised pursuant to clause 6(4) or clause 6(6). The Chairman believed that clause 6(7) was a standard provision in legislation to enable authorized officers to deal with resistance when enforcing the law. She requested and SALD agreed to provide examples in other ordinances which contained a similar provision as clause 6(7).

Admin

Clause 7 - Offence of providing decoders and reception equipment for television programme service on subscription basis without licence

Action

39. DS(ITB)(Ag) said that it would be an offence under clause 7 to import or sell a decoder for use by a Television Receive Only System (TVRO) to receive a broadcasting service which was not licensed on a subscription basis.

40. In reply to Mr MA Fung-kwok, Principal Assistant Secretary for Information Technology and Broadcasting (PAS(ITB)) said that free satellite television services uplinked from places outside Hong Kong but receivable in Hong Kong did not require a television programme service licence in Hong Kong. However, if the uplinked television services were received overseas on a subscription basis, such services would likely be encrypted and a Hong Kong licence would be required if the service was to be received by TVRO or SMATV in Hong Kong.

Clause 8 - To whom licence may be granted

41. DS(ITB)(Ag) said that clause 8 was based on the existing provisions in the Television Ordinance, except that BA would be empowered to grant Non-Domestic and Other Licensable television programme service licences. The licensing criteria were stipulated in clause 8(4).

42. Members did not raise any queries.

Clause 9 - Recommendations by the Broadcasting Authority on applications for licences

43. DS(ITB)(Ag) said that BA should make recommendations to CE in C in relation to licence applications for Domestic Free and Domestic Pay television programme services.

44. Members did not raise any queries.

Clause 10 - Grant of licence

45. DS(ITB)(Ag) said that clause 10 provided that a licence might be granted subject to conditions and might subsequently be varied by CE in C or BA in the public interest.

46. Miss Emily LAU sought clarification on the meaning of "public interest" in clause 10(4) and the circumstances for CE in C or BA to invoke the power. DS(ITB)(Ag) advised that in view of the long licence period, BA might conduct mid-term review of the performance of licensees, and public hearings would usually be held to collect views from the public in this respect. The clause was to provide flexibility for BA to vary the licence conditions in the public interest following performance reviews. He stressed that the licensee would be consulted on any proposed variation of licence conditions.

Action

47. Mr Ronald ARCULLI expressed concern that the current drafting of clauses 10(4) & (5) conferred wide powers on the licensing authority who could impose stringent licence conditions without the consent of the licensee, given that the latter was only allowed to make representations under clause 10(6).

48. Miss Emily LAU and Mr Andrew CHENG considered that the meaning of "public interest" was much wider than public views collected during the mid-term performance review. They therefore requested that the circumstances for invoking the power of clause 10(4) should be clearly specified in law. DS(ITB)(Ag) agreed to consider members' views.

Admin

Date of next meeting

49. Members agreed to hold the next meeting on 6 May 2000 from 9 am. Members noted that the meeting would be a double time-slot.

50. The meeting ended at 4:35 pm.

Legislative Council Secretariat

5 October 2000