

LEGISLATIVE COUNCIL BRIEF

BROADCASTING BILL

INTRODUCTION

At the meeting of the Executive Council on 25 January 2000, the Council ADVISED and the Chief Executive ORDERED that the Broadcasting Bill (the Bill), at Annex, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Background

2. On 3 September 1998, we published a consultation paper entitled “1998 Review of Television Policy” (the Review) for public consultation. On 8 December 1998, the Executive Council ADVISED and the Chief Executive ORDERED that the policy recommendations arising from the Review should be approved. Among others, the Chief Executive in Council (CE in C) made the policy decision that the statutory law governing the “transmission” and “provision” of television programme services should be separated and that the licensing and regulatory framework for the latter should be provided for in a technology-neutral Bill.

Policy Objectives

3. The Bill seeks to further advance our broadcasting policy objectives, which are to :

- (a) widen programming choice to cater for the diversified tastes and interests of the community;

- (b) encourage investment, innovation and technology transfer in the broadcasting industry;
- (c) ensure fair and effective competition in the provision of broadcasting services;
- (d) ensure that broadcasting services provided are up to the expectations and do not offend the tastes and decency of the community; and
- (e) promote the development of Hong Kong as a regional broadcasting and communications hub.

THE BILL

Structure

4. The Bill consists of 8 parts in the main body and 9 Schedules. To allow flexibility in the regulatory framework to cater for the fast-changing broadcasting and multi-media environment, the finer details of the regulatory provisions, e.g., those relating to voting control, programming requirements and advertising time restrictions, are set out in Schedules so that they can be amended by subsidiary legislation without having to go through the lengthy process of an amendment bill. This structure will also make the Bill more user-friendly.

Scope of Television Programme Service

5. The Bill seeks to regulate television programme services originating from, or being provided for viewers in, Hong Kong. Under Clause 2, “television programme service” is defined as the provision of a service that includes television programmes (i.e. moving visual representational images or a combination of these images and sounds that are intended to inform, enlighten or entertain) for transmission by telecommunications that are readily accessible to, or made available to, the general public in or outside Hong Kong; or to persons in two or more specified premises (which means domestic households and hotel rooms), simultaneously or on demand, whether on a point-to-point or a point-to-multipoint basis or any combination of them. There will be four categories of

television programme services, collectively defined as “broadcasting service”, as follows -

- (a) domestic free television programme (Domestic Free) service;
- (b) domestic pay television programme (Domestic Pay) service;
- (c) non-domestic television programme (Non-domestic) service; and
- (d) other licensable television programme (Other Licensable) service.

6. Of the four categories of broadcasting services, two are domestic services (services primarily targeting Hong Kong), one is non-domestic (services not primarily targeting Hong Kong) and the other, the remaining otherwise licensable services. The first two domestic services categories are to cover services intended or available for reception by over 5,000 specified premises. They will come under either the Domestic Free service (if it is intended or available for reception by the public free of charge) or the Domestic Pay service (if it is intended or available for reception by the public on payment of a subscription). Other licensable services intended or available for reception by not more than 5,000 specified premises in Hong Kong would come under the category of Other Licensable service. While a company may hold more than one Other Licensable service licences for different services, we have built in a safeguard to the effect that the licensee and those exercising control of it and their associates shall not, without the prior approval of the CE in C, hold such number of Other Licensable service licence or exercise control of such licensees, the combined services of which are intended or available for reception by an audience of more than 200,000 specified premises (Section 1 of Schedule 7 to the Bill).

Services excluded

7. For the sake of clarity, it is made clear under the definition of “television programme service” that such service will not include the provision of a service consisting only of a programme that is made solely for the performance or display in a public place (e.g. a shopping mall) or is intended wholly or mainly for the purposes of the trade, business, employment or profession of the recipient.

8. Apart from the above clarifications, the Bill also specifies that certain services which may involve the transmission of visual images by telecommunications will not be regarded as television programme services for

the purposes of the Bill and will therefore be exempted from its application. To allow flexibility in the regulatory framework to cater for the fast-changing broadcasting and multi-media environment, the exemptions are specified in a list in Schedule 3 of the Bill so that it can be amended by subsidiary legislation. Schedule 3 covers, among others, the following services –

- (a) telecommunications services that are currently exempted from the application of the Television Ordinance (Cap. 52). These include, for example, transactional services and video conferencing;
- (b) services provided on the Internet. While video and audio services are now available on the Internet, we consider that their existing mode of operation is different from broadcasting and their pervasiveness is not yet comparable to television programme services currently operating in Hong Kong. Our policy intent is that this type of service should be exempted from the application of the Bill for the time being unless and until its pervasiveness and mode of operation draw much closer to broadcasting and the question of effective enforcement can be resolved; and
- (c) free-to-air satellite television services uplinked from places outside but receivable in Hong Kong. At present, these services are allowed to be received and distributed by satellite master antenna television (SMATV) systems without a licence. In line with our open-sky policy on broadcasting, this type of service should continue to be exempted from the application of the Bill.

Codes of Practice and Guidelines

9. Clauses 3 and 4 empower the Broadcasting Authority (BA) to approve and issue codes of practice and to issue guidelines respectively. Codes of practice may be approved for the purpose of providing practical guidance to licensees in respect of requirements under the Bill imposed on licensees or in respect of licence conditions. Guidelines may be published for the benefit of licensees (or companies seeking to be licensees) to help them understand the considerations the BA intends to adopt in performing functions conferred on it by the Bill.

Regulation of Broadcasting Services

10. Clause 5 makes it an offence to provide a broadcasting service “except under and in accordance with a licence”. Clause 6 makes it an offence to import, manufacture, sell, offer for sale or let for hire etc. an unauthorized decoder for viewing encrypted television programmes without payment of a subscription where a subscription is required to be paid. Clause 7 makes it an offence to import, manufacture, sell, offer for sale or let for hire etc. a decoder for use by a “Television Receive Only System” to receive an unlicensed subscription satellite television service. The sanctions for contravention are standardised at a maximum level of \$1,000,000 and imprisonment for 5 years.

Licensing Provisions

11. Clause 8 specifies to whom a licence may be granted. Clause 8(4)(a) provides that in the case of a Domestic Free or a Domestic Pay service licence, except with the approval of the BA, the majority of the directors and the majority of the principal officers, including the principal officer in charge of the selection, production or scheduling of television programmes, must meet the residence requirement (“the Residence Requirement”) (i.e. for the time being ordinarily resident in Hong Kong and has been so resident for at least one continuous period of not less than seven years). Clause 8(4)(b) provides that in the case of Non-domestic or Other Licensable service licence, not less than one director or principal officer of the licensee must meet the Residence Requirement.

12. Clause 9 provides that the BA shall make recommendations to the CE in C in relation to applications for Domestic Free or Domestic Pay service licences. Clause 10 provides that a Domestic Free or Domestic Pay service licence may be granted by the CE in C and that a Non-domestic or Other Licensable service licence may be granted by the BA, subject to such conditions as it thinks fit. Clause 11 relates to the renewal or extension of licences.

Determination of services primarily targeting Hong Kong

13. Clause 12 provides that a licensee (including a person seeking to be a licensee) shall, before providing a television programme service, make an application to the BA for a determination on whether or not the service would be

considered as primarily targeting Hong Kong. This power enables the BA to ascertain which category of licence such a service would fall into.

Requirements Relating to Licensed Services

(A) Competition provisions

14. The Bill includes a general provision prohibiting a licensee from engaging in conduct which has the purpose or effect of preventing or substantially restricting competition in a television programme service market (Clause 13), and a specific provision prohibiting a licensee in a dominant position in a television programme service market from abusing its position (Clause 14). The BA will be given general and specific powers to enable it to enforce the competition provisions, including the powers to require a licensee and other persons to supply information (Clauses 24 and 25); to determine dominance¹ in a television programme service market (Clause 14(2)); to investigate (Clause 24) and make determinations of anti-competitive practices (Clause 13(1)); to require a licensee to cease and desist from a practice determined by the BA to be in breach of the competition provisions (Clause 15); and to impose financial penalties (Clause 27). All complaints about contravention of the competition provisions will be handled by the BA direct.

Exclusions

15. Certain trade practices are currently exempted from the application of the free competition clause in the existing broadcasting licences. These include (a) restrictions on any programme acquired or produced by the licensee; (b) restrictions on supplying any proprietary decoder; and (c) restrictions on any person using or exploiting his artistic talent or ability. We had previously proposed that these trade practices should continue to be exempted from the application of the competition provisions in the Bill.

¹ Clause 14(2) provides that a licensee is in a dominant position when, in the opinion of the BA, it is able to act without significant competitive restraint from its competitors and customers. Clause 14(3) provides that in considering whether a licensee is dominant, the BA shall have regard to relevant matters including, but not limited to: the market share of the licensees; the licensee's power to make pricing and other decisions; any barriers to entry into the relevant television programme service market and such other matters as may be stipulated in guidelines concerning the test of dominance issued under clause 4 by the BA in consultation with the licensees in the relevant television programme service market.

16. In the light of the advice of our consultant with experience in competition laws in other jurisdictions, we have made some modifications to these exemptions. The exemption in paragraph 15(a) above has been narrowed down to “restrictions on the inclusion in a television programme service of a programme produced by the licensee” (Clause 13(5)(a)). This is because the original exemption will in effect be a blanket exclusion of all behaviour in relation to “content” from the application of the competition provisions. As for the exemption in paragraph 15(b) above, we consider that decoders, which are likely to give rise to potential competition issues in a multi-channel environment, should not be categorically exempted. They should instead be dealt with by the Telecommunications Authority in accordance with the “interconnection” as well as sharing and access provisions in the Telecommunication Ordinance (Cap. 106) where applicable. As for the exemption referred to in paragraph 15(c) above, while exclusive contracts with artistes are generally acceptable, the circumstances under which they may give rise to competition concerns should be spelt out more clearly in guidelines to be issued by the BA. Separately, the BA should also be empowered, on application by a licensee and on a ground prescribed by regulation, to exempt conduct from the competition provisions (Clause 13(4)). This will enable the BA to take action if and only if a genuine distortion of the competition the law seeks to promote is occurring without depriving it of powers to look at such complaints categorically.

Enforcement

17. The competition provisions may affect existing contracts that a licensee has already entered into. Section 4(2) and (3) of Schedule 8 to the Bill provides a transitional arrangement whereby agreements lawfully entered into before the gazettal date of the Bill will be exempted from the prohibition on anti-competitive conduct (Clause 13) for two years from that date.

18. The enforcement of competition provisions will require detailed guidelines covering, among others, the BA’s enforcement procedures, elaboration on the competition provisions and competition analysis framework. The guidelines will be important as they set out how and in what circumstances the BA will enforce the competition provisions. The BA will conduct consultation on the draft guidelines with a view to finalising them by the time the Bill is passed.

(B) Television programme service locking device

19. Clause 19 provides that, except for a service provided to hotel rooms, a licensee shall provide a television programme service locking device to the satisfaction of the BA where its licensed service is a Domestic Pay, Non-domestic (only where a subscription is required to be paid for the service provided in Hong Kong) or Other Licensable service. Given the mandatory requirement to provide a locking device, the BA has agreed to consider suitably relaxing the relevant programme and advertising standards in the generic codes of practice.

Enforcement of Licences and Sanctions

20. The current maximum levels of financial penalty that the BA may impose on a licensee (i.e. \$50,000 for the first occasion, \$100,000 for the second occasion and \$250,000 for any subsequent occasion) were set in 1988. The BA has proposed that these levels should be increased by four times to \$200,000, \$400,000 and \$1,000,000 respectively having regard to, among others, the need to catch up with inflation. The revised levels are reflected in Clause 27. In addition, Clause 29 empowers the BA to require a licensee to include a correction and/or apology in its licensed service if the BA finds the licensee to have contravened a provision in a code of practice, a requirement under the Bill, a licence condition or a direction, etc. of the BA.

21. Clauses 30 and 31 provide for the suspension and revocation respectively of licences. Clause 33 provides for an appeal channel to the CE in C for a licensee (including a person seeking to be a licensee) against any decision of the BA in the exercise of a discretion conferred on the BA under the Bill or the Broadcasting Authority Ordinance. These provisions are modelled on the Television Ordinance.

Schedules

22. Schedule 1 provides for the control of cross-media ownership, ownership by non-residents and restriction on licensees to exercise control on disqualified persons.

(A) Disqualified persons

23. The provisions on disqualified persons are set out in Part 2 of Schedule 1. These provisions largely replicate those in the Television Ordinance (Cap. 52) except where CE in C has decided otherwise, e.g. the deletion of certain categories from the list of disqualified persons and the removal of restrictions on investment by the licensees except in disqualified persons. Pursuant to the policy decisions, “companies which transmit sound outside Hong Kong or television material whether within or without Hong Kong” will be deleted from the list of disqualified persons. Disqualified persons are persons prohibited from exercising control² of Domestic Free and Domestic Pay service licensees except with the prior approval of the CE in C.

24. During the 1998 Review of Television Policy, we proposed that in a diversified and liberalised broadcasting market, “companies which supply programmes for broadcasting by a licensee” (“programme suppliers”) should be removed from the list of disqualified persons. This proposal was subsequently qualified to the effect that “programme suppliers” would remain as a disqualified person in relation to the dominant television programme service licensee. This was to address the concern that such a programme supplier, if allowed to exercise control in a dominant licensee, might manipulate the association and deny the programme supplier’s competitors the dominant licensee’s air-time they might need. We also proposed that the dominant fixed telecommunication network services (FTNS) licensees should require the CE in C’s approval to exercise control in a Domestic Free service licensee or a Domestic Pay service licensee which is dominant in the pay television market. This proposal was to address the concern that the dominant FTNS licensee might seek to abuse its dominant position in both the telecommunications and broadcasting markets.

25. Our competition consultant has advised that we should not define dominance in legislation although the principles for determining dominance should be provided. The consultant has also advised against publicly identifying a licensee as holding a dominant position until a competition analysis including defining the relevant market and assessing the market power has been conducted.

² A person “exercises control of a company” if he is a director or principal officer of the company, the beneficial owner or voting controller of more than 15% of the voting shares of that company or he otherwise has the power, by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating that corporation or any other corporation, to ensure that the affairs of the first-mentioned corporation are conducted in accordance with the wishes of that person.

Given that the competition provisions now proposed in the Bill are much more comprehensive and strengthened than our original proposal, they would be able to address the concerns mentioned in paragraph 24 above. We have therefore removed “dominant FTNS licensee” and “programme suppliers” from the list of disqualified persons.

(B) Unqualified voting controllers

26. The policy decisions on the restrictions on non-residents (unqualified voting controllers) exercising control of licensees are reflected in Part 3 of Schedule 1. In brief, the restrictions are applicable only to Domestic Free service licensees and the incremental steps requiring the BA’s approval are relaxed from 2%, 4%, 6%, 8% and 10% to 2%, 6% and 10% (Section 20(1) of Schedule 1).

(C) Investment by a licensee

27. CE in C had made the policy decision in December 1998 that while the current restrictions on investment by a licensee should be removed, investment by a Domestic Free or Domestic Pay service licensee in a disqualified person should continue to be restricted. This policy decision is reflected in Section 33 of Part 4 of Schedule 1.

28. Schedule 2 is a list of items which are not regarded as newspapers for the purpose of the cross-media ownership restriction on newspaper proprietors. Schedule 3 sets out the services which may involve the transmission of visual representational images by telecommunications but will not be regarded as television programme services for the purposes of the Bill (please see paragraph 8 above). Schedules 4 to 7 set out the supplementary provisions applicable to each of the four types of television programme service licences.

Transitional and savings provisions

29. Schedules 8 and 9 contain transitional and savings provisions and consequential amendments respectively.

(A) Existing licences

30. On transitional arrangements, we propose that each existing licence issued under the Television Ordinance or Telecommunication Ordinance should be expressly deemed to be a certain category of licence issued under the Bill.

31. Accordingly, each of the existing commercial television broadcasting licensees (i.e. Television Broadcasts Limited and Asia Television Limited) shall be deemed to be a Domestic Free service licensee and the holder of a licence granted under the Telecommunication Ordinance; the existing subscription television broadcasting licensee (i.e. Hong Kong Cable Television Limited) shall be deemed to be a Domestic Pay service licensee and the holder of a licence granted under the Telecommunication Ordinance; the existing programme service licensee (i.e. Cable & Wireless HKT VOD Limited) shall be deemed to be a Domestic Pay service licensee; the existing satellite television uplink and downlink licensees (i.e. Hutchvision Hong Kong Limited, Galaxy Satellite Broadcasting Limited, APT Satellite Glory Limited and Starbucks (HK) Limited) shall be deemed to be Non-domestic service licensees; and the existing hotel television service licensees shall be deemed to be Other Licensable service licensees. Subscription satellite television services provided in Hong Kong under a satellite television uplink and downlink licence, if approved by the CE in C before the enactment of the Bill, may come under the categories of Domestic Pay, Non-domestic or Other Licensable service, as determined by the BA, having regard to the nature, languages and coverage, etc. of such services. For such licences, we will have to decide on a case-by-case basis the deeming arrangements.

(B) Item K broadcasters

32. Under the existing regulatory regime, “item K broadcasters” (i.e. those satellite broadcasters who uplink their programmes by hiring the facilities of Cable and Wireless HKT International Limited (HKTI)) are not required to be licensed under the Telecommunication Ordinance and are not subject to the regulation of the BA. As one of the conditions imposed on HKTI’s permission to transmit the signals, these broadcasters are required to comply with the programmes and advertising standards issued by the Secretary for Information Technology and Broadcasting, which mirror those issued by the BA for the satellite television uplink and downlink licensees. This anomaly will be rectified in the Bill whereby all television programme services originated from Hong

Kong will be subject to licensing. We recommend that “item K broadcasters” should be given a transitional period of 2 years to apply for an appropriate licence under the Bill when enacted and hence the requirement for a licence under the Bill should not apply to them during the transitional period (Section 4(1) and (3) of Schedule 8).

(C) Fit and proper persons

33. At present, there is no “fit and proper person” requirement on television broadcasting licensees under the Television Ordinance (i.e. commercial television broadcasting, subscription television broadcasting and programme service licensees). As for satellite television uplink and downlink licensees, such a requirement is stipulated as a licence condition. Clause 20 of the Bill requires that a licensee and any person exercising control of it shall be and remain a fit and proper person. There may be commercial or operational difficulties on the existing licensees if they are required to comply with this new requirement. We propose that this new requirement should not apply to a person who is lawfully exercising control of a television broadcasting licensee granted under the Television Ordinance on the gazettal date of the Bill. However, he may not subsequent to this date increase his control of the licensee (Section 4(4) of Schedule 8).

(D) Royalty and licence fees

34. The charging of advertising and subscription royalties will be abolished with the repeal of the Television Ordinance. Under the Bill, the annual licence fee, calculated on a full cost recovery basis, is specified in the licence conditions instead of by subsidiary legislation (Part 4 of Schedule 4, which is applicable to all licensees). This is to streamline the administrative procedure. To give effect to the policy decision that licensees should be required to pay the full cost licence fee as a quid pro quo for the abolition of royalties, Section 5 of Schedule 8 provides for a transitional arrangement whereby the Financial Secretary may, by notice in writing served on an existing licensee, specify the annual licence fee payable immediately after the repeal of the Television Ordinance.

Consequential and other amendments

35. The Bill when enacted will replace the Television Ordinance to cover all types of television programme services, including terrestrial and satellite television services which are now separately licensed under the Television Ordinance and the Telecommunication Ordinance respectively. The provisions relating to the regulation of sound broadcasting services currently provided under Part IIIA of the Telecommunication Ordinance and Part IV of the Broadcasting Authority Ordinance will be left intact for the time being pending formulation of the policy on digital audio broadcasting.

36. When considering the new scale of financial penalties to be imposed on television licensees in March 1999, the BA also proposed to increase the levels of maximum financial penalty applicable to sound broadcasting licensees (i.e. \$80,000 for the first occasion, \$200,000 for the second occasion and \$400,000 for subsequent occasions). On grounds of equity, the revised scales for television and sound broadcasting licensees should take effect at the same time. The Broadcasting Authority Ordinance will be amended by way of consequential amendments in the Bill (Section 17 of Schedule 9). The equivalent powers of the BA to demand apology and correction by sound broadcasting licensees will also be incorporated in these provisions (Section 18 of Schedule 9).

LEGISLATIVE TIMETABLE

37. The legislative timetable will be :

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| Publication in the Gazette | 28 January 2000 |
| First Reading and commencement of Second Reading debate | 16 February 2000 |
| Resumption of Second Reading debate, Committee Stage and Third Reading | to be notified |

BASIC LAW IMPLICATIONS

38. The D of J advises that the Bill is consistent with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

39. The D of J advises that the Bill is consistent with the human rights provision of the Basic Law.

FINANCIAL AND STAFFING IMPLICATIONS

40. The economic benefits that will accrue to Hong Kong from a thriving and more competitive television industry are likely to outweigh the loss in royalty revenue. Upon the abolition of the royalty schemes, licence fees at full cost levels will become payable and the additional revenue is estimated to be \$28 million in the first year based on the 1999-2000 estimates.

41. Initially, the Television and Entertainment Licensing Authority (TELA) will absorb the additional workload arising from the BA's taking on the additional licensing functions for Non-domestic and Other Licensable services and the enforcement of the competition provisions. In the light of experience and in the interest of building up its own expertise in enforcing competition provisions, TELA will review the situation in both areas of work and may need to bid for additional resources.

ECONOMIC IMPLICATIONS

42. The technology-neutral Bill seeks to provide a fair, predictable and business-friendly regulatory regime flexible enough to embrace new services made possible by convergence in technologies. This will help to speed up technology transfer, attract investment, stimulate the growth of related industries like programme production, and create new employment opportunities. A vibrant television industry in Hong Kong would not only widen viewers'

programme choice, but also enhance our position as the regional broadcasting hub.

PUBLIC CONSULTATION

43. The Bill seeks to implement the policy decisions arising from the 1998 Review of Television Policy, which were made after two rounds of thorough consultation with the industry and the community.

44. The BA has been consulted and is supportive of the Bill.

PUBLICITY

45. A press release will be issued on 28 January 2000. Briefings for the existing licensees will be arranged on the same day.

28 January 2000

Information Technology and Broadcasting Bureau
Government Secretariat