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Paper for the House Committee meeting on 8 January 2010

Report of the Bills Committee on Telecommunications (Amendment) Bill 2009

Purpose

This paper reports on the deliberations of the Bills Committee on Telecommunications (Amendment) Bill 2009 (the Bills Committee).

Background

2. The licensing regime for sound broadcasting services is set out in Part IIIA of the Telecommunications Ordinance (Cap. 106). Section 13B of the Telecommunications Ordinance stipulates that an eligible corporation may apply to the Broadcasting Authority (BA), in such form as the BA may determine, for a licence to establish and maintain a sound broadcasting service. Section 13C(1) requires the BA to consider applications made under section 13B and to make recommendations thereon to the Chief Executive (CE) in Council. Section 13C(2) provides that having considered BA's recommendations in respect of an application for the licence, the CE in Council may grant a licence to the applicant subject to the terms and conditions the CE in Council may specify.

3. To enhance the transparency and legal certainty of the existing sound broadcasting licensing regime, the Administration has promulgated a set of licensing criteria adopted by the CE in Council for the grant of sound broadcasting licences. This set of licensing criteria is based on the local experience in considering broadcasting licence applications as well as overseas best practices. The Administration proposes to prescribe this set of licensing criteria by law, and to empower the BA to issue guidelines indicating how it proposes to perform its function of making recommendations on sound broadcasting licence applications to the CE in Council, through the Telecommunications (Amendment) Bill 2009 (the Bill).

The Bill

4. The Bill seeks to amend the Telecommunications Ordinance to:
- (a) provide that an application for a sound broadcasting licence may be entertained only if the BA is satisfied as to certain matters;
 - (b) specify the matters to which the CE in Council must have regard in exercising the discretion whether to grant sound broadcasting licences;
 - (c) enable the BA to issue guidelines indicating the manner in which it proposes to perform certain specified functions; and
 - (d) provide for matters connected with these purposes.

The Bills Committee

5. At the House Committee meeting held on 23 October 2009, Members agreed to form a Bills Committee to study the Bill. Hon Andrew LEUNG Kwan-yuen was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has held four meetings with the Administration, and received views from the stakeholders, including the sound broadcasting industry, at one of these meetings. A list of organizations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

6. The majority of members of the Bills Committee generally support the legislative intent of the Bill, i.e. to set out the condition precedent for an application for a sound broadcasting licence and the licensing criteria to which the CE in Council, as the licensing authority, is to have regard when deciding whether or not to grant a sound broadcasting licence. While some deputations from the sound broadcasting industry support the legislative proposal and consider the licensing criteria relevant and reasonable in assessing sound broadcasting licence applications, some other deputations consider the licensing criteria too vague and might be open to abuse. Deliberations of the Bills Committee on the legislative proposal are summarized in the ensuing paragraphs.

Availability of suitable frequency spectrum

7. Clause 2 of the Bill adds a subsection to section 13B of the Telecommunications Ordinance to set out the condition precedent for an application for a sound broadcasting licence. The proposed section 13B(2) provides that an application for a sound broadcasting licence may be entertained only if the BA, after consulting the Telecommunications Authority, is satisfied that

the frequency proposed by the applicant is available at the date of the application and is suitable for use for the provision of the proposed broadcasting service.

8. The Bills Committee has discussed with deputations the availability of frequency spectrum in the Frequency Modulation (FM) Band (87 – 108 MHz) for the provision of sound broadcasting services in Hong Kong. Regarding Citizens' Radio's view that a bandwidth of 0.2 MHz can carry one radio channel, members have asked the Administration to clarify whether the FM Band can support up to 100 independent channels without interference, and whether community-based localized broadcasting covering a specific locality or region using low-power transmission will interfere with regional broadcasts and aero-nautical communications.

9. According to the Administration, Hong Kong follows the recommendations of the International Telecommunications Union in allocating the spectrum 87 – 108 MHz for FM radio broadcasting services. To avoid mutual radio interference, FM frequencies are separated by 0.2 MHz apart. Technically speaking, there are about 100 FM frequencies available between 87 – 108 MHz. In accordance with international practice and having regard to Hong Kong's close proximity to Guangdong and Macao, Hong Kong needs to share the use of these FM frequencies with Guangdong cities and Macao on an equity basis. Currently, Hong Kong is using 49 FM frequencies, while about 50 FM frequencies are being used by Guangdong cities and Macao. Moreover, as aero-nautical communications are operating in adjacent frequency band (108 – 137 MHz) to FM broadcasting, some FM frequencies have to be left idle in order to protect aero-nautical communications from undue interference. The 49 FM frequencies currently used by Hong Kong spread across the FM Band with frequency gaps which are carefully planned to avoid interference with regional and aero-nautical communications. With the adoption of this coordinative approach, co-channel interference in the use of FM frequencies is reduced to the minimum.

10. The Administration has advised that unlike most metropolitan areas in the world, Hong Kong has a mountainous terrain which makes it particularly challenging to maintain territory-wide FM radio coverage. Multiple transmitting stations are required in order to provide territory-wide radio coverage. In addition, Hong Kong is a small place which renders re-using the same FM frequency at different hilltop stations infeasible. In order to ensure the most efficient use of FM spectrum and hence offering the maximum possible number of FM programme channels in Hong Kong, the Government appointed a consultant in the early 1980s to design a VHF/FM Plan for Hong Kong. According to the recommendations of the consultant, Hong Kong requires seven hilltop¹ transmitting stations at strategic locations in order to provide territory-wide FM radio coverage. To avoid interference, frequency used at one hilltop site cannot be used elsewhere. Therefore, each FM programme channel requires at least seven FM frequencies. All 49 FM frequencies available to Hong Kong for

¹ These hilltop transmitting stations are located at Mount Gough, Kowloon Peak, Golden Hill, Beacon Hill, Cloudy Hill, Castle Peak and Lamma Island.

territory-wide broadcasting have therefore been allocated and are currently being taken up by Radio Television Hong Kong (RTHK) and the two commercial sound broadcasting licensees (i.e. Commercial Radio Hong Kong and Metro Broadcast) to broadcast seven FM programme channels on a territory-wide basis. Taking account of these requirements, there is no more room within the FM spectrum for territory-wide sound broadcasting.

Development of digital audio broadcasting in Hong Kong

11. Given that all of the seven territory-wide FM channels and seven territory-wide AM channels have been allocated and are currently being taken up by RTHK and three commercial sound broadcasting licensees for the provision of territory-wide services, the Bills Committee has discussed the availability of spectrum for future development of digital audio broadcasting (DAB) services.

12. The Administration has advised that according to overseas experience, Band III (174 – 230 MHz) is suitable for DAB services. The prevailing digital audio broadcasting technologies using Band III are Eureka-147 developed in Europe. A frequency multiplex of 1.5 MHz in Band III can carry seven Compact Disc quality sound channels. In Hong Kong, four frequency multiplexes in Band III have been identified. According to the framework for development of mobile television services announced in December 2008, two out of the four available frequency multiplexes in Band III could be used for providing mobile TV, DAB or datacasting services. The remaining two Band III multiplexes are reserved for future DAB services, or other possible electronic communications services when technology further evolves. Since the announcement in December 2008, the Administration has been monitoring market and technological developments and are reviewing the use of the available frequency multiplexes. A decision has not yet been taken on when to proceed with the release of these multiplexes.

13. Some members including Hon Emily LAU share the views of the Civic Party and Hong Kong Journalists Association that the Administration should expedite the development of DAB services in Hong Kong so as to supplement the existing analogue broadcasting and improve the quality of AM broadcasting and reception as well as to free up spectrum for the introduction of public access channels. These members opine that the Government should be more open-minded to community participation in broadcasting, and provide more platforms and channels for different sectors of the community and non-governmental organizations to express diverse views.

14. The Administration has advised that subject to the outcome of the public consultation being conducted by the Commerce and Economic Development Bureau and the established mechanism governing the allocation of new resources, RTHK will be allocated appropriate resources and frequency spectrum to enhance its operations and expand the scope of its services, including the provision of dedicated digital channels to be used as platform for community participation in broadcasting.

15. The Administration has further advised that RTHK will commence the preparatory work for the spectrum use and transmission network planning for the provision of DAB services in consultation with the Telecommunications Authority. The Government has committed to providing sufficient resource for the development of RTHK as the public service broadcaster of Hong Kong. In this connection, the Commerce and Economic Development Bureau and RTHK are working together to follow up on the resource planning for establishing digital radio and TV services by the new RTHK. A Community Broadcasting Involvement Fund will be set up to provide financial support and technical assistance to facilitate community groups to participate in broadcasting and content productions. It is estimated that territory-wide DAB services can be rolled out in phases in a period of around three to five years.

Chief Executive in Council as licensing authority

16. The Bills Committee has noted that clause 3 of the Bill amends section 13C of the Telecommunications Ordinance to, inter alia, set out the matters (i.e. the licensing criteria) to which the CE in Council, as the licensing authority, is to have regard when deciding whether or not to grant a sound broadcasting licence. The matters to be considered include the following:

- (a) applicant's financial soundness and commitment to investment;
- (b) applicant's managerial and technical expertise;
- (c) variety, quantity and quality of programmes to be provided;
- (d) technical soundness and quality of the proposed broadcasting service;
- (e) speed of service roll-out;
- (f) where construction work is to be carried out, the extent of inconvenience that may be caused to the public;
- (g) benefits to the local broadcasting industry, the audience and the community as a whole;
- (h) applicant's quality control and compliance capability; and
- (i) whether the applicant and all persons exercising control of the applicant are fit and proper persons.

17. In this regard, Hon Cyd HO has queried whether it is necessary for the CE in Council to exercise a discretion as clause 3 already provides for the matters for consideration in determining whether or not a licence for sound broadcasting services should be granted.

18. The Administration has explained that under the existing section 13C(2) of the Telecommunications Ordinance, the CE in Council already has the power to grant licences for the provision of sound broadcasting services. Clause 3 of the Bill, in making reference to "exercising the discretion whether to grant a licence under subsection (2)", only refers to the existing authority of the CE in Council under section 13C(2) of the Telecommunications Ordinance. The Bill by no means seeks to expand the CE in Council's existing power. The clause only serves to specify the criteria to which the CE in Council must have regard in exercising the authority as to whether a sound broadcasting licence should be granted under that section.

19. The legal adviser to the Bills Committee has advised that in accordance with section 41(1) of the Interpretation and General Clauses Ordinance (Cap. 1), the CE in Council, in exercising the power conferred by section 13C(2) of the Telecommunications Ordinance, has a discretion either to grant or to refuse to grant a sound broadcasting licences.

20. Hon Emily LAU and Hon LEE Wing-tat have raised concern that there is a lack of transparency in the decision-making process. They are also concerned about the unfettered discretionary power given to the CE in Council which is not an independent licensing body as in the case of some overseas licensing regimes. These members are of the view that an applicant who satisfies the licensing criteria and is so recommended by the BA should be granted a licence to operate and maintain sound broadcasting services. In such a case, the CE in Council should not exercise discretionary power to refuse the application.

21. The Administration has advised that many overseas licensing authorities are also appointed by the governments. To ensure that the CE in Council would be provided with independent advice, all sound broadcasting licence applications are processed and recommended by the BA which is an independent statutory authority established under the Broadcasting Authority Ordinance (Cap. 391). Upon receipt of an application, the BA Secretariat will examine the application and may require the applicant to provide further information as necessary. Clarification or additional information may be sought from the applicants as necessary. To ensure a transparent and fair licensing process, in the event that the BA makes an unfavourable recommendation and/or the Administration has a negative assessment in respect of the application, the applicant will be informed of such recommendation and/or assessment and the applicant will be invited to make representations. The applicant's representations, together with the BA's advice and the Administration's assessment, form the submission to the Executive Council. Submissions to the Executive Council would be made in confidence according to established practices, and the Government is not in a position to disclose information relevant to the deliberation of the Executive Council. Nonetheless, the Government would inform the licence applicant of the decision with reasons for refusal if the application is rejected. The Government would also publicly announce the licensing decisions by way of press release and Legislative Council Brief. Similar to other licensing regimes, the CE in Council as the licensing authority retains the discretion to make the final decision. However, there have

been no occasions on which the advice of the BA has not been taken fully into account when considering applications for sound broadcasting licenses.

22. To enhance transparency and public participation in the licensing process, Hon LEE Wing-tat has proposed to add a mandatory requirement for the BA to hold a public hearing in connection with licensing for sound broadcasting services.

23. The Administration has advised that the proposed additions relating to the conduct of public hearing are outside the scope of the Bill. The Administration considers the proposal not necessary, as there are established procedures in place under the existing licensing process to consult the public. In accordance with the Guide to the Consultation Process of the Broadcasting Authority, the BA would publish a notice stating details of the application in the specified form on the BA website and in one English and one Chinese language daily newspaper, and invite the public to make representations within 21 days. Public hearings have also been conducted in respect of the mid-term review of the domestic free television programme service licences. The Guide has operated effectively and could be flexibly amended in response to public expectation. To address Hon LEE Wing-tat's concern, the Administration will relay his request for public hearing in processing sound broadcasting licence applications to the BA for consideration; where justified, arrangements for public hearings can be implemented via administrative means.

24. Hon Emily LAU has suggested transferring the powers of the CE in Council for granting sound broadcasting licence to the BA, so as to ensure the credibility and independence of the licensing authority. The Administration has advised that the suggestion involves policy changes and is outside the scope of the Bill. The Administration considers the existing arrangement for the BA to make recommendation on sound broadcasting licence applications to the CE in Council appropriate.

25. The Bills Committee has questioned why section 13C of the Telecommunications Ordinance is not amended by repealing "Governor in Council" and substituting "Chief Executive in Council" under clause 3 of the Bill. The Administration has explained that the Bill is a short Bill and its only objective is to prescribe under the law the licensing criteria to be taken into account in considering an application for the grant of a sound broadcasting licence in Hong Kong. Given the narrow scope of the Bill and the fact that only two existing sections are amended in this exercise, it would be out of proportion to make the Bill a platform for making adaptation changes to all references to "Governor in Council" in the Telecommunications Ordinance. Such changes should more appropriately be dealt with under a separate adaptation exercise or when the next suitable opportunity to amend the Telecommunications Ordinance arises. The Administration will keep the matter in view and take appropriate action in due course. Meanwhile, there is no legal issue because of the application of paragraph 11 of Schedule 8 to the Interpretation and General Clauses Ordinance, which stipulates that "any reference to the Governor of Hong Kong or to the Governor in Council shall be construed as a reference to the Chief Executive of the Hong Kong

Special Administrative Region or the CE in Council respectively".

Licensing criteria

Financial soundness and commitment to investment

26. Hon Emily LAU has expressed concern that the licensing criterion on financial soundness and commitments to investment will preclude set-ups that have less financial means from being granted a licence to operate community radio service. She is of the view that the Administration should consider lowering the financial threshold so that not only resourceful conglomerates, but also smaller community groups that are relatively less financially capable can also have the opportunity to operate their own channels and participate in community broadcasting. Regarding this criterion, the Law Society of Hong Kong has suggested that guidelines should subsequently be issued to spell out the factors to be taken into account when assessing financial soundness. Hong Kong Journalists Association has suggested rephrasing it to the effect that financial soundness should be commensurate with the applicant's proposed business plan.

27. The Administration has explained that the criterion on financial soundness does not specify the minimum level of financial resources required other than stating that the applicant must demonstrate a commitment to invest sufficiently in the proposed project and must possess sufficient financial capability to invest to the level proposed. As such, no prospective applicants will be barred from making an application on financial grounds. The financial requirement and related consideration will depend on the applicant's business proposal in respect of the scale, nature and programme content of the services to be provided. The criterion will not in any way specify any threshold whereby an applicant should meet before it will be granted a licence.

Variety, quantity and quality of programmes to be provided

28. Hon LEE Wing-tat and Hon Cyd HO have expressed concern whether the criterion on programme quality, which is subject to interpretation, will be used to preclude small community groups from operating community-based radio stations or construed as a means of political censorship to bar groups that hold opposing views to the Government from obtaining a licence for sound broadcasting services. Given that digitization will release additional spectrum supporting more radio channels, Hon Cyd HO is of the view that applicants proposing to provide a specific type of programmes instead of comprehensive multi-programmes should be favourably considered. Hong Kong Journalists Association has given the view that media diversity should be included as a criterion in considering a licence application and guaranteed by law so as to encourage a vibrant and diverse media environment and facilitate freedom of expression. Citizens' Radio considers that this criterion should be deleted from the Bill as it will curb freedom of expression and speech.

29. The Administration has advised that clause 4 of the Bill adds a new section 13CA to, inter alia, empower the BA to issue guidelines indicating how it proposes to perform its function of making recommendations on sound broadcasting licence applications to the CE in Council. Similar to the guidelines issued by the BA for processing licence applications for television services, detailed guidelines will be issued in respect of sound broadcasting services. Radio stations providing topical/thematic programmes will not be precluded. The reference to programme quality and content is to ensure that licence applicants are aware of the programme requirements and standards set out in the guidelines issued by the BA. The proposals submitted by applicants will be evaluated on factors, such as the appeal of the programming to audience, the quantity and quality of proposed programmes and the extent to which they will broaden audience's choice, thereby addressing members' and deputations' concern about media diversity, plurality of voices and freedom to express different points of view in programming. In fact, the existing cross-media ownership requirement under the Broadcasting Ordinance (Cap. 562) has already helped ensure media diversity.

Benefits to the local broadcasting industry, the audience and the community as a whole

30. Hon Emily LAU is of the view that to allow the grant of sound broadcasting licences to specific social/ethnic/religious groups for broadcasting covering a particular locality or region, the criterion on benefits to the local broadcasting industry, the audience and the community as a whole should be relaxed. This will encourage plurality of voices and widen programming choices. Citizens' Radio considers that this criterion should also be deleted from the Bill as it will curb freedom of expression and speech.

31. The Administration has advised that similar to the other criteria to be stipulated under the Bill, this criterion does not in any way specify any threshold whereby an applicant must meet before it can be granted a licence. The criterion is not meant to discriminate applicants with a smaller scale of operation. Its adoption should not rule out any licence applications to cater for the needs of specific social/ethnic/religious groups covering a particular locality or region. Such applications would be given a fair chance to be considered on its individual merits similar to other licence applications, including those providing for territory-wide radio broadcasting services.

Additional matters to which the Chief Executive in Council must have regard in exercising the discretion whether to grant a sound broadcasting licence

32. The proposed section 13C(6) of the Bill empowers the CE in Council to prescribe additional licensing criteria by order published in the Gazette. In this connection, Hon Ronny TONG has expressed concern that the empowering provision under section 13C subsection (4)(j) would give too wide a power to the CE in Council. Since subsection (4)(a) to (i) has already specified the licensing criteria, he has questioned whether it is necessary to add subsection (4)(j) to

empower CE in Council to prescribe additional matters for consideration in making a decision.

33. The Administration has explained that the specification of additional matters to which the CE in Council must have regard in exercising the discretion whether to grant a licence must be published by way of an order in the Gazette which will be tabled at the Legislative Council and subject to the negative vetting procedures.

Whether the applicant and all persons exercising control of the applicant are fit and proper persons

34. The Bills Committee has noted that, under the proposed section 13C(5)(c) and (d) contained in clause 3(2) of the Bill, in determining whether the applicant or person exercising control of the applicant is a fit and proper person, account must be taken of the applicant's or the person's criminal record in Hong Kong in respect of offences under the laws of Hong Kong involving bribery, false accounting, corruption or dishonesty and the applicant's or the person's criminal record in places outside Hong Kong in respect of conduct which, if done in Hong Kong, would constitute or form part of the criminal record in Hong Kong of the applicant or the person.

35. Hon LAU Kong-wah and Hon Mrs Regina IP have questioned why offences such as drug trafficking or involvement in triad society activities, indecent assault, insider trading and crimes of passion other than the offences prescribed in the proposed section 13C(5)(c) are not included as relevant for consideration in determining whether a person is a fit and proper person.

36. The Administration has explained that the definition on "fit and proper person" under the proposed section 13C(5) is based on the provision of the Broadcasting Ordinance in respect of the grant of a television programme service licence. While special importance is attached to finance-related offences, offences that have a bearing on an applicant's character and credibility, such as perjury, theft and robbery will be considered under the proposed section 13C(5)(b) (i.e. the record of the person in situation requiring trust and candour) and the proposed section 13C(5)(c) (i.e. offences involving dishonesty).

Community broadcasting

37. Hon Emily LAU has proposed to add a definition on community broadcasting and insert a separate set of licensing criteria for processing community radio licence applications, so that smaller community groups would have the opportunity to participate in community broadcasting. The Administration has advised that the proposed additions relating to community broadcasting are outside the scope of the Bill. Under the proposed licensing criteria of the Bill, there is no prescribed threshold that would rule out community broadcasting. Any application for community broadcasting will be given a fair chance to be considered on its own merits. The current licensing regime with the

enhancement to be brought about by the Bill is considered appropriate and adequate in processing all sound broadcasting licence applications.

Appeal mechanism

38. The Administration has advised that aggrieved parties whose application for a sound broadcasting licence has been refused could seek judicial review against the decision. This is on par with similar arrangements in many overseas jurisdictions including the United States, the United Kingdom and Australia. Hon Ronny TONG is of the view that judicial review to rule on procedural matters should not be taken as a formal appeal channel.

39. Hon LEE Wing-tat considers judicial review costly and procedurally complicated. He has proposed introducing mechanism whereby the applicant for a licence may appeal to the Court of First Instance regarding the licensing decision of the CE in Council. The Administration has advised that the proposal falls outside the scope of the Bill and would effectively impose an administrative function upon the court with regard to licensing matters.

Committee Stage amendments

40. Hon Emily LAU and Hon LEE Wing-tat have indicated that they may propose CSAs in relation to the conduct of public hearing, the transfer of power from CE in Council to the BA for granting sound broadcasting licence, the licensing criteria for community broadcasting and making appeals to the Court of First Instance regarding licensing decisions to address their concerns in paragraphs 20, 22, 24, 37 and 39 above. The Bills Committee itself has not proposed any CSAs to the Bill.

Recommendation

41. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 20 January 2010.

Advice sought

42. Members are requested to note the deliberations and recommendation of the Bills Committee.

Bills Committee on Telecommunications (Amendment) Bill 2009

Membership List

Chairman Hon Andrew LEUNG Kwan-yuen, SBS, JP

Members Hon LAU Kong-wah, JP

Hon Emily LAU Wai-hing, JP

Hon Timothy FOK Tsun-ting, GBS, JP

Hon Abraham SHEK Lai-him, SBS, JP

Hon LEE Wing-tat

Hon WONG Ting-kwong, BBS, JP

Hon Ronny TONG Ka-wah, SC

Hon Cyd HO Sau-lan

Hon Mrs Regina IP LAU Suk-yee, GBS, JP

Dr Hon Samson TAM Wai-ho, JP

(Total : 11 members)

Clerk Ms YUE Tin-po

Legal Adviser Miss Winnie LO

Appendix II

Bills Committee on Telecommunications (Amendment) Bill 2009

List of organizations which have given views to the Bills Committee

1. Citizens' Radio
2. Wave Media Limited
3. The Law Society of Hong Kong
4. Hong Kong Journalists Association
5. Civic Party
6. Hong Kong Human Rights Monitor
7. Metro Broadcast Corporation Limited*

* submitted written views only