

專論

- 台北高等行政法院98年度訴字第1715號判決評釋

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Focus

- Comments on the 98-Su-1715 Decision of the Taipei High Administrative Court

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一、前言

臺北高等行政法院於99年6月24日針對中天電視股份有限公司（下稱「中天」或「原告」）與國家通訊傳播委員會（下稱「NCC」）於98年間因申請許可變更營運計畫及執照事宜所生爭議作成98年度訴字第1715號判決（下稱「本判決」），認定NCC許可中天變更營運計畫及執照時所添加之附款（按，包括：(1) 中天法人股東之榮麗公司，其指派於中天之法人董事、監察人代表，其兼任中視公司之董事、監察人者，應予3個月內變更之，不得兼任。(2) 中天的部門經理以上之人員，不得兼任中視公司之職務；其廣告、業務與節目部門均須獨立、應獨自設立自有攝影棚，並不得與中視公司有節目聯合招攬情事。(3) 中天應在3個月內成立倫理委員會，且每3個月定期在網站公佈委員會對節目內容自律之報告。(4) 中天（新聞臺、娛樂臺、綜合臺）各頻道應各自設置獨立節目編審人員，並於3個月內提出內部流程控管機制之改善計劃。）違法，應予撤銷。由於上開判決對爾後通訊傳播業界之併購決策有重要影響，茲摘錄其重點及評釋如下。

I. Backgrounds

The Taipei High Administrative Court rendered the 98-Su-1715 Decision of June 24, 2010 (hereinafter, the “Decision”) with respect to the disputes arising from business plan amendment application and licensing matters between CTI Television (hereinafter, “CTI” or the “Plaintiff”) and the National Communications Commission (hereinafter, the “NCC”) and found that the additional conditions and requirements imposed by NCC upon approval of CTI’s amendment to its business plan and license (including (1) the corporate directors and supervisors of CTI as appointed by Jung Li Co., which is a CTI shareholder, shall be replaced within three months if they also concurrently serve as directors or supervisors of CTV; (2) CTI’s personnel above the rank of department manager shall not serve any position at CTV, and CTI’s advertisement, sales and program divisions shall be independent from each other; there shall be independently established studios and CTI shall not engage in joint program solicitation with CTV; (3) CTI shall set up an ethics committee and shall release a quarterly self-discipline report on program contents at its website every, and (4) independent editorial review personnel shall be set up for each CTI channel (news, entertainment and general channels); hereinafter the “Additional Terms”) are illegal and shall be revoked. Viewing the profound impact on subsequent merger and acquisition

二、判決摘要

本判決之要點如下：

(一) 衛廣法第 5 條、第 6 條、第 13 條及第 14 條等之許可，為裁量處分之性質，故 NCC 有權依據行政程序法第 93 條第 1 項之規定，在許可時添加「限制原告權利或增加原告義務」之附款。

(二) NCC 藉由系爭附款介入企業之「組織結構及內部決策」，雖有別於一般財經法律之管制手段，惟考量多元言論之重要性，勉強符合衛廣法之規範意旨及裁量之內在邊界，應認無裁量濫用情事。

1. 由於衛廣法無有針對系爭處分之明確規定，法院在認定系爭裁量處分是否違法時，主要係判斷有無「裁量濫用」，亦即判斷系爭處分有無違反「裁量內在邊界」。其次，系爭附款涉及影響最廣泛之人事決定，在判斷「裁量內在邊界議題」時，NCC 除申請變更事項外，尚可考量(追加及變更)其他前已許可之事項，作為本件裁量處分之實證基礎。

2. 在欠缺衛廣法之明文規定情況下，「裁量內在邊界」需以衛廣法之整體規範意旨界定。本案法院認為衛廣法之規範目的為「扶持多元而健全之資訊傳播

decisions in the communications industry, I highlight the Decision (Section II) and add comments (Section III) as follows.

II. Summary of Decision

The Decision is highlighted as follows:

1. The approval under Articles 5, 6, 13 and 14 of the Satellite Broadcasting Law is a discretionary decision in nature. Therefore, the NCC has the right to impose Additional Terms which limit the Plaintiff's rights or increase the Plaintiff's obligations when the approval is granted in accordance with Article 93, Paragraph 1 of the Administrative Procedure Law.

2. Although the NCC's intervention with an enterprise's organizational structure and internal decisions is different from that under economic and financial regulations, NCC's decision, strenuously though, complies with the gist of Satellite Broadcasting Law and fell within the intrinsic boundaries of discretion under the same in view of the importance of diversified speech. Therefore, it should be concluded that NCC's decision is not arbitrary or capricious.

(1) Since the Satellite Broadcasting Law does not say much about the standard that the decision at issue should follow, the court determines the legality of the discretionary decision at issue primarily by whether discretionary power is abused, i.e., whether the decision at issue violates the "intrinsic boundaries of discretion." In addition, the Additional Terms at issue involve personnel decisions, which have the most far-reaching impact. When determining the issue of

事業，使其能透過市場交易，滿足社會大眾之不同訊息需求同時降低交易之負外部性，而提升其正外部性，使資訊交易結果能形成社會福利之最大化。不僅如此，還展望將來，期待資訊之提供，長期而言，會增加知識存量及社會資源，促成國力之持續成長」。

3. 次考量資訊商品巨大的外部性，且在資訊商品之消費上，消費者主權之作用比較薄弱，NCC 對於衛星廣播電視之管制因此有需要異於一般財經法律對於市場管制之作法，故法院「勉強」肯認作為處理規範之衛星廣播電視法第 13 條及第 14 條，其變更許可裁量之內在邊界，可及於「組織結構及內部決策之介入」。

(三) 由於 NCC 未說明於本案中施加系爭附款限制之個案特殊原因，有違反平等原則之違法。

1. 附款與行政處分相同，皆具有個案性，因此附款之添加即表示「為因應該案件之實證特徵需求，而有制定個別處遇法規範之必要」。再者，「若要求內容不是針對個案之特殊情境而發，乃是對所有從業者之共通要求，則應該儘速制定通案式之抽象法規範，要求全部從業者一體遵守，不宜再以個案附

“intrinsic boundaries of discretion,” the NCC may, in addition to the amendment application before the commission then, consider (the addition and amendment to) other matters that have been previously approved, using the whole empirical basis for the discretionary decision in this matter.

- (2) In the absence of specific provisions under the Satellite Broadcasting Law, the “intrinsic boundaries of discretion” should be defined based on the overall regulatory objectives of the Satellite Broadcasting Law. In this case, the court holds that the regulatory objectives of the Satellite Broadcasting Law include the following:

“The diversified and sound development of the information and communications industries should be supported so that the public’s divergent information needs can be satisfied while the negative externalities of transactions can be reduced and positive externalities enhanced through market transactions so as to maximize the social welfare via information deals.

Moreover, it is expected that the provision of information in the long run would increase knowledge repository and social resources so as to strengthen our national capacity.”

- (3) Further, in view of the huge externalities of information goods and the relative weaker consumer power, it is necessary for the NCC to regulate, under the Satellite Broadcast Law, by means different from that under economic and financial

款之方式僅要求特定主體遵守，否則即需面對違反『平等原則』之質疑。」

2. 本案之附款包括「董事、監察人兼任禁止」、「專業經理兼任禁止及廣告、業務與節目部門獨立」、「倫理委員會之設置及運作」、「獨立節目編審人員及提出內部流程控管機制計畫」，由於上開限制目前並非一併適用於業界，且 NCC 無法說明上開附款何以僅施加於中天，法院因此認為上開附款有違反平等原則之違法。

三、判決評釋

(一) 本件判決的主要意義與影響

NCC 處分之附款由於欠缺明文之法律依據，其合法性向來備受爭議。本件判決依據司法院釋字第 426 號、第 538 號、第 593 號及第 612 號等有關『授權明確原則』之解釋，類推適用於「構成要件明確性」之判斷，進而認定本件相關附款得以衛廣法第 13 條及第 14 條為其法律依據，將對未來 NCC 及業界之運作與決策產生重大影響。首先，NCC 可能更勇於開發各式各樣法無明文之附款，而對於企業而言，則必須考量訴訟上以法律保留原則挑戰 NCC 附款的成功率已大幅降低。

regulations. Therefore, the court affirms, “reluctantly” though, that NCC’ decision that extended to “intervention with organizational structure and internal decisions,” fell within the intrinsic boundaries under Articles 13 and 14 of the Satellite Broadcasting Law.

3. Since the NCC failed to state in this case the unique reasons imposing the restrictions on CTI under the Additional Terms, the principle of equality is violated.
 - (1) Like an administrative decision, the Additional Terms shall be unique to individual cases. Therefore, the imposition of such Additional Terms means that “due to the unique need of the empirical characteristics of a case, it is necessary to prescribe unique norms.” On the contrary, if the contents of a requirement do not target the special circumstances of individual cases but rather apply universally to all operators, abstract regulations for general cases shall be prescribed as soon as possible and all operators should be required to comply. It is inappropriate to require part of the entities to comply with Additional Terms. Otherwise, questions regarding the violation of the principle of equality will arise.
 - (2) The Additional Terms in this case include the prohibition against concurrent positions held by directors and supervisors, prohibition against concurrent positions held by professional managerial officers and the requirements for the independence of advertisement, sales and programming divisions,

再者，由於本案所涉附款為對於事業影響最大之組織結構與內控決策權利，舉重明輕，其餘較輕微之負擔自可能得援引本判決而認符合法律保留原則，從權力分立之觀點，本判決實際上是打開了一個潘朵拉之盒。

此外，本件判決乃認定 NCC 之附款符合法律保留原則，僅因未針對個案說明附款之限制何以僅適用於中天，未適用於其他衛星廣播事業之，故撤銷該等附款。NCC 是否可能因此規劃制訂一個通案之裁量基準，藉此在行政爭訟中取得較有利之地位，值得持續觀察。

最末，本件是針對衛廣法所為之判決，其他 NCC 主管之法律可否比附援引，亦值探究。尤其有線廣播電視法第 18 條、第 26 條及第 35 條有關申請、變更及換發籌設、營運有線廣播電視之許可，相關審酌要件與衛廣法不盡相同，從體系解釋之觀點，不無論辯餘地，更遑論本件裁判是涉及頻道提供者，有廣法則主要涉及系統業者，兩者之規範目的未必相同。

(二) 本件判決理由之邏輯與未盡之處

在判斷行政處分是否違法時，原則上係先判斷有無法律之依據，若有，進一步判斷有無「裁

the establishment and operation of an ethics committee, and the independence of program editorial review personnel as well as the submission of an internal workflow control mechanism plan. Since the said restrictions currently do not apply universally to all operators and since the NCC failed to explain why such Additional Terms only apply to CTI, the court holds that the said Additional Terms are illegal for violation of the principle of equality.

III. Interpretation of the Decision

1. Major significance and implications of the Decision

Since the Additional Terms set forth in the NCC's decision do not have clear legal basis, the legality of adding such Additional Terms has been controversial. Pursuant to the interpretation regarding the "principle of clear authorization" under Judicial Interpretation Nos. 426, 538, 593 and 612, the Decision applies the rule above by analogy to the determination of "the clarity of constituting criteria" and further concludes that the Additional Terms relevant to this matter may rely on Articles 13 and 14 of the Satellite Broadcasting Law as their legal basis, which will have major impact on the future operations and decisions of the NCC and the operators. On the one hand, the NCC may be encouraged to develop all kinds of Additional Terms not specifically provided for under any kind of law. On the other, system operators should acknowledge that the probability of successfully challenging the NCC's Additional Terms in litigation pursuant to the

量踰越」或「裁量濫用」，最末再判斷有無違反行政法之一般原理原則。「裁量踰越」係指「裁量決定結果必須維持法規範圍內」，「裁量濫用」則係指「裁量決定過程必須符合法規授權之目的」（參見行政程序法第 10 條暨最高行政法院 94 年判字第 1800 號判決），亦有學者認為處分若不符行政法一般原理原則（包括比例原則、平等原則等等）亦屬裁量濫用。

本件判決理由之論述區分為三層次，依序為：(1)系爭附款以衛廣法第 13、14 條為法律依據，符合法律保留原則；(2)NCC 以言論多元供給為主要理由，介入原告之組織結構與內控營運，符合法規授權目的，無裁量濫用之違法；(3)NCC 未說明個案限制的特殊原因，違反平等原則，相關附款應予撤銷。

前開各層次之論理中，第 1 層次主要涉及法律保留及構成要件明確性原則，第 2 層次主要涉及比例原則，第 3 層次主要涉及平等原則之判斷。若參考前述裁量處分違法判斷程序，第 2 及第 3 層次皆屬於「裁量濫用」之判斷。法院在上述第 2 層次雖敘及「比例原則」，其論述主軸是探究裁量之內在邊界，亦即衛廣法之規範目的。法院特別指出「NCC

principle of legal reservation has been greatly reduced.

In addition, since the Additional Terms pertain to the organizational structure and internal control decision, which have the greatest impact on an enterprise, the Decision may be cited by NCC whenever the legality of other lighter restrictions are challenged. From the perspective of separation of powers, the Decision has in fact opened up Pandora's Box.

In addition, the Decision affirms that the NCC's Additional Terms comply with the principle of legal reservation and revokes such Additional Terms only because NCC failed presenting reasons why the Additional Terms only applies to CTI rather than all other satellite broadcasting enterprises. It is interesting to see whether the NCC may stipulate a discretionary standard that is generally applicable in order to secure a more favorable position in future disputes.

Finally, the Decision was rendered pursuant to the Satellite Broadcasting Law. Whether the other laws of which the NCC is the competent authority may cite the Decision by analogy is also worth exploring. Particularly, Articles 18, 26 and 35 of the Cable Broadcasting Law pertain to the application, amendment and renewal of the permits for the establishment preparation and operation of cable television with review criteria not exactly identical to those of the Satellite Broadcasting Law. From the perspective of systemic interpretation, therefore, there is room for debate, let alone the fact that the ruling on this matter involves channel providers, while

系爭附款有別於一般財經法律僅針對外部行為管制，已介入企業之組織結構或內部組織決策之形成權利，法院因此本於衛廣法之規範意旨探究此種介入是否允當。最終，法院是基於資訊產品的特性（外部性強、消費者主權弱），認為 NCC 之上開介入應屬合法。

依上開論述內容，法院顯然未詳就比例原則之各個子原則進行分析，而至多僅觸及比例原則中之「適當性原則」，至於「最小侵害原則」及「狹義比例原則」則無有論斷，此或許原告之主張未及於此之故。可預見在未來可能之相關訟爭中，此部分很有可能成為論辯之焦點。

the Cable Broadcasting Law primarily regulate system operators. They do not necessarily share the same regulatory objectives.

2. Logics of the Decision

To determine if an administrative decision is illegal, the existence of legal basis, in principle, should be determined first. If such legal basis is established, whether “excessive discretion” or “abuse of discretion” exists is further determined before the final determination of whether the general theories and principles of administrative laws are violated. “Excessive discretion” means that “the outcome of a discretionary decision should fall within the scope of laws and regulations,” while “abuse of discretion” means that “the process of a discretionary decision shall serve the objectives of legal mandate” (Compare Article 10 of the Administrative Procedure Law and the High Administrative Court’s 94-Pan-1800 Decision). Commentators suggest that if a decision does not satisfy the general theories and principles of administrative laws (including the principle of proportionality and the principle of equality), there shall be discretion abuse.

The arguments in the reasons of decision in this matter contain three levels: (1) the Additional Terms at issue, which rely on Articles 13 and 14 of the Satellite Broadcasting Law as their legal basis, meet the principle of legal reservation; (2) the NCC’s intervention with the Plaintiff’s organizational structure and internal control operation principally on the ground of diversified speech satisfies the objectives of legal mandate and does not abuse its discretionary

power; however, (3) since the NCC violates the principle of equality for failure to explain the reasons for restrictions uniquely imposed on individual cases, relevant Additional Terms shall be revoked.

Among the above-mentioned levels of theories, the first level primarily involves the principles of legal reservation and clarity of constituting criteria. The second level principally involves the principle of proportionality, while the third level mainly pertains to determination based on the principle of equality. In consideration of the process of reviewing a discretionary decision, both of the second and third levels pertain to the determination of “abuse of discretion.”

Although the court referred to the principle of proportionality in the second level mentioned above, the main arguments pertain to the exploration of the intrinsic boundaries of discretion, i.e., the regulatory objectives of the Satellite Broadcasting Law. The court specifically points out that “the NCC’s Additional Terms at issue are different from the control of external behavior under general economic and financial regulations in that the NCC has intervened an enterprise’s right to form its organizational structure or its internal organizational decisions.” Therefore, the court explored the appropriateness of such intervention based on the regulatory objectives of the Satellite Broadcasting Law and ultimately concluded that such NCC intervention is legal on account of the characteristics of information products (with strong externalities and weak consumer power).

According to the above-mentioned arguments, the court obviously did not complete the analysis of all constituent principles under the principle of proportionality. The court touched upon the “principle of appropriateness” under the principle of proportionality at best without mentioning the principle of minimal infringement and proportionality stricto sensu, probably because the Plaintiff’s assertions did not cover these aspects. However, it is foreseeable that relevant debates may arise where the Court left off.