



Establishment of the Communications Authority
Submission to the Legislative Council Bills Committee

Cable & Satellite Broadcasting Association of Asia (CASBAA)
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This submission is made on behalf of the Cable & Satellite Broadcasting Association of Asia (CASBAA). Headquartered in Hong Kong, CASBAA is the apex industry association in Asia for participants in the pay-TV industry. A non-profit association detached from individual national interests, it is dedicated to the development of the multi-channel pay-television industry across the Asia-Pacific region. Our 125 member organizations include leading pay-TV operators, international content and technology providers, and telecom companies. They are major investors with substantial experience in developing communications industries that now serve 360 million pay-TV households in Asia.

CASBAA works to promote free and fair markets, the protection of intellectual property rights and the development of thriving and competitive national communications industries in the belief that the ultimate beneficiaries will be hundreds of millions of consumers across our region.

Hong Kong is a hub of the Asian broadcasting industry. The industry's ongoing growth and development brings major economic benefits to the SAR. We estimate that the industry is responsible for creating around 1,500 high-paying posts in the international sector and another 10-12,000 jobs in the local distribution platforms. With a forecast average growth of about 10% per annum over the next five years, this is a dynamic, high-tech industry that will continue to make a very important contribution to Hong Kong's economic growth for the foreseeable future – as long as the SAR continues the policies which have favored the industry's growth.

CASBAA's member companies work in an industry which is rapidly converging, both commercially and technologically. Pay-TV content is today available to consumers in Hong Kong through distribution platforms using cable, satellite, proprietary broadband, internet, and mobile telephony. The distinctions between the "broadcasting" and "telecommunications" industries are rapidly blurring, and are likely to virtually disappear within the next decade. New business models are rapidly evolving, as industry players gain a surer knowledge of consumers' desires, and willingness, to purchase content over various transmission platforms.

It is, therefore, no surprise that we strongly favour a regulatory regime that is open, transparent, even-handed, technologically neutral, protective of creative freedoms, and flexible enough to permit evolution of new business models. It is to Hong Kong's credit that the existing regulatory system in the SAR largely embodies those attributes.

CASBAA publishes occasional reviews of the regulatory policies in effect in various Asian markets. These reviews are based on objective, industry-based analysis of whether law, regulation, and practice in these markets is "market-friendly" and conducive to growth and development of a competitive pay-TV industry. It is notable that in the reviews conducted in 2005 and 2008, Hong Kong's transparent, efficient, open, and mostly technology-neutral regulatory framework earned it the top rating among Asian and Australasian jurisdictions. We expect that similar results will emerge from a review to be published in 2011.

Hong Kong earns this recognition because it eschews the heavy hand of regulation present in some other Asian markets, and allows industry players to design and market packages of pay-TV programming on many platforms that respond to a wide variety of consumer wants and needs. The interfering nanny state is thankfully little in evidence in Hong Kong.

The benefits of these policies to Hong Kong people have been huge. Since the introduction of competition to Hong Kong's pay-TV industry in the middle of the last decade, the variety of programming available to Hong Kong consumers has more than doubled and – in a development not necessarily welcome to pay-TV operators but of benefit to average HongKongers – prices have declined. The average revenue actually collected for pay-TV in Hong Kong has declined steadily since 2002, for a cumulative drop of more than 35% over the seven years to 2009. This is because rises in price for some premium content – notably sporting events – have been more than balanced by decreases in the cost of programming to the majority of consumers who do not take sports packages.

Without a consistent government policy favouring a competitive marketplace this would not have happened.

Of course, there is always room for improvement, and Hong Kong, therefore, is wise to seek "convergence" of its regulatory regimes for telecommunications and broadcasting through creation of the Communications Authority. This should be an opportunity for creative thinking about how best to endow Hong Kong with the structures that will serve to meet future challenges.

Mission

CASBAA believes that the creation of a single, updated regulatory framework is completely consistent with the trends in the content transmission industries; we believe that the same regulatory principles should be applied to the transmission of content by all means. Transparency, efficiency and "Technology-neutrality" (which

are already general operating practices for Hong Kong's regulators) should be re-emphasized as fundamental goals.

However, we would suggest that a companion key mission for the Communications Authority should be to continue to advance the principle of competitive market regulation – sustaining a regulatory environment that allows industry players the freedom to develop and implement business strategies designed to compete in an open marketplace.

The practice of competitive market regulation is one of the reasons the SAR's regulatory framework is superior to most others in the region. We would like to see enshrined in the legislative framework for the Regulator the principle (discussed in the government's 2006 consultation paper) that market regulation should be imposed only where there is not effective competition. We see great utility in a legislated endorsement of this principle of regulatory tolerance (versus a philosophy of constant regulatory intervention that is practiced in some other Asian jurisdictions).

Further Improvements

Having applauded the government's past regulatory policy choices on the communications industry, we do believe that two aspects of the government's approach to the current revision exercise represent missed opportunities.

Firstly, the process is moving too slowly. Ours is an industry where market conditions, the evolving technological base, and shifting consumer preferences force business models to adapt at light speed. We understand the government's reasons for adopting a two-stage approach to the Communications Authority: establishing the Authority first and working out the specific policy frameworks later. However, it has taken four years just to reach the current stage of consideration of first principles. This is a great opportunity for Hong Kong to leapfrog ahead of every other jurisdiction in the Asia-Pacific region; and we think the process should be pressed ahead with enthusiasm.

After all, this (the institutional convergence) is the EASY part of the process, compared to the difficult decisions and balancing acts that will be required in the amendment of the actual regulations and policies. We are concerned that the priority being accorded to this vital set of issues has not so far moved the process along smartly. Going forward, the government expects that the second stage (of legislative revision) will need to take a number of years.

We believe the Government should set more ambitious goals with regard to the speed of this process. We strongly advocate moving as rapidly as possible to achieve the necessary unified legislation. This will require that the Communications Authority, the Administration and the Legislature set this process as a high priority and understand the urgency of putting in place a regulatory framework that will provide a large measure of certainty to accommodate new investments by industry. Convergence of content delivery technologies and the adjustment of business models is already proceeding at a highly rapid pace; the regulatory/legislative process needs to accommodate these real-world developments by moving as rapidly as can be done.

Too Much Civil Service

Secondly, we urge the legislature to take a close look at the institutional setup planned for the Communications Authority, and to give it a more efficient and business-like orientation. The writing of this legislation now provides an ideal opportunity to shape a new type of organization suitable for Hong Kong in the future. The government's proposals, unfortunately, are firmly rooted in the past with real influence firmly in the hands of the civil service structure.

The government has set out a framework for the Communications Authority as a committee supported by a government department, which administers a Trading Fund. The Authority's board is proposed to be composed almost entirely of part-time volunteers. This is the way the current Broadcasting Authority functions. We believe that the principle of incorporating the participation of distinguished members of the community on a part-time basis is most relevant to questions of content regulation, where the question of defining contemporary community standards is of key importance.

But this function would best be devolved to a Content Board, as the UK OfCom has done¹. There are many other, much more technical matters that must be handled by the Authority, including issues of spectrum allocation, system management and competition regulation. These are highly technical issues where the ideal regulator has substantial accumulated expertise that permits consistent, fact-based decision-making, and where removal from political decision-making is an absolute necessity.

A body made up wholly of part-time representatives of the community would have neither the time nor the interest to master the complexities of such issues; the inevitable result would be that while formal decision-making might remain in the hands of the Communications Authority Board of Directors, the reality of control would reside with the civil service bureaucracy which would conduct the preparatory work for Communications Authority decisions.

We have the greatest respect for Hong Kong's civil service, which is efficient and committed to decision-making that benefits the SAR, but its operating principles are not akin to those used in the private sector, and it is not prone to risk-taking, creative leadership, or challenging powerful vested interests. We believe that regulation of this dynamic sector should be vested in a group that would embody a more businesslike orientation, and which would have a mandate to protect a market-oriented regulatory environment that would be less susceptible to inside pressures.

We note that the vast majority of overseas jurisdictions which have established converged regulatory mechanisms have opted for substantial participation of full-time members on their Boards of Directors. This is true of Ofcom in the UK, the FCC in

¹ The Ofcom Board of Directors itself is a hybrid, composed of three full time "Executive" members and six part-time "Non Executive" Board members (including a Non Executive chairman). None of them are civil servants; many have substantial industry experience. The Ofcom Board of Directors is collectively responsible for decisions on all matters but it has devolved decisions on most content regulation issues to a subsidiary body, the Ofcom Content Board, whose 11-person membership includes several representatives of the community who are chosen for the express purpose of bringing community input into the crucial, non-technical decisions on content regulation.

the USA, and ACMA in Australia. In Asia as well, several regulators have been established with full-time Boards. While other organizational characteristics of these bodies vary widely, we find it significant that all these jurisdictions have concluded that effective management of a converged regulatory environment requires a core of decision makers to be committed to this task on a full-time basis.

The Communications Authority Board of Directors should have the authority and the mandate to manage its own staff, and it should appoint a Chief Executive (or Managing Director) who would be responsible for recruiting and managing a highly-qualified staff and administering the Communications Authority's day-to-day business. We do not agree that this CEO needs to be a civil service officer; rather the Board of Directors should have the ability to hire and fire him/her at will, and compensate him/her in accordance with the responsibilities s/he will undertake. As to funding, we fully support the position that the Communications Authority should be managed in such a way that its fees just cover its costs – with the proviso that it must be managed according to private-sector standards of efficiency to keep costs down. The Ofcom example is again instructive, as that organization publishes detailed annual plans and budgetary targets for public scrutiny.

Some Final Thoughts

The communications industries are vital to Hong Kong's economic development and to its unique status as China's window upon the world. The Communications Authority must be given an explicit mandate to advance the market-driven development of these industries, for the benefit of the SAR and the nation. Its role and mandate must include participation where appropriate in international discussions on matters such as spectrum allocation and copyright protection, where essential decisions are undertaken that affect the industry and its growth prospects. Hong Kong should not be reticent to recognize and defend its unique interests on issues such as these. We recognize that working on international discussions will require intensive liaison with the Central government, as envisioned under the Basic Law. The Communications Authority should be given unambiguous responsibility for carrying that process forward, and the SAR government as a whole should support it.

In closing, CASBAA wishes to once again commend the Hong Kong SAR Government for its forward-looking attempt to provide a world-class framework for regulation of our industries. As an Association and as representatives of an industry which is proud to thrive in and contribute to modern Hong Kong, we look forward to continued dialogue on these questions.