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24 November 2010

Ms Yue Tin-po
Clerk to Bills Committee on the Communications Authority Bill
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms Yue,

Communications Authority Bill (the CA Bill)

I write to provide the Administration's response to the issues raised by Members of the Bills Committee at its meeting on 4 November 2010.

Information on overseas regulators

Members have asked for information in respect of the composition, membership, missions and functions of the overseas regulators, as well as the relevant provisions in overseas legislation for the unified regulators dealing with conflict and disclosure of interest. To allow comparison with our proposal in respect of the CA, we have set out information on these aspects of the CA and four overseas regulators (i.e., unified regulators in Australia, Canada, the United Kingdom (UK)

and the United States (US)) at **Annexes A** and **B** respectively.

The workload of the Telecommunications Authority (TA) and the Broadcasting Authority (BA)

Members have also asked for information on the workload of the TA and the BA, and enquired about how the proposed membership of the CA could perform the duties effectively and efficiently after the merger of the TA and the BA.

The TA is currently a public officer – the Director-General of Telecommunications - who carries out his duties with the assistance of the staff of the Office of the Telecommunications Authority (OFTA). In accordance with the Telecommunications Ordinance (Cap. 106), public officers in OFTA could perform functions of the TA under delegation. We have set out at **Annex C** the issues handled by the TA in person from January 2007 to October 2010. We believe the proposed CA should be allowed discretion to determine the types of decisions it would reserve for itself and the types it would be prepared to delegate.

The BA now operates on a committee structure basis. The Commissioner for Television and Entertainment Licensing (CTEL) is the BA's Principal Executive Officer. In accordance with the Broadcasting Authority Ordinance (Cap. 391), CTEL can exercise powers of the BA under delegation. The agenda items of the BA from January 2007 to October 2010 are summarised in a table set out at **Annex D**. It is the established practice of the BA to issue a press release regularly on its work. The press releases issued by the BA during the same period can be found at the following web site – <http://www.hkba.hk/en/press>.

The CA Bill provides for the delegation of powers from the CA to its committees and the Director-General of Communications (DG Com) in a manner similar to that of the TA and the BA. We anticipate that the CA will suitably delegate its powers after its establishment in order to maintain the efficiency and the effectiveness of its work.

Six-year and six-board rules and the principle of gender mainstreaming

In response to Members' enquiries, we stand ready to confirm our commitment to adhering to the prevailing government policies regarding the rules and the gender ratio for appointment of members to the future CA.

Public Mission of the CA

Some Members suggested that the CA Bill should include the public mission of the CA. We will further consider how Members' suggestion should be addressed.

CA as an independent statutory body

There were suggestions of spelling out the CA as an independent statutory body in the CA Bill. The status of the CA and its relationship with the Government are set out in Clause 3(3) of the CA Bill, which states that the CA "is not a servant or an agent of the Government nor does it enjoy any status, immunity or privilege of the Government". The powers conferred on the CA through the CA Bill and various related legislation clearly allow the CA to exercise its powers in its own right. There is thus no need to stipulate in the Bill that the CA is an independent body. It is not in line with the drafting convention to use such description in the local legislation. There is no such description in the legislation for other local statutory bodies which operate independently or for the overseas unified regulators in Australia, Canada, the UK and the US.

Appointments to the CA

It was suggested that trade nominations should be accepted for appointment of members to the CA. We consider that there would be conflict of interest implications. We are also not aware of such arrangement in overseas legislation for their unified regulators.

There were views that the CA nominations should be endorsed by the Legislative Council and that nominees should attend hearings of the Legislative Council. We believe it is appropriate for the Chief Executive to appoint members to the CA. This is in line with the prevailing practice of appointing members to advisory and statutory bodies in Hong Kong.

The status of the DG Com

It was suggested that the status of DG Com as public servant should be stipulated in the CA Bill. Clause 8(1)(c) of the Bill provides that the DG Com is a member of the CA. Clause 14 sets out the role of the DG Com in supporting the CA. We have made it clear in various statements and papers presented to the Legislative Council that the DG Com will be a public officer ranked at Directorate Six level. The Administration will seek the approval of the Establishment Subcommittee and the Finance Committee of the Legislative Council on the creation of the post when we make submission on the organisation structure of the future OFCA immediately after the passage of the CA Bill.

The status of the CA's executive arm

It was also suggested that the Administration should consider setting up a non-civil service executive arm for the CA. We maintain that it would be unwieldy to go for the establishment of the unified regulator and the creation of a non-civil service executive organisation concurrently. To do so would distract the new regulator from its focus on the main policy, strategic and regulatory challenges. In fact, creating a non-civil service executive arm of the CA is a complex and controversial subject which would affect the civil service status of the current staff in OFTA and the Television and Entertainment Licensing Authority (TELA), and requires in-depth study and great care so as not to affect, among other things, the staff morale in OFTA and TELA. We note that the unified regulators in US, Australia and Canada are served by civil servants and this has not affected their operation. Without a thorough examination of the proposal and its implications, it is now premature to consider if the CA's executive arm should be a non-civil service organisation eventually. The CA and OFCA could be invited to examine the issue together after their establishment, in light of

operational experience and need.

Yours sincerely,



(Kevin LAI)

for Secretary for Commerce and Economic Development

cc

DoJ, Law Drafting Division

(Attn: Mr W C Suen and
Ms Carmen Chu)

DoJ, Commercial Unit

(Attn: Mr L Y Yung)

Director-General of Telecommunications

(Attn: Mr Chaucer Leung)

Commissioner for Television and
Entertainment Licensing

(Attn: Mr P L Po)

Communications Authority (CA) Bill – Key Aspects of the CA

Aspect	Proposal
Membership as provided in legislation	<p>(a) No fewer than five and no more than ten non-official members (one of them as Chairperson);</p> <p>(b) One public officer; and</p> <p>(c) The Director-General of Communications (DG Com)</p> <p>(One member of the CA as Vice-chairperson)</p>
Hours of work committed by members	<p>There is flexibility for the Chief Executive to appoint non-official full-time members.</p> <p>The public officer appointed to the CA holds its relevant public office on a full-time basis.</p> <p>The DG Com is the Head of the Office of the Communications Authority (OFCA) who works on a full-time basis.</p>
Remuneration	<p>The terms of appointment of non-official members as CA members would be determined by the Chief Executive.</p> <p>The public officer appointed to the CA receives remuneration commensurate with the public office he or she holds.</p> <p>The DG Com will receive remuneration as the Head of OFCA, currently proposed to be a Directorate Six post.</p>
Mission and Function	<p>Mission: To promote the long term development of the communications market and uphold the freedom of speech.</p> <p>Function: Functions under the Telecommunications Ordinance (Cap. 106), the Broadcasting Ordinance (Cap. 562), the Unsolicited Electronic Messages Ordinance (Cap. 593) and any other Ordinance conferring functions on the existing Telecommunications Authority and the Broadcasting Authority, and to tender advice to the Secretary for Commerce and Economic Development on legislation, legislative proposals and regulatory policies relating to telecommunications, broadcasting, anti-spamming or activities connected with the telecommunications and broadcasting sectors.</p>

Aspect	Proposal
Management and administrative responsibilities	The Director-General is responsible for the operation of the OFCA.
Appointment Arrangements	Appointment to be made by the Chief Executive.
Arrangements governing conflict of interest / disclosure of interest of members (relevant provision in legislation)	<p>A member must disclose any pecuniary interest or a personal interest in any matter under discussion at the meeting of the CA. (Reflecting clause 13(1) of the CA Bill)</p> <p>The disclosure must be recorded in the minutes of the meeting (Reflecting clause 13(2)(a) of the CA Bill)</p> <p>The presiding member disclosing the interest must vacate the chair (Reflecting clause 13(2)(b) of the CA Bill)</p> <p>If required by the presiding member, a member disclosing the interest must withdraw from the meeting during the discussion and must not vote on resolution concerning the matter under the discussion or be counted for establishing a quorum (Reflecting clause 13(2)(c) of the CA Bill)</p> <p>The signature of a member disclosing interest is not to be counted in transaction of business through circulation of papers. (Reflecting clause 13(3) and (4) of the CA Bill)</p>
Whether meetings are open to the public	<p>The CA would have the flexibility in deciding whether it should open its meetings to the public.</p> <p>It is anticipated that the CA would follow the existing practice of the BA by opening up meetings of its committees where appropriate.</p>
Status of executive arm	The future OFCA is a government department operating on trading fund basis.

Communications Authority Bill (CA) – Information on Overseas Unified Regulators

	US's Federal Communications Commission (FCC)	Australian Communications and Media Authority (ACMA)	UK's Office of Communications (Ofcom)	Canadian Radio-television and Telecommunications Commission (CRTC)
Membership as provided in legislation	Five (one as Chairman)	From three to nine: Includes a Chair, a Deputy Chair and at least one and not more than seven other members. The Minister may appoint as many <i>associate members</i> as he or she thinks fit for investigation or hearing or any other matter relating to ACMA's exercise of functions or powers.	Not less than three and not more than ten. Includes non-executive members (one as Chairman and one as Vice-chairman) and executive members.	Not more than 13 full-time members and not more than six part-time members. One full-time member as Chairperson and two other full-time members as Vice-chairpersons.
Existing Membership (as at November 2010)	Five	Nine members (three full-time and six part-time members) and one associate member	Nine (Six non-executive members (including the Chairman) and three executive members (including the Chief Executive))	12
Hours of work committed by members	All Commissioners work on a full-time basis.	The Chair, the Deputy Chair and another member work on full-time basis. The remaining work on part-time basis.	All non-executive members (including the Chairman) work on part-time basis. Executive members work on a full-time basis.	All 12 members work on a full-time basis.
Remuneration	Chairman—US\$165,300 per year (HK\$1.3 million) Other commissioners—US\$155,500 each per year	Salary range of members as at June 2010 when ACMA had one Chair, one Acting Deputy Chair and five part-time members:	The situation as at March 2010: Chairman—£200,000 (HK\$2.5 million) per year	Chairperson— CAD\$251,600 - 296,000 per year (HK\$1.9 million – HK\$2.3 million)

	US's Federal Communications Commission (FCC)	Australian Communications and Media Authority (ACMA)	UK's Office of Communications (Ofcom)	Canadian Radio-television and Telecommunications Commission (CRTC)
	(HK\$1.2 million)	<p>One member—AUD\$360,000 to 374,999 per year (HK\$2.7 million – HK\$2.8 million)</p> <p>One member—AUD\$300,000 to 314,999 per year (HK\$2.3 million – HK\$2.4 million)</p> <p>One member— AUD\$75,000 to 89,999 per year (HK\$0.6 million – HK\$ 0.7 million)</p> <p>Two members— AUD\$45,000 to 59,999 each per year (HK\$0.3million – HK\$0.5 million)</p> <p>Two members—AUD\$30,000 to 44,999 each per year (HK\$0.2 million – HK\$0.3 million)</p>	<p>Deputy Chairman—£106,578 per year (HK\$1.3 million)</p> <p>Other non-executive members— £42,799 a year each (HK\$0.5 million)</p> <p>Chief Executive—£381,713 a year (HK\$5 million), of which £299,821 was the basic salary, £59,964 was the pension entitlement for the year and £21,928 was other benefits</p> <p>Other two Executive Members— £282,139 (HK\$3.5 million) and £242,872 (HK\$3.0m) a year (of which the basic salaries were £230,821 and £192,084 respectively)</p>	<p>Vice-chairperson —CAD \$190,400 - 224,000 per year (HK\$1.5 million – HK\$1.7 million)</p> <p>Other members—CAD \$135,300 - \$159,200 each per year (HK\$1 million – HK\$1.2 million)</p>
Mission and Function (relevant sections if enshrined in legislation)	Mission: Make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. The Commission was	Mission: (a) Provides a communications and media environment that balances the needs of the industry and the Australian community through regulation, education and advice; and (b) Contributes to meeting communications products and services needs of the Australian community by enabling an	Mission: (a) To further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition. (Reflecting section 3(1) of Communications Act 2003)	Mission: Ensure that both the broadcasting and telecommunications systems serve the Canadian public (not available in legislation, but as a statement in CRTC's website) Function: Regulates telecommunications and broadcasting in line with

	US's Federal Communications Commission (FCC)	Australian Communications and Media Authority (ACMA)	UK's Office of Communications (Ofcom)	Canadian Radio-television and Telecommunications Commission (CRTC)
	<p>created "for the purpose of the national defense" and "for the purpose of promoting safety of life and property through the use of wire and radio communications." (Reflecting section 1 of Communications Act 1934)</p> <p>Function: the regulation of broadcasting, telecommunications and radiocommunications (various provisions in the Communications Act)</p>	<p>effective information, standards and safeguard regime (not available in legislation but included in Budget statements)</p> <p>Function: ACMA has functions under various Acts on telecommunications, broadcasting, the internet and radiocommunications. (Reflecting section 7-11 of the ACMA Act 2005)</p>	<p>Function: ensure the optimal use of spectrum, the availability of a wide range of electronic communications services, a wide range of TV and radio services of high quality and wide appeal, maintaining plurality of broadcasting services, applying protection for audience against offensive material, unfairness and infringement of privacy. (Reflecting section 3(2) of Communications Act 2003)</p>	<p>objectives set out under the Broadcasting Act and the Telecommunications Act</p>
Management and administrative responsibilities	<p>As the chief executive officer of the Commission, the Chairman delegates management and administrative responsibilities to the Managing Director who works on a full-time basis. Certain other functions are delegated to bureaux and offices. The Managing Director is not one of the Commissioners.</p>	<p>Day to day business is managed by an executive team comprising the Chair, the Deputy Chair, six General Managers and 15 Executive Managers. The Chair is the Chief Executive Officer of ACMA.</p>	<p>The Executive Committee, chaired by the Chief Executive, is the senior executive team responsible for overseeing the management of Ofcom.</p>	<p>The Chairman is the Chief Executive Officer of the Commission and has supervision over and direction of the work and staff of the Commission.</p>
Appointment Arrangements	<p>Appointed by President and endorsed by Senate.</p> <p>No nomination from the trade in the procedures of appointment.</p>	<p>Appointed by the Governor-General by written instrument, based on the recommendations of the Minister for Broadband, Communications and the Digital Economy (the</p>	<p>Appointed by relevant Secretaries of State. Chairman went through non-binding Parliamentary hearing before assuming position.</p> <p>No nomination from the trade in</p>	<p>Appointed by the Governor-in-Council (GiC) on the advice of the Cabinet, drawing the recommendations of the Minister of Canadian Heritage and Official Languages.</p>

	US's Federal Communications Commission (FCC)	Australian Communications and Media Authority (ACMA)	UK's Office of Communications (Ofcom)	Canadian Radio-television and Telecommunications Commission (CRTC)
		Minister). Associate Members are appointed by the Minister. No nomination from the trade in the procedures of appointment.	the procedures of appointment.	No nomination from the trade in the procedures of appointment.
Arrangements governing conflict of interest / disclosure of interest of members (relevant provision in legislation)	No member of the Commission or person employed by FCC shall be financially interested in any entity which (i) manufactures or sells telecommunications equipment, (ii) is engaged in the business of communication by wire or radio or through radio spectrum, or (iii) controls the company in (i) or (ii); or be employed by or have financial interests in any person significantly regulated by the Commission (Reflecting section 4 of Communications Act 1934).	A member must disclose an interest which may give rise to conflicts as soon as practicable after he or she becomes aware of the interest. (Reflecting section 29 of ACMA Act 2005) A member who has an interest that could conflict with the proper performance of the functions of his or her office, as they give him or her a role in deciding a particular matter, must not perform the role in deciding the matter unless fulfilling certain disclosure requirements. (Reflecting section 30 of ACMA Act 2005)	The Secretary of State shall satisfy that a person will have no financial or other interest likely to affect prejudicially his performance of functions as a member of Ofcom before his appointment, and from time to time (Reflecting paragraphs 1(1) and 1(2) of Schedule to Ofcom Act 2002) A member shall declare interest in matters considered at meetings and the declaration shall be recorded in the minutes. (Reflecting Paragraph 17(2) of the Ofcom Act 2002) The person declaring an interest shall not take part in any discussion or decision relating to the matter unless meeting certain requirements. (Reflecting paragraph 17(3) of Ofcom Act 2002)	A person is not eligible to be appointed or to continue as a member of the CRTC if the person is engaged in a telecommunications undertaking or has any pecuniary or proprietary interest in (i) a telecommunications undertaking, or (ii) the manufacture or distribution of telecommunication apparatus, except where the distribution is incidental to the general merchandising of goods by wholesale or retail. (Reflecting section 5(1) of CRTC Act) A member in whom any interest prohibited vests by will or succession for the member's own benefit shall, within three months thereafter, absolutely dispose of that interest. (Reflecting section 5(2) of CRTC Act)
Whether meetings are	There is no stipulation in the law.	There is no stipulation in the law.	There is no stipulation in the law.	There is no stipulation in the law.

	US's Federal Communications Commission (FCC)	Australian Communications and Media Authority (ACMA)	UK's Office of Communications (Ofcom)	Canadian Radio-television and Telecommunications Commission (CRTC)
open to the public	Have both open and closed-door meetings	Meetings not open to the public. The ACMA, however, consults extensively with representatives of industry, consumers, government and academia, often through a range of committees including: <ul style="list-style-type: none"> • Radiocommunications Consultative Committee • Consumer Consultative Forum • Technical Advisory Group • Emergency Call Service Advisory Committee • Australian ENUM Discussion Group • National Relay Service Customer Consultative Committee • Numbering Advisory Committee. 	Meetings not open to the public.	Meetings not open to the public. CRTC organises public hearings for the public to participate in.
Status of the executive arm	The FCC is supported by the Managing Director and comprises seven operating Bureaux and ten Staff Offices. Employees of the FCC are Federal employees of the Federal Government engaged in accordance with civil-service laws. FCC staff members are subject to the same general ethical regulations and retirement arrangements as other Federal	All staff members of the ACMA are engaged under the Public Service Act 1999 and are members of the Australian Public Service (APS). Like other members in the APS, ACMA employees need to observe the same service-wide values, and comply with the codes of conduct requirements, regulations, circulars and disciplinary procedures of the APS.	Employees of the Ofcom are not civil servants.	The CRTC's operational activities are supported by its employees headed by the Secretary-General. All officers and employees of the CRTC, including the Secretary-General, are appointed in accordance with the Public Service Employment Act, and the authority of appointment rests with the Public Service Commission. Staff members in the CRTC are

	US's Federal Communications Commission (FCC)	Australian Communications and Media Authority (ACMA)	UK's Office of Communications (Ofcom)	Canadian Radio-television and Telecommunications Commission (CRTC)
	employees.	The ACMA may make arrangements with other departments in the Australian Government for transfer of staff.		subject to transfer to other departments of the Government of Canada.

Workload of the Telecommunications Authority

This note sets out a summary of the issues handled by the Telecommunications Authority (TA) in person from January 2007 to October 2010. Many of the issues are complex, relate to the due exercise of statutory powers, and require thorough study. The TA would usually be heavily involved in the deliberations before deciding on these matters.

Category of issues	Number of issues			
	2007	2008	2009	2010 (Jan to Oct)
Regulation of Telecommunications Services				
Developing/reviewing licensing frameworks	5	5	3	1
Preparing consultations, making determinations or issuing statements or directions on various regulatory issues, namely interconnection arrangements and charges	8	5	10	8
Handling appeals/judicial review cases on regulatory policies and decisions	5	2	2	0
Imposing financial penalty on licensees in breach of the Telecommunications Ordinance	3	2	1	5
Managing Radio Spectrum				
Handling issues in relation to spectrum management policy	1	1	0	0

Category of issues	Number of issues			
	2007	2008	2009	2010 (Jan to Oct)
Issuing consultation papers, statements, gazette notices and orders in relation to the provision of spectrum for public mobile services	6	7	4	1
Enforcing the Unsolicited Electronic Messages Ordinance (UEMO)				
Issuing guidelines on the UEMO	1	0	0	0
Competition Matters				
Considering changes in ownership of licensees	0	1	0	0
Initiating competition investigations and preparing competition guidelines	1	1	0	1
Consumer Issues				
Reviewing the consumer aspects of telecommunications services and working on schemes or codes of practices to protect consumers	1	2	0	6
Total Number of Items	31	26	20	22

Workload of the Broadcasting Authority

This note sets out a summary of the agenda items discussed at the meetings of Broadcasting Authority (BA) from January 2007 to October 2010. Except for special meetings when particular items were discussed, each meeting had agenda items in respect of usual administrative matters for the BA, including confirmation of minutes, matters arising, publicity arrangements, any other business and meeting arrangements. For the sake of succinctness, these administrative items are not included in the summary.

Category of items	Number of items			
	2007	2008	2009	2010 (Jan to Oct)
BA's Corporate Matters				
Appointment of members to the committees of BA	5	0	1	0
BA's corporate business	1	0	0	0
Report of Committees / Commissioner's Report				
Report of Code of Practice Committee	2	1	0	0
Report of Complaints Committee	10	7	8	9
Report of the Commissioner for Television and Entertainment Licensing	12	10	11	9
TV Licensing Matters				
TV service licence applications	2	1	3	4
Issues or applications in relation to shareholding and ownership changes in respect of TV licensees	7	6	5	2

Category of items	Number of items			
	2007	2008	2009	2010 (Jan to Oct)
Issues or applications in relation to disqualified persons in respect of TV licensees	7	4	0	0
Guidelines in respect of TV licensing	1	0	1	1
Issues or applications in respect of licensing requirements for TV licensees	7	5	4	1
Mid-term review of domestic free TV service licences	0	1	11	1
Sound Broadcasting Licensing Matters				
Sound broadcasting service licence applications	0	3	2	7
Mid-term review of sound broadcasting licences	0	0	1	5
Compliance with the Legislation and/or Regulations by Licensees				
Compliance with the legislation and/or regulations by licensees	3	2	6	6
Advisory Matters in Relation to Broadcasting				
Advisory matters in relation to broadcasting	11	4	5	9
Others				
Consultancy study on broadcasting matters	2	1	1	0
Consumer issues	1	0	0	0
Total number of items	71	45	59	54

Statistics of meetings

Category of items	2007	2008	2009	2010 (Jan to Oct)
Total number of regular meetings	12	10	11	9
Total number of special meetings	0	1	2	3
Range of the duration of meetings	From one hour and five minutes to three hours and 45 minutes	From 50 minutes to two hours and 25 minutes	From 50 minutes to five hours	From one hour and five minutes to six hours and five minutes
Average duration of meetings	Two hours and 35 minutes	One hour and 45 minutes	One hour and 51 minutes	One hour and 59 minutes