

**For discussion on
11 January 2010**

**Legislative Council Panel on
Information Technology and Broadcasting**

**Establishment of the Unified Regulator
for the Electronic Communications Sector**

Purpose

This paper briefs Members on the latest progress of the Administration's proposal to establish the Communications Authority (CA) (通訊事務管理局).

Background

2. Rapid advancement in technology is blurring the traditional boundaries between telecommunications and broadcasting, leading to convergence of the two markets. To meet the regulatory challenges, advanced economies either have set up a converged regulator for telecommunications and broadcasting (e.g. the US Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission) or merged their separate telecommunications and broadcasting regulators into unified regulatory bodies (e.g., the Office of Communications in the UK established in 2002 and the Australian Communications and Media Authority in Australia established in 2005). Hong Kong, being at the global forefront of technological application and media convergence, needs to restructure its regulatory institutional arrangements and review the overall regulatory regime and legislation.

3. In March 2006, the Administration issued a public consultation document setting out proposals for merging the Broadcasting Authority (BA) and the Telecommunications Authority (TA) into a single unified regulator, the CA. The CA is intended to provide efficient, effective and well-coordinated regulation for a converging electronic communications sector. The Administration's proposal included the following key arrangements –

- (a) The Administration will introduce legislation to establish the CA to administer and enforce the existing Broadcasting Ordinance (BO) (Cap. 562) and the Telecommunications Ordinance (TO) (Cap. 106). The existing statutory powers and functions of the BA and the TA will be transferred to the CA by the enabling legislation;
- (b) Pending a review to rationalise the BO and the TO after the establishment of the CA, there will be no immediate changes to the existing regulatory and licensing arrangements for broadcasting and telecommunications under the two Ordinances;
- (c) The CA will comprise seven members: a non-official Chairman and four non-official members, and an official member appointed by the Chief Executive on the advice of the then Secretary for Commerce, Industry and Technology (now the Secretary for Commerce and Economic Development). The Director-General of the Office of the Communications Authority (OFCA) (see subparagraph (d) below) will be an ex-officio member;
- (d) The Administration will form the executive arm of the CA by merging the Broadcasting Division of the Television and Entertainment Licensing Authority (TELA) and the Office of the Telecommunications Authority. The executive arm will be a Government department named the OFCA which will operate as a trading fund. The department will be headed by the Director-General who will be a civil servant. The mode of operation of the CA and its executive arm will be largely modeled on the existing arrangements of the BA and the Broadcasting Division of TELA; and
- (e) The public mission of the CA will be to promote competition, innovation and investment in the communications market and to uphold freedom of speech.

The Legislative Council Brief issued upon the release of the consultation document (File Ref: CTB(CR)9/19/13(05)Pt.4), setting out the justifications, specific proposals and implications and other arrangements of the Administration's plan is at **Annex A**.

Outcome of Public Consultation

4. During the public consultation exercise held in 2006, the Administration received a total of 30 submissions. All submissions have been uploaded to the website of the Communications and Technology Branch of the Commerce and Economic Development Bureau (<http://www.cedb.gov.hk/ctb/eng/paper/submission4.htm>). We also attended meetings of this Panel on 17 March 2006 and 12 June 2006 to gather and respond to the views of the Members and the deputations. Having considered the views received, the Administration set out the responses to the major issues raised at **Annex B**.

Latest Progress

5. Noting that the proposal of establishing the CA gained widespread and overwhelming support, the Administration started drafting the enabling legislation (i.e. the CA Bill) after the public consultation was completed. The drafting of the Bill has been more complicated than expected, as it involves preparation of a number of necessary consequential amendments to the existing BO and TO. More time has been taken than expected to seek legal advice and comments from the concerned parties. Nevertheless, we are now close to finalising the CA Bill and plan to introduce it into the Legislative Council in the legislative session 2009-10.

6. In formulating the CA proposal, we have taken a conscious decision to adopt a staged approach in building up the institution of the CA. We will establish the CA as soon as possible through the structural merger of the TA and BA. This will enable the early establishment of a unified regulator to deal with market convergence which is already taking place. The Administration and the new regulator will then carry out a comprehensive review of the existing regulatory regimes to prepare for a new comprehensive Communications Bill to update, rationalise and replace the existing TO and BO.

Advice Sought

7. Members are invited to note the position of the Administration in response to the views conveyed and the progress of introducing the CA Bill into the Legislative Council.

**Communications and Technology Branch
Commerce and Economic Development Bureau**

January 2010

File Ref: CTB(CR) 9/19/13 (05) Pt.4

LEGISLATIVE COUNCIL BRIEF

Consultation Paper on the Establishment of the Communications Authority

INTRODUCTION

A At the meeting of the Executive Council on 28 February 2006, the Council took note of the consultation paper on the establishment of the Communications Authority at **Annex A**, which was released today for a three-month consultation. The Government proposes in the consultation paper to merge the Broadcasting Authority (BA) and the Telecommunications Authority (TA) into a unified regulator named the Communications Authority (CA) for effective, efficient and well co-ordinated regulation of the whole electronic communications sector.

JUSTIFICATIONS

2. At present, the BA and TA are responsible for the regulation of broadcasting and telecommunications industry respectively. The existing institutional arrangement of having separate regulators for broadcasting and telecommunications is no longer effective with the blurring of the boundary between the two sectors. We committed in the Government's *Digital 21 Strategy: Sustainability and Opportunities* published in March 2004 to reviewing whether the existing regulatory arrangement best serves Hong Kong in the era of convergence and deregulation.

3. Digitisation and media convergence are blurring the boundary between telecommunications, broadcasting and information technology. At the technology level, new and emerging services, such as Voice over Internet Protocol, Internet Protocol Television and multimedia services over 3G telecommunications networks, no longer fit neatly into the conventional sectoral delineation. At the market level, major operators are moving into the triple-play business model of providing telephony, television and Internet access services over a single network, either by horizontal expansion (e.g. PCCW Limited's expansion into the pay television market) or through collaboration (e.g. partnering between

Hutchison Global Communications Limited and Galaxy Satellite Broadcasting Limited). Digital terrestrial television, to be launched by Asia Television Limited and Television Broadcasts Limited by 2007, will provide another digital platform for further convergence.

4. The rapid technological and market developments in the electronic communications sector call for corresponding restructuring at the regulatory level. The UK and Australia have recently merged telecommunications and broadcasting regulators into a unified regulatory body. A unified regulator will be better equipped to deal with complicated cross-sectoral competition issues and provide a one-stop-shop for resolving other regulatory issues in a convergent environment.

A Staged Approach

5. In Hong Kong, it is desirable to enshrine the unified regulatory framework in a piece of comprehensive legislation. This entails a protracted and comprehensive exercise of reviewing the Telecommunications Ordinance (TO)(Cap.106), Broadcasting Ordinance (BO)(Cap.562) and Broadcasting Authority Ordinance (Cap. 391). However, Hong Kong is in the forefront of convergence. The advent of new converged services already raises regulatory concerns and requires a well co-ordinated response. We therefore propose to set up the CA as soon as possible to regulate the electronic communications sector. It will continue to enforce the existing BO and TO and administer all the matters which currently fall under the purview of the BA and TA. From there on, the CA will be tasked to review and rationalise the TO and BO together with the Administration.

6. The advantage of this staged approach is that it would enable the CA to be established and function as soon as possible, provide input in the review of the provisions of the TO and BO, and have ownership of the strengthened regime that will eventually emerge. In this context, we are aware of the concerns of industry as to the case of rationalising the separate competition regimes set out respectively under the TO and BO.

Consolidation of Competition Provisions

7. Telecommunications and broadcasting are the only two sectors in Hong Kong with legislative provisions to regulate competition matters. However, the scope covered by the competition provisions in the two sectors are different, so are the provisions on competition test as well as prohibition of anti-competitive conduct, and abuse of dominance.

These provisions could be consolidated into one single set of competition provisions for the whole electronic communications sector so as to facilitate the CA to deal with cross-sectoral competition issues.

Appeal Mechanism on Competition Matters

8. Currently, appeals against the decisions of the TA on competition matters lie with the Telecommunications (Competition Provisions) Appeal Board according to section 32N of the TO. Those against the BA are considered by the Chief Executive in Council according to section 34(1) of the BO. This arrangement will be under challenge when appeals which cannot be neatly classified into telecommunications or broadcasting arise as would likely happen in a convergent environment. There are distinctive advantages for a single appellate body to consider appeals against the CA's decisions on competition matters for the electronic communications sector to ensure consistency and effectiveness in handling cross-sectoral competition matters. As such appeals involve highly technical market and economic analysis, they should be best left to a dedicated body with the necessary knowledge and expertise. On this ground, it would be appropriate to expand the Telecommunications (Competition Provisions) Appeal Board to cover the entire electronic communications sector.

Specific proposals

9. We propose in the consultation paper to enact enabling legislation to establish the CA, abolish the BA and TA, and repeal the Broadcasting Authority Ordinance (BAO)(Cap. 391). The CA will have jurisdiction over the broadcasting and telecommunications sectors.

10. Apart from the above and necessary consequential amendments to give effect to the merger, we will not make any further changes to the BO and the TO.

11. For good governance and on par with international practice, we propose that the CA should be a committee instead of a public officer. It will comprise seven members: a non-official Chairman, four non-official members and one official member appointed by the Chief Executive, and the Director-General of the executive department as the ex-officio member.

12. The Office of the Telecommunications Authority (OFTA) and the Broadcasting Division of the Television and Entertainment Licensing Authority (TELA) will be amalgamated into a new government department

called the Office of the Communications Authority, operating as a trading fund. Headed by the Director-General, a public officer ranked at D6, the department will be the executive arm of the CA.

IMPLICATIONS OF THE PROPOSAL

B 13. The proposal in the consultation paper, if realised, has economic, financial and civil service implications as set out in **Annex B**. There is no in-principle objection from the Basic Law and the human rights perspectives to put forward the proposal for public consultation. The proposal has no productivity or environmental implications. It has no significant sustainability implications, but will facilitate industry development and encourage innovations in a converging environment.

PUBLICITY

14. We will issue a press release to announce the commencement of the consultation today. The consultation paper will be uploaded to the website of the Commerce, Industry and Technology at www.citb.gov.hk/ctb. A spokesman will be available to answer media and public enquiries. We will brief the Legislative Council Panel on Information Technology and Broadcasting on the proposal.

BACKGROUND

15. The BA is a statutory body constituted under the BAO. It comprises six to nine non-official members and three official members appointed by the Chief Executive. Its executive arm is the Broadcasting Division of TELA. The Commissioner for Television and Entertainment Licensing, a public officer, is the statutory Principal Executive Officer of the BA. The BA's operation is thus financed by TELA's funding from the general revenue.

16. The major functions and responsibilities of the BA are, among other things, securing proper broadcasting content standards, handling broadcasting licensing matters, enforcing competition provisions in the BO, and approving foreign ownership of domestic free television programme service and sound broadcasting service licensees. Only these two categories of licensees are subject to foreign ownership restrictions.

17. On the other hand, the TA is a public officer appointed by the Chief Executive pursuant to section 5 of the TO. Since the establishment of OFTA in 1993, the Director-General of Telecommunications, who heads OFTA, has been appointed accordingly as the TA. OFTA is operating under the Trading Funds Ordinance (Cap. 430).

ENQUIRIES

18. For enquiries, please contact Mr. Eddie Cheung, Principal Assistant Secretary (A) for Commerce, Industry and Technology (Communications and Technology), at 2189 2236.

**Communications and Technology Branch
Commerce, Industry and Technology Bureau
3 March 2006**

**Consultation on the
Establishment of the Communications Authority**

**Communications and Technology Branch
Commerce, Industry and Technology Bureau
3 March 2006**

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Foreword

This document sets out the Government's proposal to merge the Broadcasting Authority and Telecommunications Authority into a unified regulator named the Communications Authority for efficient, effective and co-ordinated regulation of a converging electronic communications sector.

Please send your comments on the proposal to the Communications and Technology Branch of the Commerce, Industry and Technology Bureau by 2 June 2006 by any of the following means:

Post Communications and Technology Branch
 Commerce, Industry and Technology Bureau
 2/F, Murray Building,
 Garden Road
 Hong Kong

Fax (852) 2511 1458
 (852) 2827 0119

E-mail kevinchoi@citb.gov.hk

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Executive Summary

Technological advancement has been blurring the boundary between telecommunications, broadcasting and information technology. Transmission networks are increasingly substitutable with similar capability of supporting triple-play business model, i.e., a single company providing telephony, broadband Internet access and broadcasting services through a single data pipeline, be it satellite, optical fibre, traditional telephone lines or wireless networks.

Convergence at the technological and market levels has led to integration at the regulatory level. The UK and Australia have recently merged telecommunications and broadcasting regulators into a unified regulatory body.

Our intention to explore the merits of a unified regulatory set-up was foreshadowed in the Government's *Digital 21 Strategy: Sustainability and Opportunities* published in March 2004. We now come to a view that there is a need to set up a unified regulatory framework for the entire electronic communications sector to facilitate the development of this fast changing industrial sector.

It is desirable to enshrine the unified regulatory framework in a comprehensive Communications Bill. This entails a protracted comprehensive exercise of reviewing the Telecommunications Ordinance (Cap.106), Broadcasting Ordinance (Cap.562) and Broadcasting Authority Ordinance (Cap. 391). However, Hong Kong is in the forefront of convergence. The advent of new converged services already raises regulatory and competition concerns and requires a well co-ordinated response. To enable us to tackle these urgent issues, we propose, as the immediate target, the establishment of a unified regulator for the entire electronic communications sector (as a working title we call it the Communications Authority, CA for short) by merging the Broadcasting Authority (BA) and the Telecommunications Authority (TA) as soon as possible. The CA will be tasked to review and rationalise the Broadcasting Ordinance and Telecommunications Ordinance together with the Administration.

2. The proposal includes the following key arrangements:
 - (a) we will introduce legislation to establish the CA to administer and enforce the existing Telecommunications Ordinance and Broadcasting Ordinance. The existing statutory powers and functions of the TA and BA will be transferred to the CA by the enabling legislation;
 - (b) there will be no changes to the existing regulatory and licensing arrangements for telecommunications and broadcasting under the Telecommunications Ordinance and Broadcasting Ordinance;
 - (c) we will merge the Office of the Telecommunications Authority and the Broadcasting Division of the Television and Entertainment Licensing Authority to form a new government department called the Office of the Communications Authority (OFCA), operating as a trading fund. The department headed by the Director-General will serve as the executive arm of the CA;
 - (d) the CA will comprise seven members: a non-official Chairman and four non-official members, and an official member appointed by the Chief Executive on the advice of Secretary for Commerce, Industry and Technology (SCIT). The Director-General of OFCA will be the ex-officio member; and
 - (e) the public mission of the CA will be to promote competition, innovation and investment in the communications market and to uphold freedom of speech guaranteed under Article 27 of the Basic Law and the relevant provisions of the Hong Kong Bill of Rights Ordinance.

Part A Introduction

In the Government's *Digital 21 Strategy: Sustainability and Opportunities* published in March 2004, we undertook to review whether the existing regulatory arrangement for the broadcasting and telecommunications sectors still serves the best interest of Hong Kong in the era of convergence and deregulation. We also undertook to put forward proposals and consult the public and industry. The present consultative document is to follow up these undertakings.

Backdrop: changing technological and market landscape

2. The broadcasting and telecommunications industries worldwide have been undergoing a major transformation for sometime. This process is driven by technological advancement through digitisation and convergence. Digitisation has practically removed the constraints on spectrum capacity and has been instrumental in fostering media convergence, which has enabled a single platform supporting telephony, broadcasting, and Internet access services ("triple-play"), thereby generating opportunities for new services and business models.

3. These developments have changed the landscape of the broadcasting and telecommunications industries fundamentally. More services and service providers can now be accommodated than has hitherto been possible. This is not just a matter of increased network carriage capacity but also a change in the nature of the activities. In addition to the conventional point-to-multipoint delivery mode of service catering to the mass, more customised services are being created to niche markets based on the needs and tastes of minority interests. The broadcasting market is becoming less vertically integrated as operators may not need to engage in the full range of conventional operation of a broadcasting station from content production, programming to transmission. The medium of transmission is highly flexible and versatile. The boundaries between telecommunications, broadcasting and information technology are increasingly blurred.

4. As a result of these developments, the market entry barriers have been lowered substantially, particularly with regard to capital investment in conventional transmission networks. Indeed modern technological

development has enabled the delivery of broadcast-quality TV programmes over the Internet, wireline or wireless telecommunications networks, and the lease of transmission capacity to new service providers. All these fundamental changes have manifested themselves in competitive business models, innovative application of technology and diversity of content and service development (e.g. real-time information services, personalised infotainment, interactive advertising and e-commerce). Such manifestations have in turn translated themselves into unprecedented regulatory challenges. A snapshot of this development in Hong Kong is at **Box 1** below.

Box 1

Hong Kong is one of the forerunners in convergence. Below are some key developments.

Convergence on Wireline Networks

PCCW Limited (PCCW), formerly Hong Kong Telephone Company, operates the largest conventional telephone network in Hong Kong with near universal coverage. It has transformed itself from a telephony service provider into a triple-play (telephony, Internet access and television) service provider. As early as 1998, it launched a video-on-demand service on its telephone network. Now it offers fixed line telephony service with a variety of value added features and broadband Internet access service. With the deployment of Asymmetrical Digital Subscriber Line (ADSL) and Internet Protocol (IP) multicast technologies, PCCW has turned its telephone network into an advanced network capable of carrying broadcasting services. Its pay TV service, branded as “Now Broadband TV”, is a leading IPTV programme and service provider in the world.

Hong Kong Broadband Network Limited (HKBN), the subsidiary of City Telecom (HK) Limited which was first established as an entity to provide telephony service, built one of the largest Metro Ethernet network in the world in 2002. HKBN has also adopted the triple-play business model. In addition to broadband Internet access service and voice over Internet Protocol (VoIP) service, it is capable of providing video services to subscribers through high-speed broadband Internet access services provided by it or other service providers.

Convergence on Cable Networks

Hong Kong Cable Television Limited (HKCTV), the sole cable TV operator in Hong Kong, was granted a subscription TV franchise in 1993. Over the years, it has built an extensive hybrid fibre coaxial cable (HFC) network, covering some 90% of TV households in Hong Kong. The transmission of its pay TV service over the HFC network is supplemented by microwave and satellite distribution to achieve almost universal coverage. It is the biggest local pay TV operator with a subscriber base of about 700,000. i-Cable Communications Limited (i-Cable), HKCTV's parent company, and Wharf T&T Limited, i-Cable's sister company, are together offering telephony, broadband Internet access, and VoIP services over the same digitised HFC network.

Convergence on Wireless Networks

Both 2G and 3G mobile operators are also quick in embracing convergence. Mobile transmission speed and capacity are increasing by the day. Technological advancement has converted their mobile networks into multi-purpose data pipelines and mobile handhelds into multimedia gadgets. They are able to provide customers with mobile telephony, Internet access and video services.

Asia Television Limited (ATV) and Television Broadcasts Limited (TVB), the two free-to-air terrestrial television broadcasters in Hong Kong, are planning to launch digital terrestrial television (DTT) broadcasting by 2007. The DTT platform, though mainly used for broadcasting purpose, can be used to provide non-broadcasting data services. It is set to become another powerful platform for convergence. Notably, the DTT network supports mobile television services for reception by receivers in vehicles and portable hand-helds including mobile phones.

In some countries, operators have rolled out real-time TV broadcasting via satellite and terrestrial transmission networks for reception by hand-held devices. Some content providers have already packaged real-time mobile TV content for mobile phones.

Convergence through Partnership

A broadcaster or telecommunications operator can benefit from convergence through partnership without the need to branch into new business fields that it is unfamiliar with. Galaxy Broadcasting Satellite Limited (Galaxy) offers pay TV service, branded as “SuperSun TV”, to its customers via satellite through satellite master antenna television (SMATV) and communal aerial broadcasting distribution (CABD) systems and in-building coaxial cable distribution systems (IBCCDS). In order to expand its coverage, Galaxy has partnered with Hutchison Global Communications Limited (HGC), a fixed network operator that owns and operates a fibre-to-the-building telecommunications network in Hong Kong, to deliver its pay TV service through HGC’s broadband IP network. Together they will be able to offer customers triple-play services. This is a vivid demonstration of commercial cooperation between a broadcaster and a telecommunications operator, each contributing its forte, to meet the convergence challenges. Galaxy also partners with PCCW Media Limited, another pay TV licensee, to create synergy in widening coverage and enriching programming choice for their subscribers.

The above illustrates the merits of our existing flexible, technology-neutral regulatory regime which facilitates the sort of business specialisation and cooperation as exemplified in the Galaxy-HGC and Galaxy-PCCW Media models.

Convergence between Fixed and Mobile Networks

To further enrich the convergence scenario, broadband wireless access (BWA) such as WiMax is emerging as a transmission technology for fixed-mobile convergence. The Office of the Telecommunications Authority is dealing with the licensing and regulatory issues of BWA.

The existing institutions: BA and TA

5. While the policy responsibility for broadcasting and telecommunications is vested in one single policy bureau, the regulatory responsibility for these two sectors in terms of licensing and enforcement is

delineated along traditional industry lines.

6. At the policy level, the consolidation of responsibility for communications policy was proposed in 1997¹. In April 1998, the Government put telecommunications, broadcasting and information technology, hitherto under three bureaux of the Government Secretariat, into one single policy bureau by establishing the Information Technology and Broadcasting Bureau (now the Communications and Technology Branch of the Commerce, Industry and Technology Bureau). This arrangement has enabled better co-ordination of policies concerning these increasingly intertwined and important sectors.

7. At the regulatory level, the Broadcasting Authority (BA) regulates television and radio broadcast services in accordance with the Broadcasting Ordinance (Cap. 562) and Part IIIA (Sound Broadcasting Service) of the Telecommunications Ordinance (Cap. 106), respectively. On the other hand, the Telecommunications Authority (TA) regulates the telecommunications sector in accordance with the Telecommunications Ordinance and the technical standards for broadcasting services.

Broadcasting Authority

8. Institutionally, the BA is a statutory body constituted under the Broadcasting Authority Ordinance (Cap. 391). It comprises six to nine non-official members and three official members appointed by the Chief Executive. Its executive arm is the Broadcasting Division of the Television and Entertainment Licensing Authority (TELA), a government department headed by the Commissioner for Television and Entertainment Licensing (CTEL), a public officer, who serves as the statutory Principal Executive Officer of the BA. The Broadcasting Division of TELA receives its funding from general revenue through the annual resources allocation process.

9. The major functions and responsibilities of the BA are to-

- secure proper broadcasting content and technical standards and handle complaints about breach of such standards;
- issue non-domestic television programme service licences and other

¹ The 1997 Policy Address of the Chief Executive of the Hong Kong Special Administrative Region (HKSAR).

licensable television programme service licences and make recommendations on applications for licences of sound broadcasting, domestic free and domestic pay television programme services for which the Chief Executive in Council is the licensing authority;

- administer all broadcasting licences and enforce licensing conditions;
- approve acquiring, holding and exercising of 2% or above foreign² voting control of domestic free television programme service licensees³; and
- enforce the competition provisions in the Broadcasting Ordinance.

Telecommunications Authority

10. In contrast, the TA is a public officer appointed by the Chief Executive pursuant to section 5 of the Telecommunications Ordinance. Since the establishment of the Office of the Telecommunications Authority (OFTA) in 1993, the Director-General of Telecommunications (DG-Tel), who heads OFTA, has been appointed accordingly as the TA. OFTA is a government department operating under the Trading Funds Ordinance (Cap. 430)⁴, and as such does not rely on general revenue for its expenses.

11. The major functions and responsibilities of the TA are to -

- manage the radio spectrum;
- license all telecommunications services and transmission facilities (including those for broadcasting) and enforce licensing conditions;
- regulate the economic and technical aspects of telecommunications services;
- support the BA in the technical regulation of broadcasting services;
- exercise control on import and export of radio communications transmitting apparatus and their use to prevent interference; and
- enforce the competition provisions in the Telecommunications Ordinance.

² “Foreign” here means persons and companies that do not satisfy the “ordinarily resident in Hong Kong” requirement as referred to in the Broadcasting Ordinance.

³ The power to approve cross-media ownership applications rests with the Chief Executive in Council.

⁴ A government department operating on a trading fund basis means it is a self-financing accounting entity. It is financially supported by income derived mainly from charges for its service provided. For OFTA, its income comes mainly from licence fees.

12. Operationally, OFTA provides the BA and the Broadcasting Division of TELA with support and advice in relation to engineering and technical issues in broadcasting matters. From time to time, OFTA also assists the BA in economic regulation matters such as economic analysis for processing competition complaints.

Part B The case for a unified regulator

International trend

13. In the US and Canada, there has long been a single regulator responsible for the regulation of both the telecommunications and broadcasting sector – the US Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission (CRTC). In the light of convergence, some jurisdictions have decided to follow the single regulator model by merging the broadcasting and telecommunications regulators into a single body. Two recent notable examples are the change to the regulatory institutional framework in the UK and Australia.

14. The UK Government recognises that technological development moves faster than regulation can keep up. It therefore merged in end-2002 five regulatory bodies, namely, the Independent Television Commission, the Broadcasting Standards Commission, the Office of Telecommunications, the Radio Authority and the Radiocommunications Agency into the Office of Communications (Ofcom) as the single regulator for the electronic communications sector. The objective is to have a simpler and more flexible system where the regulator has delegated powers to act in response to fast-changing circumstances.

15. The Australian Government recognises that new digital technologies are allowing previously distinct sectors to compete across increasingly convergent markets using a range of different delivery platforms. In this environment, maintaining two sector-specific regulators that deal with similar issues across the communications industry is neither practical nor effective. On 1 July 2005, the Australian Communications Authority and the Australian Broadcasting Authority were merged to form the Australian Communications and Media Authority (ACMA). The objective of establishing the new institutional set-up is to enable a coordinated regulatory response to converging technologies and services and to the long-term management of spectrum.

Needs and benefits in the Hong Kong context

(a) Necessity

16. The case for a unified regulator for Hong Kong is necessitated by

technological development and the resulting market dynamics. Maintaining the status quo is simply not an option in the longer term.

17. The trend towards further convergence is clear and inevitable. Emerging new market segments may or may not replace existing market segments and may not also fall squarely within the conventional demarcation of telecommunications or broadcasting regime. Technological advancement allows different players with different core competencies and competitive advantages greater flexibility in determining its presence in different market segments, existing or emerging, within the communications sector and its interdependence with other players at different levels of the value chain.

18. An operator may choose to specialise in the market segment in which it has competency or to extend its presence in multiple market segments. Extension of market presence can be vertical (i.e. in different stages of the value chain from content origination to network transmission) or horizontal (i.e. in different forms of related services such as TV and multimedia productions), through mergers and acquisitions, long-term partnership, or short-term collaboration. Our existing technology-neutral regulatory regime has been able to cope with some of these developments as illustrated in Box 1 above but more and more regulatory issues will arise, challenging conventional paradigms and existing rules. Further updating of our regulatory regime is warranted. Two specific examples are set out in **Box 2** below.

Box 2

Migration from radio and television to multimedia services

- Using digital broadcasting technology, a radio station may transmit radio service, text messages and video via the L-Band or Band III (the frequency bands allocated for digital audio broadcasting) for direct reception by mobile integrated receivers. The aforesaid service is not called digital radio but, quite rightly, Digital Multimedia Broadcasting (DMB) by its pioneers. This raises questions about the distinction between radio and television broadcasters when both are migrating to the provision of multimedia services.

Emerging mobile TV services

- In addition to other emerging wireless technologies, the deployment of DVB-H technical standard allows terrestrial television broadcasters to transmit tailor-made broadcasting services for direct reception by hand-held devices including mobile phones. The problem of whether and how we should regulate such services may arise.
- Given the high penetration of mobile phones in Hong Kong, mobile TV could be a pervasive medium. If pervasiveness of a service is a determining criterion in our regulatory regime, it begs the question of whether mobile TV should be licensed as a TV service. And if yes, we need to consider whether such services should be licensed as a distinguishable class of TV services.

19. A functional, overarching regulator designed along market, rather than technical, lines will have a full grasp of the technological impact on industry and services, and also the market dynamics in the entire communications sector. We need a regulator who has jurisdiction and powers over the entire communications sector to ensure that different players are interacting with each other and participating in different market segments in a fair and competitive manner.

(b) Fair competition in a converging market

20. At present, the broadcasting and telecommunications industries are the only two sectors in Hong Kong with statutory regulation of anti-competitive conduct. Such measures were first set out in the conditions of various licences and later incorporated into the Telecommunications Ordinance in 1999 and the Broadcasting Ordinance in 2000.

21. The scope of the competition provisions in the Telecommunications Ordinance covers comprehensively “any market for the provision or acquisition of telecommunications networks, telecommunications systems, telecommunications installations, or customer equipment or services” while that in the Broadcasting Ordinance covers specifically the downstream

television service market. Such a legislative framework will become increasingly challenged as the television service market intertwines with the telecommunications market.

22. There could be anti-competitive practices the impact of which can only be assessed by taking into account the effect of conduct on the relevant market segments within the communications sector or on the communications sector as a single market. On the other hand, as the telecommunications and broadcasting markets are converging, there will be new opportunities for business synergy that will enhance efficiency and bring benefits to consumers. The regulatory authority needs to have sufficient understanding of the converging markets so that the approach it takes towards, and the decisions it makes on, competition issues will not inhibit technical and economic progress through cooperation and business/technological synergy.

23. A properly empowered single authority should be better equipped with the perspective and competence to deal with complicated cross-sectoral competition issues in a converging environment.

(c) Practical benefits

24. A unified regulator will benefit both the regulator and the industry. In the first place, the single regulator will be a one-stop-shop for resolving regulatory issues in a converging environment. There will also be better assurance of consistency in regulatory approach and practice in a converged environment. Such an arrangement will also be helpful to the industry as it would reduce administrative work and enhance working efficiency. On the other hand, the regulator can pool different kinds of expertise together to tackle a communications issue.

(d) Operational synergy and efficiency

25. At present, the BA is responsible for the management of content issues, and technical and economic regulation of the broadcasting sector.

26. Technical and economic regulation, such as technical standards for broadcasting services, enforcement of anti-competitive practices, compliance of licensing conditions, requires expertise from the engineering, legal,

accounting and applied economics professions. In this regard, the BA has to rely to a significant extent on OFTA and external consultants to assist it in handling these matters. Since technical and economic regulation of the broadcasting and telecommunications sectors requires largely the same expertise, there is great potential to achieve operational synergy and efficiency by putting these regulatory functions and the requisite experience and expertise in one single organisation.

(e) Benefits to consumers

27. The ability of the unified regulator to harness and exploit the benefits of a converging environment as discussed above would bring about a better utilisation of public resources with enhanced efficiency, early deployment and dissemination of technologies, further service and business innovation and more competition in the electronic communications sector. Consumers stand to gain in these developments.

Part C A new Communications Authority: what is it?

Implementation – A Staged Approach

28. The proposed Communications Authority (CA) will be a statutory body and its effectiveness and functions will be determined by what is given to it by law to perform. Given the converging environment, changing technological and industrial landscape and market dynamics, as well as the regulatory experiences accumulated over the years, we reckon that the ideal approach is to prepare and enact a comprehensive Communications Bill that encompasses all the necessary provisions for the effective regulation of the evolving communications sector and empowers the proposed CA to enforce such a statute.

29. However, we do not start with a clean slate. To pursue this comprehensive approach will mean that at the outset we embark on a major, fundamental and ambitious review of the Telecommunications Ordinance, Broadcasting Ordinance and Broadcasting Authority Ordinance with a view to consolidating them into a single piece of legislation with extensive rationalisation, updating and amendment. This would however be a complex and protracted exercise that could undermine the immediate objective of urgently creating a unified regulator to meet the challenges of an increasingly converging environment.

The Priority

30. We therefore propose to adopt a staged approach whereby we start with a straightforward exercise of amalgamating the BA and TA. The newly formed unified regulator will manage two separate pieces of pre-existing sector-specific legislation, namely the Telecommunications Ordinance and Broadcasting Ordinance. This arrangement is similar to that in Australia when they set up the unified regulator, ACMA. In Canada, the CRTC also manages separate pieces of legislation.

31. On this basis, we will bring in new legislation (a Communications Authority Ordinance) to provide for the establishment of the CA to administer and enforce the Telecommunications Ordinance and Broadcasting Ordinance as they are. The CA will take over the existing powers and functions of the TA

(provided for in the Telecommunications Ordinance) and BA (provided for in the Broadcasting Authority Ordinance). Upon the enactment of the Communications Authority Ordinance, the TA and BA will be abolished. In the second stage, the CA will be tasked to review and rationalise the Broadcasting Ordinance and Telecommunications Ordinance together with the Administration.

32. The advantage of this approach is that it would enable the CA to be established and function as soon as possible, provide input in the review of the provisions of the Telecommunications Ordinance and Broadcasting Ordinance, and have ownership of the strengthened regime that will eventually emerge. In this context, we are aware of the concerns of industry as to the case of rationalising the separate competition regimes set out respectively under the Telecommunications Ordinance and Broadcasting Ordinance.

Consolidation of Competition Provisions

33. The existing arrangement of having two dissimilar competition regimes (see paragraph 21 above) may become untenable when cross-sectoral anti-competitive practices arise as a result of further convergence in the communications market. The existing competition regimes in the two Ordinances at **Annex** could be consolidated according to the framework below:

- a clear provision that the competition regime is applicable to the entire electronic communications sector;
- consolidated provisions on prohibition of anti-competitive conduct. This involves harmonising section 13 of the Broadcasting Ordinance and section 7K of the Telecommunications Ordinance. The existing discrepancy that the BA may exempt anti-competitive conduct upon application on prescribed grounds (section 13(4) of the Broadcasting Ordinance) while the TA has no such exemption power under the Telecommunications Ordinance will be reconciled by a general provision that the CA may prescribe exemptions by subsidiary legislation;
- consolidated provisions on prohibition of abuse of dominance in an electronic communications market. This involves harmonising

section 14 of the Broadcasting Ordinance and section 7L of the Telecommunications Ordinance. The existing redundant provision on non-discrimination by a dominant licensee in the telecommunications market (section 7N of the Telecommunications Ordinance) will be removed because the provision on prohibition of abuse of dominance has already included anti-competitive discriminatory conduct;

- a consumer protection provision prohibiting misleading and deceptive conduct similar to the existing one in the Telecommunications Ordinance (section 7M). It will cover the conduct of all telecommunications and broadcasting services licensees; and
- the competition effect tests for statutory competition analysis and investigation should be standardised.

Appeal Mechanism on Competition Matters

34. There is a discrepancy in the mechanism for handling appeals against the decisions of the regulator on competition matters in respect of telecommunications and broadcasting. Section 34(1) of the Broadcasting Ordinance and section 26(1) of the Broadcasting Authority Ordinance provide that broadcasting service licensees may appeal to the Chief Executive in Council on broadcasting-related regulatory matters, including decisions by the Broadcasting Authority on competition issues. In respect of telecommunications, section 32N of the Telecommunications Ordinance provides that telecommunications licensees can appeal against the TA's decisions on competition matters to the Telecommunications (Competition Provisions) Appeal Board.

35. This arrangement works as long as appeals can be neatly classified into broadcasting and telecommunications. However, in a convergent environment, there would inevitably be appeals falling in the gap between the two. To allow such appeals to go to one of the two, or both, appellate bodies with different modus operandi is unfair and messy.

36. There are distinct advantages in having a single appellate body on competition matters for the entire electronic communications sector. These include, among other things, consistency in interpretation and handling as well as a cross-sectoral view of issues involved. We propose therefore that in tandem with consolidating the competition provisions along the line of paragraph 33 above, the appeal mechanism should be rationalised so that one single appellate body is vested with the responsibility on competition matters. As such appeals involve highly technical market and economic analysis, they should be best left to a dedicated body with the necessary knowledge and expertise. On this ground, it would be appropriate to expand the Telecommunications (Competition Provisions) Appeal Board to cover the entire electronic communications sector.

We seek comments on the proposed staged approach of setting up the CA in the first place, without making changes to the existing licensing and regulatory frameworks for telecommunications and broadcasting, and on the proposed priority items for review in the next stage.

The Public Mission

37. The CA will have a duty to promote the interests of consumers, ensure fair competition in the market, and facilitate innovation and investment in the communications industry. The ultimate objective is to maintain a vibrant communications sector to enhance Hong Kong's competitive advantage as a communications hub in the region.

38. Setting proper content standards and regulating programme contents on the basis of such standards are the key functions of any industry regulator of the broadcasting sector. These can be contentious matters. It must be stressed that in Hong Kong, freedom of speech is already protected under Article 27 of the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383). The BA has been handling this aspect of industry regulation impartially in a transparent manner and in accordance with the relevant codes of practice on sound or television broadcasting. A key mission of the proposed CA must therefore be to continue to uphold freedom of speech guaranteed under Article 27 of the Basic Law and the relevant provisions of the Hong Kong Bill of

Rights Ordinance.

Core values

39. In discharging its functions, the CA has to be open and transparent, fair and consistent, and engaging and supportive. To put these values into practice, it has to have the right mechanism and practices in place, including the publication of notices setting out the process and justifications for regulatory decisions, consultation with the industry and the public on matters that impact on the industry and consumers, publication of regular research and market analysis to provide basis for regulatory policy and intervention. It has to set up a mechanism to engage the industry and public in regulatory issues regularly.

Regulatory approach

40. Our regulatory approach should suit the local situation while on par with international best practice. It should be proactive but light, with an emphasis on fulfilling the public mission of the regulator. In particular we would wish to highlight a few aspects for consideration.

41. First, we are aware of a general paradigm shift from active regulation based on detailed rules to a more relaxed approach with emphasis on fair competition. This is certainly the European sentiment: “*ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e., in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem.”⁵

42. Second, new services will emerge and disruptive technologies will bring challenges to the regulatory regime. Operators will experiment with or bring in new services to test their technical and commercial viability. Some of these services may cause problems under the regulatory regime but such problems may be transitory. The regulator must be mindful of the risk of stifling innovation and investment by premature regulatory intervention, and risk of regulatory creep if the regulatory ambit is to be continuously extended.

⁵ Clause 27, European Union Framework Directive (2002/21/EC)

43. We propose that as a guiding principle, regulatory tolerance should take precedence over regulatory intervention as long as public interest is safeguarded when dealing with innovative services enabled by emerging technologies.

We seek comments on the public mission, core values and regulatory approach of the CA.

Structure of the CA

44. The respective structures of the TA and BA offer a starting point. The powers and authorities provided for in the Telecommunications Ordinance are vested with a public officer (DG-Tel), who is designated as the TA. The TA works in a transparent, engaging and independent way vis-à-vis the industry and consumers, and is generally recognised as such. Judicial remedies are available to aggrieved parties and they provide further checks to the powers of the TA. On the other hand, the BA is a statutory body of individuals that collectively makes major regulatory decisions and takes enforcement actions under the Broadcasting Ordinance, Part IIIA of the Telecommunications Ordinance, and Broadcasting Authority Ordinance. A unified regulator will have to reconcile these differences.

45. Our view is that to model the proposed CA with an expanded remit to cover the entire communications sector on the existing TA is not defensible. It is going to be highly controversial whether a public officer should be vested with such a wide range of powers for the communications sector, which is of vital importance to Hong Kong, the legal remedy available notwithstanding.

46. For good governance practice, we propose to go for a governing body model for the proposed CA. This is not exactly new as the BA has such a resemblance under the Broadcasting Authority Ordinance for the regulation of the broadcasting sector. This is also the set-up of other comparable overseas communications regulators such as the Federal Communications Commission of the US (albeit the Commissioners are partisan political appointees), the Office of Communications of the UK, the Canadian Radio-television and Telecommunications Commission, and the newly established ACMA in

Australia. Thus the governing body (as a working title we will call this a board of directors) will be tasked to make major regulatory decisions, promulgate annual work plans, approve processes and procedures that ensure transparency and accountability, oversee the performance of the executives, and hold the CA to its public purposes.

47. The proposed CA will comprise a non-official Chairman, four non-official members, one official member appointed by the Chief Executive of HKSAR, and the Director-General of the executive department as the ex-officio member. A lean structure of seven members will ensure that views from different perspectives can be considered without compromising efficiency in the decision-making and approval process.

48. Following the best practices of comparable overseas regulators, members of the board of the CA have to follow a published code of ethical standards and the statutory requirements for declaration of interests similar to the existing disclosure provisions in the Broadcasting Authority Ordinance.

Office of the Communications Authority (OFCA)

49. To begin with, given the two pre-existing organisations, viz. OFTA and the Broadcasting Division of TELA, we will not start with a clean slate when considering the executive support for the proposed CA (as a working title we would call this the Office of the Communications Authority, or OFCA for short). There are broadly two options.

50. The first option is a non civil service organisation that is of necessity derived from the existing OFTA and Broadcasting Division of TELA. There are precedents for this, as in the case of the Securities and Futures Commission. Such an organisational set-up enables a statutory body independent of the civil service to be set up and to employ qualified staff on its own, with the funding for the set-up coming largely from the market.

51. The second option is that the executive support for the CA could basically mirror image the current relationship between the BA and the Broadcasting Division of TELA: OFTA and the Broadcasting Division of TELA could be amalgamated to become a single support organisation within the civil service establishment, as OFTA and the Broadcasting Division of

TELA at present are, to serve the new CA.

52. The argument for a non civil service organisation is based mainly on operational flexibility, particularly in respect of recruitment to meet the challenges of digital age policy. We however prefer the Australian model of introducing minimal changes to the organisation, at least initially. For the case of communications regulation, the most important considerations are to ensure co-ordinated regulatory responses to convergence and widening of the horizon of the regulator so that it can approach regulatory issues from a wider perspective. We favour the adoption of the second option at least initially for the following reasons.

53. First, to go for the establishment of a unified regulator and the creation of non civil service executive support at the same time will be too unwieldy and this would likely distract the new unified regulator from its focus on the main policy, strategic and regulatory challenges. The uncertainty to the staff about their future could also cause confusion and further distraction.

54. Second, OFTA and the Broadcasting Division of TELA respectively have been effective in discharging their public duties. OFTA in particular has evolved into a highly professional organisation and has been instrumental and successful in the deregulation and liberalisation of the Hong Kong telecommunications market over the years. Ours is one of the most competitive and innovative in the world, much to the interest of consumers in Hong Kong. The immediate arguments for change are due more to the current structural fragmentation that is unsuited for a unified regulator in future.

55. Third, there is already some flexibility in the system for recruitment and hiring of external expertise, as evidenced by the establishment of OFTA and its modus operandi (and the Broadcasting Division of TELA to a lesser extent). Both OFTA and the Broadcasting Division of TELA are staffed mainly by civil servants complemented by non civil service contract staff to cater for the access to experience and expertise not readily available from the ranks of the civil service, or to human resources and competencies in the rapidly changing communications field.

56. There is thus no overriding urgency or justification to set up a non civil service organisation at the outset. We propose that we leave this matter to

the new CA to consider having regard to its own operating experience. For the initial phase, we propose to establish the new OFCA through the amalgamation, redeployment and streamlining of the existing resources of OFTA and the Broadcasting Division of TELA. We further propose that the current trading fund model operated by OFTA should be extended to OFCA to enable it to receive and keep all incomes from the administration of telecommunications and broadcasting licences, and that there will be no new upfront capital injection required from the Government.

57. The OFCA will be headed by a Director-General, a public officer ranked at D6, i.e. same as the existing ranking of the Director-General of Telecommunications, who will be responsible for the day-to-day management of OFCA to ensure effective support for the CA through OFCA's investigations, analyses, recommendations and execution of regulatory decisions.

We seek comments on the proposed structure that the CA should be a committee supported by a government department.

Budget and finance

58. At present, OFTA is operating a trading fund with a revenue income of \$318.6 million in 2004-05, mainly from licence fees, services charges and investment income. During the same period, expenditure stood at \$242.8 million for staff costs, operational expenses, depreciation and consultancies. As at 31 March 2005, the trading fund has a reserve of \$831.2 million, inclusive of \$212.4 million trading fund capital injected into the OFTA Trading Fund when it was set up in 1995. On the other hand, the operating expenses of the Broadcasting Division of TELA in 2004-05 stood at about \$29 million, against an income of about the same amount from licence fees that went back to general revenue.

59. The CA has to cope with a lot of research and administrative work arising from the streamlining of regulatory practices alongside with major reviews of legislative provisions, procedures and guidelines, and enhanced research and knowledge management activities, we envisage that there will be increase in the operating expenses of the new unified regulator at least for the

first few years since its inception. In addition, the administrative work for supporting a collective decision-making system for regulatory matters in the entire communications sector should not be underestimated. However, we envisage streamlined practices, operational synergy, and deregulatory measures will eventually result in savings. Any staff savings will be redeployed elsewhere and there is no question of forced redundancy. The net cost effect and its impact on the licence fees will need to be assessed in the medium term, say, three years after the commencement of operation of the CA.

Part D Timetable and transitional arrangements

60. Building on the implementation proposals in Part C above, we will introduce enabling legislation to set up the CA by repealing the Broadcasting Authority Ordinance and transferring the regulatory powers and functions of TA and BA to the CA. This will be a straightforward exercise to amalgamate the TA and BA.

61. OFTA and the Broadcasting Division of TELA will be amalgamated to form the OFCA, as a trading fund, to support the CA. This would require a Legislative Council Resolution to amend the scope of the OFTA trading fund. After the passage of the enabling legislation and the Legislative Council Resolution endorsing the expanded trading fund, the new CA supported by OFCA can officially start functioning.

62. In the second phase, the CA is expected to review and update regulatory guidelines and procedures, and contribute to the process of integrating the enabling legislation to establish CA, Broadcasting Ordinance and Telecommunications Ordinance into a composite Communications Ordinance. The tentative timetable for the transitional arrangements is appended below.

March to June 2006	Three-month public consultation
June to October 2006	Analysis of public comments and formulation of finalised proposals
November 2006	Introduction of legislation to set up the CA
1 st month from the passage of the legislation	To appoint members of the CA
4 th month from the passage of the legislation	CA commences operation. Second stage review commences

**Communications and Technology Branch
Commerce, Industry and Technology Bureau**

3 March 2006

**Competition Provisions
in the Broadcasting Ordinance (Cap. 562)**

13. Prohibition on anti-competitive conduct

- (1) Subject to subsections (4) and (5), a licensee shall not engage in conduct which, in the opinion of the Broadcasting Authority, has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.
- (2) The Broadcasting Authority may consider conduct to fall within subsection (1) as including, but not limited to –
 - (a) direct or indirect agreements to fix the price in a television programme service market;
 - (b) conduct preventing or restricting the supply of goods or services to competitors;
 - (c) direct or indirect agreements between licensees to share any television programme service market between them on agreed geographic or customer lines;
 - (d) limiting or controlling production, markets, technical development or investment;
 - (e) applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing them at a competitive disadvantage;
 - (f) making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.
- (3) Subject to subsection (4), a provision in an agreement is void in so far as it provides for or permits, whether directly or indirectly, conduct which contravenes subsection (1).
- (4) The Broadcasting Authority may –
 - (a) on an application made to it in the specified form by a licensee;
 - (b) on a prescribed ground; and
 - (c) by notice in writing served on the licensee, exempt conduct specified in the application from subsection (1) subject to such conditions as the Broadcasting Authority thinks fit specified in the notice.

- (5) Subsection (1) shall not apply to –
 - (a) any restriction imposed on the inclusion in a television programme service of a television programme produced wholly or substantially by the licensee of the service; or
 - (b) any prescribed restriction.
- (6) For the avoidance of doubt, it is hereby declared that nothing in this section shall prejudice the existence of any rights arising from the operation of the law relating to copyright or trademarks.

14. Prohibition on abuse of dominance

- (1) A licensee in a dominant position in a television programme service market shall not abuse its position.
- (2) A licensee is in a dominant position when, in the opinion of the Broadcasting Authority, it is able to act without significant competitive restraint from its competitors and customers.
- (3) In considering whether a licensee is dominant, the Broadcasting Authority shall have regard to relevant matters including, but not limited to –
 - (a) the market share of the licensee;
 - (b) the licensee's power to make pricing and other decisions;
 - (c) any barriers to entry to competitors into the relevant television programme service market;
 - (d) such other relevant matters as may be stipulated in guidelines concerning the test of dominance issued under section 4 by the Broadcasting Authority in consultation with the licensees in the relevant television programme service market.
- (4) A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Broadcasting Authority, the licensee has engaged in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.
- (5) The Broadcasting Authority may consider conduct to fall within the conduct mentioned in subsection (4) as including, but not limited to –
 - (a) predatory pricing;
 - (b) price discrimination, except to the extent that the discrimination

- only makes reasonable allowance for differences in the costs or likely costs of supplying the service or other matter;
- (c) making the conclusion of agreements subject to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the agreement;
- (d) discrimination in the supply of services to competitors.

15. Provisions supplementary to sections 13 and 14

- (1) The conduct of an associate of a licensee, or the position of the associate in a television programme service market, may be considered for the purposes of section 13 or 14.
- (2) A person sustaining loss or damage from a breach of section 13(1) or 14(1), or a breach of a licence condition, determination or direction relating to that section, may bring an action for damages, an injunction or other appropriate remedy, order or relief against the licensee who is in breach.
- (3) No action may be brought under subsection (2) more than 3 years after –
 - (a) the commission of the breach concerned referred to in that subsection; or
 - (b) the imposition under section 28 of a penalty in relation to the breach,
 whichever is the later.
- (4) For the avoidance of doubt, it is hereby declared that a breach of section 13(1) or 14(1) occurs when the Broadcasting Authority forms the opinion referred to in section 13(1) or 14(4) respectively.

16. Notice to licensee to cease certain conduct

The Broadcasting Authority may, by notice in writing served on a licensee –

- (a) require the licensee to cease and desist on and after a date specified in the notice from conduct specified in the notice as conduct which the Broadcasting Authority states in the notice that it is of the opinion that it contravenes section 13(1) or 14(1);
- (b) direct the licensee to take such steps as are specified in the notice, and within the period specified in the notice, as the

Broadcasting Authority considers appropriate for the purpose of securing, or assisting the securing of, the licensee's compliance with that section.

**Competition Provisions
in the Telecommunications Ordinance (Cap. 106)**

7K. Anti-competitive practices

- (1) A licensee shall not engage in conduct which, in the opinion of the Authority, has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.
- (2) The Authority in considering whether conduct has the purpose or effect prescribed under subsection (1) is to have regard to relevant matters including, but not limited to –
 - (a) agreements to fix the price in a telecommunications market;
 - (b) an action preventing or restricting the supply of goods or services to competitors;
 - (c) agreements between licensees to share any telecommunications market between them on agreed geographic or customer lines;
 - (d) the conditions of relevant licences.
- (3) Without limiting the general nature of subsection (1), a licensee engages in conduct prescribed under that subsection if he –
 - (a) enters into an agreement, arrangement or understanding that has the purpose or effect prescribed by that subsection;
 - (b) without the prior written authorization of the Authority, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person;
 - (c) gives an undue preference to, or receives an unfair advantage from, an associated person if, in the opinion of the Authority, a competitor could be placed at a significant disadvantage, or competition would be prevented or substantially restricted.

7L. Abuse of position

- (1) A licensee in a dominant position in a telecommunications market shall not abuse its position.
- (2) A licensee is in a dominant position when, in the opinion of the

Authority, it is able to act without significant competitive restraint from its competitors and customers.

- (3) In considering whether a licensee is dominant, the Authority shall take into account relevant matters including, but not limited to –
 - (a) the market share of the licensee;
 - (b) the licensee's power to make pricing and other decisions;
 - (c) any barriers to entry to competitors into the relevant telecommunications market;
 - (d) the degree of product differentiation and sales promotion;
 - (e) such other relevant matters as may be stipulated in guidelines referred to in section 6D(4)(a).
- (4) A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Authority, the licensee has engaged in conduct which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.
- (5) The Authority may consider conduct to fall within the conduct referred to in subsection (4) as including, but not limited to –
 - (a) predatory pricing;
 - (b) price discrimination, except to the extent that the discrimination only makes reasonable allowance for differences in the costs or likely costs of supplying telecommunications networks, systems, installations, customer equipment or services;
 - (c) making conclusion of contracts subject to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the contract;
 - (d) arrangements (other than arrangements the subject of an authorization referred to in section 7K(3)(b)) requiring a person seeking the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service either from the licensee providing the service or from another person;
 - (e) discrimination in supply of services to competitors.

7M. Misleading or deceptive conduct

A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring

telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service.

7N. Non-discrimination

- (1) Subject to subsection (4) and without prejudice to the operation of section 7K, a licensee who is in a dominant position in a telecommunications market shall not discriminate between persons who acquire the services in the market on charges or the conditions of supply.
- (2) Subject to subsection (4), an exclusive licensee or a carrier licensee shall not discriminate between a person who lawfully acquires and uses telecommunications networks, systems, installations, customer equipment or services to provide services to the public and any other person who is not providing a service to the public.
- (3) Discrimination includes discrimination relating to –
 - (a) charges, except to the extent that the discrimination only makes reasonable allowance for difference in the cost or likely cost of supplying the service;
 - (b) performance characteristics; and
 - (c) other terms or conditions of supply.
- (4) The prohibitions in subsections (1) and (2) apply only where in the opinion of the Authority such discrimination has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.

7O. Transitional provisions applicable to the repealed section 7

Where, immediately before the commencement of section 4 of the Telecommunication (Amendment) Ordinance 2000 (36 of 2000), there was in existence a licence granted or deemed to be granted under section 7, then, on and after that commencement, the licence shall, for the unexpired period of validity it had left to run immediately before that commencement and subject to the same conditions to which it was subject immediately before that commencement, be deemed to be a licence granted under this Ordinance, and the other provisions of this

Ordinance (including any power under this Ordinance to cancel, withdraw or suspend a licence granted under this Ordinance) shall apply accordingly.

7P. Authority may regulate changes in relation to carrier licensees

- (1) Where, after the commencement of this section, there is a change in relation to a carrier licensee –
 - (a) subject to subsection (2), the Authority may conduct such investigation as he considers necessary to enable him to form an opinion as to whether or not the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market; and
 - (b) (where the Authority, after conducting such investigation, forms an opinion that the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market) the Authority may, by notice in writing served on the licensee, direct the licensee to take such action specified in the notice as the Authority considers necessary to eliminate or avoid any such effect, but the Authority may not issue such direction if the Authority is satisfied that the change has, or is likely to have, a benefit to the public and that the benefit outweighs any detriment to the public that is, or is likely to be, constituted by any such effect.
- (2) An investigation under subsection (1)(a) may only be commenced within 2 weeks after the Authority knows or ought reasonably to have known (whichever is the earlier) that the change has occurred.
- (3) The Authority shall, before forming any opinion or issuing any direction under subsection (1) –
 - (a) give all carrier licensees and any interested person a reasonable opportunity to make representations to the Authority; and
 - (b) consider the representations, if any, made under paragraph (a).
- (4) Without limiting the general nature of the action that the Authority may direct a carrier licensee to take under subsection (1)(b), the action may include the procuring of modifications to the change.
- (5) A carrier licensee served with a notice under subsection (1)(b) shall comply with the direction in the notice.

- (6) Where there is a proposed change in relation to a carrier licensee, the licensee or any interested person may apply in writing to the Authority for consent to the proposed change.
- (7) Where the Authority, on receiving an application made under subsection (6) –
 - (a) forms an opinion that the proposed change would not have, or not be likely to have, the effect of substantially lessening competition in a telecommunications market, the Authority shall decide to give consent; or
 - (b) forms an opinion that the proposed change would have, or be likely to have, the effect of substantially lessening competition in a telecommunications market, the Authority may decide to –
 - (i) refuse to give consent;
 - (ii) give consent subject to the direction that the carrier licensee concerned takes the action that the Authority considers necessary to eliminate or avoid any such effect; or
 - (iii) give consent without issuing a direction under subparagraph (ii) if the Authority is satisfied that the proposed change would have, or be likely to have, a benefit to the public and that the benefit would outweigh any detriment to the public that would be, or would likely to be, constituted by any such effect.
- (8) The Authority shall, before forming any opinion, making any decision or issuing any direction under subsection (7) –
 - (a) give all carrier licensees and any interested person a reasonable opportunity to make representations to the Authority; and
 - (b) consider the representations, if any, made under paragraph (a).
- (9) The Authority shall, by notice in writing served on the carrier licensee referred to in subsection (6) and (where an interested person makes an application under that subsection) the interested person, inform the licensee and (if applicable) the person of –
 - (a) the decision made under subsection (7)(a) or (b)(i), (ii) or (iii);
 - (b) where a decision is made under subsection (7)(b)(ii), the action that the Authority directs the licensee to take.
- (10) Without limiting the general nature of the action that the Authority may direct a carrier licensee to take under subsection (7)(b)(ii), the action may include the procuring of modifications to the proposed change.

- (11) Where a proposed change referred to in subsection (6) takes effect –
- (a) pursuant to the consent given by the Authority under subsection (7)(a) or (b)(iii); or
 - (b) pursuant to the consent given, and in compliance with the direction issued, by the Authority under subsection (7)(b)(ii), the Authority shall not issue a direction under subsection (1)(b) in respect of the change.
- (12) Subject to subsection (13), the amount of any costs or expenses incurred by the Authority –
- (a) in making a decision under subsection (7)(a) or (b)(i), (ii) or (iii); or
 - (b) in relation to the processing of an application made under subsection (6),
- is recoverable as a debt due to the Authority from the carrier licensee, or the interested person, who makes the application under subsection (6).
- (13) The amount recoverable under subsection (12) shall not exceed the amount specified in Schedule 3.
- (14) The Authority shall publish –
- (a) where he forms any opinion or issues any direction under subsection (1), the opinion or direction; or
 - (b) where he forms any opinion, makes any decision or issues any direction under subsection (7), the opinion, decision or direction,
- in such manner as he considers appropriate.
- (15) The Secretary may by order published in the Gazette amend Schedule 3.
- (16) For the purposes of subsections (1) and (6), there is a change in relation to a carrier licensee if –
- (a) subject to subsection (17), a person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 15% of the voting shares in the licensee;
 - (b) a person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 30% of the voting shares in the licensee; or
 - (c) a person, either alone or with any associated person—
 - (i) becomes the beneficial owner or voting controller of more

than 50% of the voting shares in the licensee; or

- (ii) acquires the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation or otherwise, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person.

(17) Subsection (16)(a) does not apply if the person referred to in that subsection, when becoming the beneficial owner or voting controller of more than 15%, but not more than 30%, of the voting shares in the carrier licensee concerned –

- (a) either alone or with any associated person, is not, or does not concurrently become, the beneficial owner or voting controller of more than 5% of the voting shares in any other carrier licensee; and
- (b) either alone or with any associated person, does not have the power (including by the holding of voting shares), or does not concurrently acquire the power (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating any other carrier licensee or any other corporation or otherwise, to ensure that the affairs of such other carrier licensee are conducted in accordance with the wishes of that person.

(18) In this section –

“associated person” (相聯人士), in relation to a person, has the meaning assigned in the definition of “associated person” in section 2(1), but –

- (a) the references to “the licensee” in that definition shall be construed as references to the person; and
- (b) where the person is a corporation, the references to “associated corporation” in that definition shall be construed as references to a corporation over which the person has control, a corporation which has control over the person or a corporation which is under the same control as is the person;

“interested person” (有利害關係的人) means –

- (a) in relation to a change referred to in subsection (1), a person who does any of the acts referred to in subsection (16)(a), (b) or (c) in relation to the carrier licensee concerned;

- (b) in relation to a proposed change referred to in subsection (6), a person who proposes to do any of the acts referred to in subsection (16)(a), (b) or (c) in relation to the carrier licensee concerned;

“voting control” (表決控制權) means the control of or the ability to control, whether directly or indirectly, the exercise of the right to vote attaching to one or more voting shares in a carrier licensee –

- (a) by the exercise of a right, where such exercise confers the ability to exercise a right to vote or to control the exercise of a right to vote;
- (b) by an entitlement to exercise such a right to vote;
- (c) under a duty or obligation;
- (d) through a nominee;
- (e) through or by means of a trust, agreement or arrangement, understanding or practice, whether or not the trust, agreement or arrangement, understanding or practice has legal or equitable force or is based on legal or equitable rights; or
- (f) as a chargor of voting shares in a carrier licensee unless the chargee of the voting shares or the nominee of the chargee has given notice in writing to the chargor under the charge of an intention to exercise the right to vote attaching to such voting shares;

“voting controller” (表決控權人) means a person who either alone or with one or more other persons holds voting control;

“voting shares” (有表決權股份) means shares in the carrier licensee which entitle the registered owner of such shares to vote at meetings of shareholders of the licensee.

- (19) For the purposes of this section, the fact that the particular voting share or shares in relation to which a person is a voting controller cannot be identified is immaterial.

* * * * *

SCHEDULE 3
SPECIFIED AMOUNT

[s.7P]

\$200,000.

Economic Implications

The total value added of the telecommunications and broadcasting sectors is about \$23 billion in 2004, and its share in GDP is 1.8%. Setting up a unified regulator offers a good opportunity to take stock of the overall regulatory practices, identify room for improvement, and formulate a co-ordinated approach to address increasingly complicated issues brought by technological and market convergence. This would enhance the efficiency and effectiveness of the regulatory arrangement, and facilitate further development of the entire electronic communications sector but the overall economic benefits could not be quantified.

Financial Implications

2. Under the cost-recovery principle, the expenses of the unified regulator should be recovered from the licence fees and service charges to licensees.

3. We propose that the Office of the Telecommunications Authority (OFTA) and the Broadcasting Division of the Television and Entertainment Licensing Authority (TELA) should be amalgamated into the Office of the Communications Authority (OFCA) as the executive arm of the unified regulator. The OFTA's trading fund should be expanded into the OFCA trading fund with a wider scope covering the activities of regulation of the electronic communications sector.

4. OFTA had a revenue income of \$318.6 million against an expenditure of \$242.8 million in 2004-05. As at 31 March 2005, the trading fund had capital and reserves of \$831.2 million. The operating expenses of the Broadcasting Division of TELA in 2004-05 stood at \$29 million, offset by an income of about the same amount from licence fees. We envisage that there will be increase in the operating expenses of the new unified regulator at least for the first few years of its inception. However, streamlined practices, operational synergy, and deregulatory measures will eventually result in savings. The net cost effect will need to be assessed in the medium term. However, we do not see the need for further upfront capital injection into the new, expanded trading fund.

Civil Service Implications

5. While there will be redeployment of civil service posts from OFTA and the Broadcasting Division of TELA to the new OFCA, the proposal will not result in any immediate changes to the existing civil service establishment in OFTA and the Broadcasting Division of TELA. Any possible civil service implication arising from streamlined practices, operational synergy and deregulatory measures will need to be further examined in the long run. All staff savings will be redeployed and there is no question of forced redundancy.

**Establishment of the Communications Authority
Summary of the Administration's Responses to the Major Issues
raised in Public Consultation**

During the public consultation held in 2006, we received a total of 30 submissions. All submissions have been uploaded to the website of the Communications and Technology Branch of the Commerce and Economic Development Bureau (<http://www.cedb.gov.hk/ctb/eng/paper/submission4.htm>). We also attended the meetings of the Legislative Council Panel on Information Technology and Broadcasting on 17 March 2006 and 12 June 2006 respectively to gather and respond to the views of the Legislative Council Members and the deputations. The major issues arising from the public consultation are set out in the ensuing paragraphs.

Establishment of the CA

2. There was overwhelming support for the establishment of the CA and the proposal that the governing body should be in the form of a Board. There were suggestions that the chairperson of the Board should work full time in order to provide effective leadership and oversight, that the Board should possess the requisite expertise to understand and deal with the complicated issues in the communications sectors, and that the remuneration of the Board chairperson and members should reflect the nature and level of the expertise required. We agree that the Board should have the necessary expertise and be fully effective, and would maintain the flexibility to appoint the most capable person to chair the Board.

3. There were also views for CA Members to comprise members from the broadcasting and telecommunications industries, and their appointment by the Chief Executive to be endorsed by the Legislative Council. We reckon that the CA as a regulator of the industries would need to ensure impartiality and guard against conflict of interests. It would not be appropriate to include representatives of industry operators which were the target of the CA's regulation. CA Members should also be appointed on the basis of the individuals' expertise and free from politicisation.

Executive Arm of the CA

4. In the consultation document, we proposed that the executive support for the CA should be undertaken by the Office of the Communications Authority (OFCA), which would be formed by amalgamating the Office of the Telecommunications Authority (OFTA) and the Broadcasting Division of the Television and Entertainment Licensing Authority (TELA). We note that there were views which suggested that the executive arm of the CA should have a non-civil service structure. The main argument for this was that such a structure would have more operational flexibility. We addressed this issue in the consultation paper. We remain of the view that, as evidenced by the current arrangements of OFTA and TELA, the proposed OFCA would have the flexibility to recruit and hire external expertise. To go for the establishment of the unified regulator and the creation of a non-civil service executive department concurrently would be unwieldy and would distract the new regulator from its focus on the main policy, strategic and regulatory challenges.

5. Some members of the industry opined that as OFTA and the Broadcasting Division of TELA would be merged, there would be efficiency savings to make the reduction of licence fees possible. While we note such views, it would be up to the CA and the Secretary for Commerce and Economic Development, as the case may be, to consider the level of licence fees, taking into account the actual financial situation of the new regulator and the cost-recovery principle, after the inception.

Rationalising the BO and the TO

6. Views were expressed during the public consultation on the need to rationalise the BO and the TO without further delay. Some issues considered to be the priority included the consolidation of the competition regimes and cross-media and foreign ownership restrictions for broadcasting services.

7. The Administration fully notes the need for a piece of comprehensive legislation, and we have taken a conscious decision to

take a staged approach. We maintain that setting up the unified regulator and rationalising the BO and the TO at the same time would be a complex and protracted exercise which would delay the establishment of the CA. Adopting a staged approach will enable us to set up the CA in the shortest time possible. Upon establishment, the CA will be tasked to review and rationalise the BO and the TO together with the Administration.

8. As for the competition provisions under the two Ordinances, the Administration is now working towards the introduction of a cross-sector competition law and hope to introduce the Competition Bill into the Legislative Council within the 2009-10 legislative session. Given the policy objective of having a single competition law which can effectively and consistently deal with anti-competitive conduct in all sectors of the Hong Kong economy, the Administration's proposal is to repeal the competition-related provisions under the BO and the TO and to apply the relevant provisions under the future Competition Ordinance to the broadcasting and telecommunications sectors. This would address the prevailing concerns on the inconsistencies between the BO and the TO on competition matters.

Communications and Technology Branch
Commerce and Economic Development Bureau
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