

**For discussion
on 12 June 2017**

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

**Review of
Broadcasting Ordinance (Cap. 562) and
Telecommunications Ordinance (Cap. 106)**

PURPOSE

This paper outlines the initial directions of the review of the Broadcasting Ordinance (Cap. 562) (BO) and the Telecommunications Ordinance (Cap. 106) (TO) (Review).

BACKGROUND

Two-stage Approach to Modernise the Regulatory Regimes

2. Against the backdrop of rapid development of the broadcasting and telecommunications sectors, the Government has undertaken to take steps to modernise the regulatory regimes for broadcasting and telecommunications in response to the market needs and new technological development trends. A two-stage approach has been adopted in taking forward the initiative.

3. In the first stage, pursuant to the enactment of the Communications Authority Ordinance (Cap. 616) (CAO), the Government introduced a unified regulator, the Communications Authority (CA), in 2012, thereby completing the structural merger of the former Broadcasting Authority and the former Telecommunications Authority. No substantive changes to the regulatory and licensing regimes had yet been introduced at the said stage.

4. The Review represents the second stage of the Government's two-stage approach in revamping the regulatory regimes governing the broadcasting and telecommunications sectors. In this stage, the Government will carefully scrutinise the legislative and regulatory

provisions under, inter alia¹, the BO and the TO, with a view to modernising the statutes to ensure that they dovetail with technological advancements and market developments. As legislation is a means of reflecting the underlying policies in respect of broadcasting and telecommunications, in the course of the Review we would naturally revisit, re-affirm and refine, as necessary, some of our underlying policies.

THE ORDINANCES

5. The BO, the TO and their predecessor legislation were enacted decades ago upon the introduction of television and telecommunications (e.g. telephone and radio) technologies in Hong Kong². The governing ordinances (the Television Ordinance (TVO)³, the predecessor of the BO, and the modern version of the TO⁴) have been in operation since the 1960s.

6. The two ordinances have since been separately reviewed and amended on different occasions, with the introduction of the BO to replace the TVO in 2000 being the most significant updating exercise. Operational experiences and stakeholders' feedbacks have revealed that certain provisions in the ordinances are dated and could not meet modern day needs. The separate individual amendment exercises over the years have also resulted in different extents of misalignment between the regulatory regimes for television broadcasting (under the BO) and sound broadcasting (under the TO). To cope with the fast-growing and rapid-changing technological settings and market landscape, with the

¹ Other relevant legislation include the Broadcasting (Miscellaneous Provisions) Ordinance (Cap. 391) (B(MP)O) and the CAO.

² Non-commercial sound broadcasting in Hong Kong started in 1928, while commercial sound broadcasting began in 1949 with wired service, and in 1959 with wireless broadcast. Television broadcasting started in 1957 with cable service, and in 1965 with wireless broadcast.

³ The TVO, the predecessor of the BO, was first introduced in 1964 to specify statutory control of commercial wireless television broadcasting. It was repealed in 2000 by the BO which sought to, inter alia, provide a technology-neutral regulatory framework for television programme services. Amendments were correspondingly made to the TO in 2000 to regulate carrying of television programmes under a Fixed Carrier (Restricted) Licence (which has been replaced by the Unified Carrier Licence since 2008).

⁴ In 1962, the current TO was introduced to bring the law in line with the International Telecommunication Convention, Geneva, 1959, and to modernise regulatory provisions for different telecommunications means. In 1989, Part 3A was added to the TO, providing a self-contained regulatory regime for and stipulating the regulatory role of the Broadcasting Authority in sound broadcasting. In 2000, the TO was extensively amended to, inter alia, reorganise the licensing system, introduce statutory means to promote competition and to improve interconnection and access to land and buildings for telecommunications installations upon liberalisation of the telecommunications market.

unified regulator, the CA, established and having been in operation for a few years, it is an opportune juncture to review both the BO and the TO to streamline and align the relevant provisions as appropriate. A consistent theme that transcends the previous legislative review and amendment exercises is the underlying policy of pro-competition and light-handed regulatory approach in both the broadcasting and telecommunications sectors, and such approach has served the industries well, fostering development and engendering growth.

LATEST MARKET DEVELOPMENTS

Broadcasting

7. Broadcasting performs the important functions to inform, educate and entertain. The broadcasting industry has generally remained vibrant in Hong Kong, with a plurality of services offering viewers a wide array of infotainment choices⁵. It is also an integral part of Hong Kong's creative industries. Digital Terrestrial Television (DTT) has been developing well in Hong Kong since its introduction in late 2007, and nearly all households in Hong Kong could now receive DTT and analogue television programme services (including domestic free television programme service (free TV) or domestic pay television programme service (pay TV))⁶. Spectrum and network based television service remains one of the most pervasive sources of infotainment in Hong Kong.

8. The broadcasting landscape in Hong Kong has undergone arguably the most rapid changes in decades in the past five years or so. We witnessed the granting of two new free TV licences, a first in decades, the departure of a some forty-year-old free TV licensee from the market as well as the termination of a some sixteen-year-old pay TV licence. Applications for renewal of free TV, pay TV and sound broadcasting licences submitted by various incumbent licensees have been approved

⁵ As at 1 June 2017, there were in total 20 free TV, pay TV and non-domestic television programme service licensees, providing 588 television channels, of which 437 were receivable in Hong Kong. Among these licensees, three were free TV licensees and two were pay TV licensees. For analogue sound broadcasting, Radio Television Hong Kong and two commercial licensees were providing 13 analogue radio channels in total.

⁶ As at end-March 2016, 2.46 million television households (or 6.49 million viewers) out of a total of 2.48 million households could receive analogue broadcasting of free TV, representing a penetration rate of about 99%. Take-up rate of DTT services was close to 85%. Penetration rate for licensed pay TV was over 94%, with total number of subscribers at over 2.3 million. For radio broadcasting, the analogue sound broadcasting services practically covered the whole territory of Hong Kong.

by the Chief Executive in Council (CE in C) under the extant licensing regimes under the BO and the TO for the operators to continue their operations. The Government has recently decided that digital audio broadcasting (DAB) services should be discontinued in Hong Kong following the surrender of the relevant sound broadcasting licences by the three former commercial operators ahead of the expiry dates of the licences and having considered the future of the DAB market outlook. On broadcasting technology development, the most notable one is perhaps the emergence of Over-the-Top (OTT) television services, delivering television content to users via the Internet which is exempted from regulation under the BO. The blossoming of various forms of infotainment over the Internet and mobile platforms has not only changed the viewing habits of audience but also impacted on the market shares of traditional spectrum and network based broadcasters.

Telecommunications

9. Hong Kong prides itself on having one of the most sophisticated and successful telecommunications markets in the world. The local fixed telecommunications services market has been fully liberalised since 2003, with no limit on the number of licensees. All sectors of Hong Kong's telecommunications market have been liberalised with no foreign ownership restriction. The underlying policy goals are to maintain a level playing field in the market, to enable efficient use of resources and to ensure that consumers get the best services available in terms of capacity, quality and price. The Radio Spectrum Policy Framework published in 2007 epitomises such policy goals and objectives. Competition in telecommunications services has been keen. As at February 2017, there were four mobile network operators and 29 mobile virtual network operators providing mobile communications services to more than 17 million subscribers, representing a population penetration of 232%, one of the highest in the world. For Internet services, there were 26 facility-based operators and 192 services-based operators authorised to provide broadband Internet access services. Household penetration rate was 93% with around 2.6 million residential and commercial fixed broadband subscribers. For local fixed telecommunications services, there were 26 local fixed carriers, providing around 94 fixed lines per 100 households, also one of the highest in the world.

INITIAL DIRECTIONS OF REVIEW

10. The ensuing paragraphs outline our observations and initial

directions of the Review. Along such directions, detailed proposals and policy options are being developed. The stakeholders and the public at large will be invited to give their comments on our policy objectives and the proposed improvement measures in achieving such objectives.

11. The current version of the BO and the TO was enacted in 1960s, at a time when the communications landscape was vastly different from that of today. When such laws were first introduced, well before the emergence of alternative means of delivery (such as the Internet), spectrum-based (and prior to that, wired) broadcast was the predominant transmission technology enabling real-time dissemination of images and sound signals to the audience. That being the case, however, the existing control regimes are not obsolete in entirety. Indeed, a considerable number of the legislative intents remain relevant and applicable, albeit in varying degrees, in the modern day context. In forging the directions of the Review, we are mindful to assess the fundamental validity and applicability of the original policy objectives and legislative intents, followed by critical evaluation of the effectiveness of the current provisions in manifesting such objectives and intents so as to develop the appropriate level of control to meet present day needs, taking into account the multifaceted developments of the markets and technologies. In this connection, the key of the Review should be to ensure that the relevant provisions in the ordinances strike the right level of balance. The updated statutes should adequately regulate licensees to preserve the interests of audience and consumers, while at the same time provide latitude for the industries to continue to innovate and thrive.

Broadcasting

12. Despite the technological advancements witnessing the boom of online media platforms in the past decade or so, the long and well-established television broadcasting and sound broadcasting still are highly pervasive media of infotainment for the majority of households and drivers in Hong Kong. Television sets have long become, and still are, family essentials in Hong Kong, and radios are also commonly installed in private and commercial vehicles as standard provisions. In view of the pervasiveness, statutory licensing regimes for television broadcasting and sound broadcasting were put in place and should remain in place to ensure the competence of licensees and that they would deliver a wide range of quality programmes to cater for the taste and interests of the mass audience respectively under the BO and the TO.

13. Under the extant regimes, while the CE in C is to decide the granting (and renewal) of free TV and pay TV as well as sound

broadcasting licences (the services of which are still the most pervasive) after considering the recommendations of the CA, the CA is the authority for granting (and renewal of) non-domestic television programme service (non-domestic TV) licences (covering television services not primarily targeting Hong Kong) and other licensable television programme service (other licensable TV) licences (covering television services targeting a relatively small number of audience and hotels). Though the system has been operating effectively in general, we would review whether there is room for further streamlining and alignment.

14. Under the existing statutory regimes of the BO and the TO as well as the codes of practice and guidelines promulgated by the CA, there are a number of levels of control aiming to achieve the ultimate objective of ensuring the quality and diversity of broadcasting programmes. Notably, to avoid potential editorial uniformity and to foster plurality of content and views in Hong Kong media, statutory restrictions on cross-media ownership are in place to disallow free TV, pay TV and sound broadcasting licensees and persons exercising control of them and their associates from owning businesses of each other and other media outlets (such as advertising agencies and local newspapers). Such control on cross-media ownership is manifested through the restrictions imposed on “disqualified persons” (DPs) under the BO⁷ and the TO⁸ which catch a wide net of stakeholders. In relation to a free TV licensee or a pay TV licensee under the BO, any types of licensee under the BO⁹ (namely, free TV, pay TV, non-domestic TV and other licensable TV¹⁰), sound broadcasting licensees under the TO¹¹, operators in certain industries (namely, advertising agencies¹² and local newspapers¹³), as well as the persons exercising control of them and their associates, are DPs. In relation to a sound broadcasting licensee under the TO, free TV licensees and pay TV licensees under the BO¹⁴ and their associates¹⁵, a sound broadcasting licensee under the TO¹⁶, operators in certain

⁷ For example, the BO, Schedule 1, s.3.

⁸ For example, the TO, s.13G.

⁹ The BO, Schedule 1, s.4(1).

¹⁰ Except that a non-domestic TV programme service licensee is not a disqualified person in relation to a pay TV licensee: the BO, Schedule 1, s.4(1)(b).

¹¹ The BO, Schedule 1, s.5(a).

¹² The BO, Schedule 1, s.6(a).

¹³ The BO, Schedule 1, s.7(a).

¹⁴ The TO, s.13A, definition of “disqualified person”, (da)(i).

¹⁵ The TO, s.13A, definition of “disqualified person”, (da)(ii).

¹⁶ The TO, s.13A, definition of “disqualified person”, (c).

industries (namely, advertising agents¹⁷, businesses relating to supplying material for broadcasting by a sound broadcasting licensee¹⁸ and businesses relating to transmitting sound or television materials in Hong Kong or outside Hong Kong¹⁹), as well as the persons exercising control of them²⁰, are DPs.

15. There have been demands from stakeholders that the extent of control on cross-media ownership under the current statutory regimes should be reviewed, citing the ground that competition in the broadcasting industry is getting extremely keen as the convergence of the broadcasting and telecommunications technologies and services and the development of Internet capacity and functions are accelerating by leaps and bounds, thereby calling for flexibility for business consolidation for market players and investors in the multi-media businesses. There are also criticisms that the wide catchment of the extant DP regime, in particular that relating to the definition of “associates”²¹, has at times created legal and technical breaches only because of a relationship with the licensees so remote that the DP issue would unlikely give rise to any negative impact in terms of editorial uniformity and media concentration. We also note that some of our overseas counterparts are in the process of conducting review of their legislative provisions in respect of ownership and controls of their broadcasters amidst the rapid changes of technological settings.

16. It remains the policy objective of the Government that programmes broadcast by free TV, pay TV and sound broadcasting licensees should adequately cater for local audience’s taste and interests. Under the extant control regime, the aforementioned policy is manifested through the mechanism of foreign ownership control with the associated residency requirements on free TV and sound broadcasting licensees.

17. For example, under the existing mechanism, except with the prior approval in writing of the CA, the majority of the directors and principal officers of a free TV or pay TV licensee, including the principal officer in charge of the selection, production or scheduling of television programmes, must be “ordinarily resident” in Hong Kong²² and must

¹⁷ The TO, s.13A, definition of “disqualified person”, (a).

¹⁸ The TO, s.13A, definition of “disqualified person”, (b).

¹⁹ The TO, s.13A, definition of “disqualified person”, (d).

²⁰ The TO, s.13A, definition of “disqualified person”, (e).

²¹ The BO, Schedule 1, s.1(1), definition of “associate” and definition of “relative”.

²² Under the BO, s.2, “ordinarily resident in Hong Kong” means –

have been resident for at least seven continuous years²³. The CA's prior written approval has to be sought likewise if a voting controller not being ordinarily resident in Hong Kong is to hold, acquire or exercise beyond 2% (but less than 6%, or 6% or more but not more than 10%, or more than 10%) of the total voting shares of a free TV licensee²⁴. Operational experience has revealed that there is room for reviewing, for example, the threshold percentages requiring the CA's approval in certain circumstances to facilitate acquisition of shares for sole investment purposes thereby attracting injection of capital from investors without compromising the objective of restricting control by non-local residents. In reviewing this area, we will be mindful to ensure that the broadcasters should accord priority to Hong Kong audience's interests, while at the same time it would not unduly deter foreign investments in the local broadcasting market.

18. A free TV licensee or a sound broadcasting licensee must be a company incorporated in Hong Kong and must not be a subsidiary²⁵. The original objective of the non-subsiary restriction was, when first enacted, to require such licensees to only focus on their own broadcasting businesses, and remain an independent entity with management and control free from interference and influence by other companies of the same group, and facilitate the then calculation of the royalties which was no longer in place after 2001 (and therefore no longer relevant). We will examine whether such concerns over interferences are still applicable and the level of control still appropriate, in particular against the backdrop of emergence of online media and convergence of media technologies and services.

Telecommunications

19. Regarding telecommunications, the control regime has been largely effective since the full liberalisation of the telecommunications

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- (a) in relation to an individual, residence in Hong Kong for not less than 180 days in any calendar year, or residence in Hong Kong for not less than 300 days in any two consecutive calendar years; and
 - (b) in relation to a corporation, a corporation which satisfies the following –
 - (i) if the number of directors who actively participate in its direction –
 - (A) is two, each is an individual;
 - (B) is more than two, each of a majority of them is an individual, for the time being ordinarily resident in Hong Kong in accordance with paragraph (a) and has been so resident for at least one continuous period of not less than seven years; and
 - (ii) the control and management of the corporation is bona fide exercised in Hong Kong.

²³ The BO, s.8(4)(a)(iv).

²⁴ The BO, Schedule 1, s.20(1).

²⁵ The BO, s.8(3) and the TO, s.13F(b).

market. While fundamental updates to the regime are not envisaged at this stage, there are still individual areas that worth reviewing to enhance the operation of the regime. For instance, stakeholders have been urging the Government to consider the enhancement of protection of underground telecommunications facilities²⁶ by imposing criminal liability (apart from the existing provision of civil remedies) to help forestall damage caused by reckless excavation works and lower the risk of service interruption that would cause massive inconvenience to the public and businesses. Telecommunications operators have submitted that telecommunications have become an essential service to different kinds of business as well as individual users and the interruption of the transfer of vital information by telecommunications may have dire consequences and is certainly against the public interest.

Alignments between the BO and the TO

20. There are areas that require rationalisation and alignment between the BO and the TO.

21. One of the major parts of the TO currently houses the sound broadcasting control regime. Such regime is quite distinct from the rest of the TO that is on telecommunications matters. We are actively exploring the case for transferring the sound broadcasting control regime to the BO, and the need for aligning as appropriate the relevant control provisions regarding television broadcasting and sound broadcasting.

22. Other areas of alignment that might be required include the penalty levels of different breaches of the regulatory provisions. For example, the TO, the BO and the B(MP)O all empower the CA to impose a financial penalty on a licensee in the event of any contravention of a licence condition, a requirement under the ordinances, a direction issued by the CA, etc., but the maximum amounts of financial penalties as stipulated in the TO, the BO and the B(MP)O are different. Differences are also found in the appeal mechanisms in respect of broadcasting and telecommunications matters under the BO, the B(MP)O and the TO. While the BO²⁷ and the B(MP)O²⁸ provide that a broadcasting licensee may appeal to the CE in C against the decisions of the CA, there is no appeal mechanism on telecommunications-related regulatory matters other than matters handled under section 7Q (concerning exploitative

²⁶ The TO, s.18.

²⁷ The BO, s.34, for television broadcasting licensees.

²⁸ The B(MP)O, s.26, for sound broadcasting licensees.

conduct) under the TO²⁹. That said, we are mindful that there are ongoing judicial review and appeal cases concerning such an appeal mechanism under the BO. We will take into account further development of the cases to decide whether there is a need to and if so, how to refine the appeal mechanism.

Way Forward

23. In conducting the Review, the Government will be mindful of the need to streamline the regulatory regimes to meet modern day needs, with a view to facilitating licensees' efficient operation while without compromising the integrity and effectiveness of the control systems. The modernised legislative control regimes should facilitate the promotion of investment and competition in the broadcasting and telecommunication markets to enhance Hong Kong's position as the regional broadcasting and telecommunications hub. In the Review, we would take account of the experiences gained in administering the two ordinances, stakeholders' views, technological advancements, practices in other advanced economies and trends in the local market.

24. As outlined above, the Government has preliminarily identified a number of areas in the BO and the TO that warrant in-depth review and updating, and that stakeholders and the public should be consulted on how best to amend the statutes to address the issues. The nature of such issues varies widely, from relatively straightforward amendments such as aligning the provisions of the BO and the TO with respect to television broadcasting and sound broadcasting, to high-level, far-reaching policy matters relating to the fundamental intent of the legislative regime. The Government is drawing up its proposals, with a view to launching a public consultation exercise within 2017/18.

25. Depending on the feedbacks received from the public consultation, we may engage the public and/or stakeholders further on specific topic(s) that require more focused discussions. Subject to the consultation outcomes, we will prepare legislative amendments for introduction into the LegCo.

26. The Review considers whether and what amendments have to be made to the relevant ordinances to update the statutory control regimes. However the Review per se would not preclude the statutory

²⁹ The TO, s.32N.

regulator's ongoing efforts to review and update their guidelines and codes made under the current legislative regime. As the policy Bureau, CEDB would ensure that the relevant exercises would dovetail. The ultimate objective is to foster effective licensing and regulatory regimes, with the most updated legislative and policy/administrative frameworks complementing each other.

Communications and Creative Industries Branch
Commerce and Economic Development Bureau
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