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Report of the Bills Committee on Communications Authority Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Communications Authority Bill (the Bills Committee).

Background

2. Under the existing regulatory regime, the Broadcasting Authority¹ (BA) is responsible for the regulation of television and sound broadcasting services in accordance with the Broadcasting Ordinance (Cap. 562) (BO) and Part IIIA of the Telecommunications Ordinance (Cap. 106) (TO) respectively. The Telecommunications Authority (TA) is responsible for the regulation of the telecommunications sector and the technical standards for broadcasting services. Since the establishment of the Office of the Telecommunications Authority² (OFTA) in 1993, the Director-General of Telecommunications, who heads the OFTA, has been appointed as the TA under section 5 of the TO.

3. Rapid advancement in technology is blurring the traditional boundaries between telecommunications and broadcasting, leading to convergence of the two markets. According to the Administration, Hong Kong needs to restructure its regulatory institutional arrangements and review the overall regulatory regime and legislation for telecommunications and broadcasting to keep pace with technological development.

¹ The Broadcasting Authority is a statutory body established under the Broadcasting Authority Ordinance (BAO) (Cap.391).

² The Office of the Telecommunications Authority is operating under the Trading Funds Ordinance (Cap. 430).

4. On 3 March 2006, the Administration published a consultation paper to seek public views on its proposal to merge the BA and the TA into a unified regulator, namely the Communications Authority (CA), for the efficient, effective and coordinated regulation of a converging electronic communications sector. The Administration proposed a two-staged approach -

- (a) upon its establishment, the CA would continue to enforce the existing provisions of the BO, the TO and other relevant ordinances, and administer all matters currently under the purview of the BA and the TA; and
- (b) the CA would be tasked to review and rationalize together with the Administration the BO and the TO to ensure the consistent and effective regulation of the broadcasting and telecommunications sectors.

5. According to the Administration, there was widespread and overwhelming support for the proposal of establishing the CA after the consultation. The Administration subsequently introduced the Communications Authority Bill (the Bill) into the Legislative Council (LegCo) on 30 June 2010.

The Bill

6. The Bill seeks to:

- (a) establish the CA;
- (b) transfer the functions of the BA and the TA to the CA;
- (c) dissolve the BA; and
- (d) provide for incidental and connected matters.

The Bills Committee

7. At the House Committee meeting held on 2 July 2010, Members agreed to form a Bills Committee to study the Bill. Hon LAU Kong-wah and Dr Hon Samson TAM Wai-ho were elected Chairman and Deputy Chairman of the Bills Committee respectively. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has held 11 meetings with the Administration, and exchanged views with representatives

of the BA at two meetings on the establishment of the CA, the provisions in the Bill and related matters. On 7 October 2010, the Bills Committee also received views from stakeholders, including the broadcasting and telecommunications industries as well as trade associations. A list of organizations/individuals that have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

8. The Bills Committee generally supports the legislative intent of the Bill to establish the CA as a single unified regulator to take over the existing functions of the BA and the TA in regulating the broadcasting and telecommunications sectors. In the course of deliberation, members have raised concerns about the adoption of the staged approach, the establishment of the CA, its functions and composition, meetings and transaction of business, annual reports, disclosure of interests, the roles and functions of the Director-General of Communications (DG Com) and the Office of the Communications Authority (OFCA), delegation of functions, immunity, payments, exemption in relation to transfer of custody of records. and their use, the offence to give or disclose information obtained or received officially, the proposed amendment to section 33 of the TO, amendments related to and consequential upon the establishment of the CA, and the enforcement of the relevant provisions under the future competition law in the broadcasting and telecommunications sectors.

Adoption of the staged approach

9. According to the Administration, a staged approach will be adopted in modernizing the regulatory regime for the broadcasting and telecommunications sectors. The Administration will first establish the CA through the structural merger of the TA and the BA to enable the CA to deal with increasing market convergence as soon as possible. Upon establishment, the CA will take over the existing functions of the TA and the BA under the TO, the BO and other relevant ordinances applicable to the broadcasting and telecommunications sectors. The Administration and the CA will then carry out a review of the existing regulatory regimes and introduce legislative changes to update and rationalize the TO and the BO.

10. Some deputations including Hong Kong Human Rights Monitor, Internet Professional Association and PCCW Limited had expressed the view that the review of the regulatory regimes on telecommunications and broadcasting should be conducted prior to or concurrently with the establishment of the CA. Some of them considered it necessary to review the cross-media ownership restrictions having regard to the popularity and

prevalence of cross-media services on the Internet and the need to promote the development of a digital economy. Some deputations also considered that the Bill should include provisions specifying the function and task of the CA in reviewing media ownership and the relevant ordinances.

11. To meet the challenges brought about by rapid technological convergence, Hon WONG Yuk-man is of the view that a comprehensive review of the relevant outdated ordinances and regulations governing the broadcasting and telecommunications sectors should be conducted in parallel with the setting up of the CA.

12. The Administration has explained that there would be difficulty to pursue the option of reviewing the legislative frameworks in tandem with the setting up of the CA. Combining the two would be a very complex and protracted exercise and would delay the establishment of the CA. The staged approach would be more pragmatic and enable the Administration to modernize the two regulatory regimes in a more efficient manner.

13. The Administration has assured the Bills Committee that the Administration is fully and firmly committed to reviewing the TO and the BO as a matter of priority immediately upon the establishment of the CA. The Secretary for Commerce and Economic Development (SCED) will make clear during the resumption of Second Reading debate on the Bill the policy intention of and the Administration's commitment to the review of the TO and the BO. The review will cover issues including cross media ownership and foreign ownership restrictions, licensing authorities and appeal mechanisms, and the regulatory regimes for the telecommunications and broadcasting sectors. The Administration will devise a more detailed plan together with the CA upon its establishment on the areas to be reviewed and the relevant timetable.

Establishment of the Communications Authority (clause 3)

14. Clause 3 of the Bill establishes a body corporate, the CA, as the unified regulator merging the BA and the TA, to administer and enforce the existing regulatory and licensing regimes for the telecommunications and broadcasting sectors.

15. Hon Emily LAU has suggested that the Administration should spell out in the Bill that the CA is "an independent statutory body". Dr Hon Margaret NG has also proposed moving a Committee Stage amendment (CSA) to specify the independent status of the CA in the long title of the Bill. The Administration has advised that the status of the CA and its relationship with the Government are set out in clause 3(3), which states that the CA "is not a servant or an agent of the Government nor does it enjoy any status,

immunity or privilege of the Government". The powers conferred on the CA through the Bill and various related legislation clearly allow the CA to exercise its powers in its own right. It is not in line with the drafting convention to describe a statutory body as "independent" in local legislation. There is no such description in the legislation for other local statutory bodies which operate independently or for the overseas unified regulators in Australia, Canada, the United Kingdom (UK) and the United States (US). The Administration sees no need to stipulate in the Bill that the CA is an independent body.

Functions of Authority (clause 4)

16. Clause 4 of the Bill provides for the functions to be performed by the CA including administering and enforcing the BAO (to be renamed as the Broadcasting (Miscellaneous Provisions) Ordinance (B(MP)O)), the BO, the TO, the Unsolicited Electronic Messages Ordinance (Cap. 593) (UEMO) and other relevant ordinances.

17. While noting the BA's view that the public mission of the CA should be succinct and balanced and should serve to safeguard public interest, Hon LEE Wing-tat, Hon Wong Yuk-man, Hon Emily LAU and Dr Hon Margaret NG share some deputations' view that the CA should strive to protect freedom of information and expression, and also to promote competition in and development of the communications market. The Chairman is of the view that while it is incumbent on the CA to uphold freedom of expression, it is equally important to strike a balance in ensuring responsible expression in television and radio programmes to safeguard public interest.

18. The Administration has advised that it is the established policy objective to uphold the freedom of speech guaranteed under the Basic Law, and statutory bodies in Hong Kong including the CA should follow such policy. It is also the established policy and the mission of the CA to achieve the objectives of promoting competition, innovation and investment in the communications market. Nevertheless, the regulatory objectives and functions of the CA may need to be adjusted from time to time having regard to its own state of development, the fast changing telecommunications and broadcasting landscape, and the commitment for the CA to further the development of the communications market. The Bill should leave flexibility for the CA to adapt to these changes.

19. Hon Emily LAU considers that the Bill should be amended to include the public mission of the CA, in particular its mission of upholding the freedom of expression, with reference to relevant provisions in the legislation of overseas jurisdictions. Hon CHAN Kam-lam, however, considers it sufficient to set out the powers and functions of the CA in the Bill. He

agrees that flexibility should be allowed for the CA to make the necessary adjustment having regard to the development of the communications and broadcasting markets in Hong Kong.

20. In the light of views expressed by members, the Administration agrees to move a CSA to clause 4 of the Bill to set out the following matters to which the CA must have regard in performing its functions -

- (a) to foster an environment that supports a vibrant communications sector to enhance Hong Kong's position as a communications hub in the region;
- (b) to encourage innovation and investment in the communications market;
- (c) to promote competition and the adoption of best practices in the communications market for the benefit of the industry and consumers; and
- (d) to act in a manner consistent with the provisions of the Hong Kong Bill of Rights Ordinance (Cap. 383).

21. The Bills Committee has noted that apart from administering and enforcing the BO, the TO and other relevant ordinances, the CA is tasked under clause 4(3) to tender advice to SCED on any legislation, legislative proposals and regulatory policies relating to telecommunications, broadcasting, anti-spamming or activities connected with the telecommunications or broadcasting sectors. In this connection, Dr Hon Margaret NG opines that the Administration should consider giving a greater role to the CA in making policies for the electronic communications industry.

22. The Administration has advised that the formulation of policies remains principally the role of the Government, and the CA as a statutory regulatory body will offer advice during the policy formulation process. This is the relationship between the Government and most statutory bodies in Hong Kong, and also the case of overseas unified regulators in the UK, Australia and Canada. In the development of Government policies such as digital audio broadcasting and digital terrestrial television, the BA has been greatly involved in providing useful advice which was given considerable weight and subsequently taken on board by the Administration. The Administration has assured the Bills Committee that the CA will play an important role in the formulation of Government policies in respect of the electronic communications sectors. The functions of the CA in tendering advice on policies and legislative proposals have also been provided for in the Bill.

23. Dr Hon Margaret NG has proposed that the long title of the Bill should refer to "an independent Communications Authority", and that clause 4 should provide that the CA is to "carry out its functions under this Ordinance without interference from the Government". The Bills Committee has noted the advice of its legal adviser that it is unlikely that Dr NG's proposed amendments to the Bill, if enacted, would affect the courts' assessment of the independence of other statutory bodies or corporations established under existing ordinances which do not contain provisions similar to the proposed amendments.

24. The Administration has advised that while it is the policy intention for the CA to act as an independent statutory body, the Administration is not aware of any establishing ordinance in respect of any existing local statutory body being formulated to include the word "independent". The Administration has conducted research and identified relevant provisions in respect of various legislation which serve to reflect the status of statutory bodies that act independently, namely, the Independent Police Complaints Council, the West Kowloon Cultural District Authority, the Financial Reporting Council, the Electoral Affairs Commission, the Equal Opportunities Commission, and the Urban Renewal Authority. The relevant ordinances have all used wording similar to that in clause 3(3) of the Bill to describe the status of the body concerned. Moreover, the CA would depend on the OFCA Trading Fund for its finance, and it would also rely on the DG Com as well as the OFCA to implement its decisions. Including the references proposed by Dr NG in the Bill to signify the independent position of the CA will also raise questions such as whether the CA would rely on Government funding or it has its own funding source, or whether the CA would rely on the future OFCA to implement its decisions. As such, the Administration considers it unacceptable to amend the long title and clause 4 of the Bill as proposed by Dr NG.

Annual report (clause 6)

25. Clause 6 of the Bill requires the CA to submit annual reports to the Chief Executive (CE) and to table them in LegCo. The CA's annual report will include its work relating to telecommunications, broadcasting, anti-spamming or activities connected with the telecommunications and broadcasting sectors.

26. The Administration has advised that similar to the existing practice of the BA, statistics on complaints and major regulatory decisions that are of public concern will be included in the annual reports of the CA. On complaints that are of public concern, such as the investigation into anti-competitive conduct, publicity arrangements such as press releases and

press conferences will be arranged for major regulatory decisions made. According to rule 21(3) of the Rules of Procedures of LegCo, the designated public officer presenting a paper to LegCo may address the Council with the permission of the President of LegCo. This allows SCED to address LegCo when tabling the annual report of the CA if the case so requires. In this connection, Hon LEE Wing-tat has suggested that SCED should address the Council when tabling the annual report of the CA.

27. The Administration has further advised that there are different channels for LegCo Members to discuss and clarify issues in respect of the annual report or the operation of the CA, for example, through discussion at the Panel on Information Technology and Broadcasting (the ITB Panel), raising questions or moving motions for debate at the Council meetings. Though not set out as a requirement in the legislation, the chairperson of the CA and the DG Com heading the OFCA for providing support for the CA will follow the existing practice of members of the BA and officers in the OFTA and the TELA in attending meetings of the ITB Panel to brief members on various aspects of the work of the CA.

Composition of the Communications Authority (clauses 8 and 9)

28. Clauses 8 and 9 of the Bill provide for the composition of the CA and matters relating to the chairperson and vice-chairperson of the CA. The CA will comprise five to ten non-official members (including a non-official chairperson) and a public officer, all of whom are to be appointed by the CE, and the DG Com, in accordance with the requirements of the job, as an ex-officio member.

Six-six Rules and gender mainstreaming

29. Hon Emily LAU has urged the Administration to undertake that the appointment of members to the CA would be in compliance with the six-six Rules³ and the principle of gender mainstreaming⁴. The Administration has stressed that these are established Government policies and need not be specifically provided for in the Bill. The Administration stands ready to confirm its commitment to adhere to these policies while appointing CA members, similar to the arrangements for appointing BA members.

3 The six-six Rules mean that a non-official member of any advisory and statutory body should not serve for more than six years in any one capacity and that a person should not serve as a member on more than six advisory and statutory bodies at the same time.

4 Gender mainstreaming is advocated by the United Nations in promoting women's interests and gender equality by taking into account the needs and perspectives of both genders in the decision-making process. It seeks to enable both genders to have equal access to and benefit from society's resources and opportunities, such that women and men can both fully develop their potential and contribute to society.

Appointment mechanism

30. The Bills Committee has noted that while there is no parliamentary involvement in the appointment process of the Australian Communications and Media Authority and the Canadian Radio-Television and Telecommunications Commission, the Chairman-elect of the Office of Communications of the UK has to go through a non-binding pre-appointment hearing at the House of Commons. The Bills Committee has also noted that the Commissioners of the Federal Communications Commission of the US are appointed by the US President with the confirmation of the Senate.

31. Members of the Bills Committee in general have expressed concern about the wide power of the CE in making appointments to the CA. Hon Emily LAU, Hon LEE Wing-tat, Hon Paul TSE and Hon Ronny TONG have suggested that, to enhance transparency and public accountability, the appointments to the CA should be endorsed by LegCo. The Administration should also consider amending the Bill to require the chairperson-designate of the CA to go through a pre-appointment hearing at LegCo.

32. The Administration has advised that the prevailing appointment mechanism, i.e. the CE to make appointments, for advisory boards/committees and statutory bodies adopted in Hong Kong has been well-established and functioning smoothly. The CE would adopt the same mechanism for appointing CA members whereby appointments would be made in a fair, open and transparent manner to ensure impartiality and guard against conflicts of interests.

33. Hon Emily LAU has opined that the Administration should consider allowing industry bodies and different sectors of the community to nominate members to the CA to enhance transparency of its appointment mechanism. Dr Hon Samson TAM is of the view that the industry bodies should be allowed to make nominations to the CA. The Administration should also consider appointing academics and the younger generation of the industry to the CA. Hon LEE Wing-tat considers that the institution of the appointment mechanism should prevent people of the same view from being appointed to the CA. Moreover, the CA should comprise a certain number of non-official members to be nominated or elected by community groups, such as human rights organizations, ethnic minorities and the Hong Kong Journalists Association. Hon Mrs Regina IP is of the view that given the uniqueness of the electronic communications industry, the DG Com and members appointed to the CA should possess the requisite industry knowledge and expertise. In this connection, Dr Hon Margaret NG and Hon Emily LAU suggest that clause 8 should spell out clearly the criteria (such as possession of requisite professional knowledge and expertise) for appointment to the CA.

34. The Administration has advised that as the CA will be an industry regulator, nominations from the industry will likely give rise to conflicts of interest. The Administration is also not aware of any such arrangement in the overseas legislation for their unified regulators. Nevertheless, to address members' concerns, the Administration proposes to move CSAs to include additional criteria for appointment, other than those criteria in clause 8(1)(a) that the person should not be a public officer and should have been ordinarily resident in Hong Kong for at least seven years. Under the proposed amendment, non-official members to be appointed by the CE must, in the opinion of the CE, have –

- (a) extensive knowledge of, experience in or exposure to, communications services; or
- (b) knowledge of or experience in management, accounting, finance, education, law or community service, or such professional or other experience as would render the person suitable for the appointment.

Membership

35. Dr Hon Margaret NG, Hon Emily LAU, Hon LEE Wing-tat and Hon WONG Yuk-man have queried that with its small membership, the CA might not be able to effectively and efficiently perform the complex and heavy duties of the TA and the BA after the merger.

36. The Administration has advised that to address public concern about the small membership of the CA, the proposed number of non-official members of the CA has been increased from 5 to "no fewer than 5 and no more than 10" (including a non-official chairperson). The CA will also include a public officer and the DG Com. Moreover, the Bill provides for the delegation of powers from the CA to its committees, the DG Com or any public officer in a manner similar to that of the TA and the BA. According to the Administration, the TA is currently a public officer, i.e. the Director-General of Telecommunications, who carries out his duties with the assistance of the staff of the OFTA. Public officers in the OFTA could perform functions of the TA under delegation as provided for in the TO. As for the BA, the Commissioner for Television and Entertainment Licensing (CTEL) is the principal executive officer of the BA. CTEL can also exercise powers of the BA under delegation. The Administration anticipates that the CA will suitably delegate its powers after its establishment in order to maintain the efficiency and the effectiveness of its work.

37. Hon Emily LAU has expressed concern about the possible conflicts of interests if there are non full-time members from the industry. Referring to the high remuneration for members of overseas regulatory bodies, she considers that full-time CA members with remuneration should help minimize possible conflict of interests. Hon WONG Yuk-man opines that full-time members with the requisite professional expertise and experience should be appointed to deal with the more complex industry-specific issues. Hon LEE Wing-tat has expressed disappointment that the BA has been slow in dealing with complaints received, such as the complaint about anti-competitive conduct. Referring to the appointment of associate members to the Australian Communications and Media Authority for the purpose of conducting inquiry or investigation, Mr LEE suggests there should be one or more full-time CA members dedicated to dealing with complaints. The Chairman of the Bills Committee points out that the Canadian Radio-Television and Telecommunications Commission currently has 12 full-time members and no part-time members. He has requested the Administration to consider appointing full-time members to the CA, in view of the important and heavy duties of the CA.

38. The Administration has advised that complaints received by the BA are processed in accordance with the established procedures and the relevant legislation. Time is required for processing the complaints, e.g. gathering the necessary information from the parties concerned and for the parties to state their case, regardless of whether the members are appointed on a full-time basis or not.

39. The Administration has further advised that unlike some other overseas unified regulators where the chairpersons and members have executive functions and responsibilities, the CA will be serviced by a civil-service executive arm (i.e. OFCA) providing secretarial, legal and technical support. The performance of the functions of the CA will be implemented through the DG Com supported by the OFCA, with around 500 staff members transferred from the OFTA and the TELA. In addition to clause 13 of the Bill which provides for the disclosure of interests by CA members, the two-tier structure (the CA serviced by civil-service executive arm) would help ensure good governance of the CA.

40. The Administration has assured the Bills Committee that the CE would take into account the concerns about the workload of the CA when appointing members to the CA. As a matter of administrative law, the CE is required to exercise his power of appointment in a reasonable manner. Flexibility would be allowed for the appointment of full-time members to the CA, if future workload of the CA warrants such an arrangement. The level of honorarium for members of the CA and its committees would be commensurate with the amount of workload and the time committed. If a

decision is made for the appointment of a full-time chairperson of the CA, the ITB Panel will be informed. For the sake of clarity and the avoidance of doubt, the Administration will move a CSA adding a new subclause (9) to clause 8 to provide for the CE's power to determine the remuneration and the terms and conditions of appointment to the CA.

Meaning of "public officer"

41. Under section 3 of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1), "public officer" means any person holding an office of emolument under the Government, whether such office is permanent or temporary. Members have enquired whether non-official members of the CA would become public officers as defined in section 3 of the IGCO if they are appointed to work on a full-time basis under clause 8(1)(a) of the Bill, and whether "public officer" should be properly defined in the Bill to provide for certainty.

42. The Administration has advised that according to legal advice, non-official members of the CA so appointed do not fall within the definition of "public officer" in the IGCO as they are not holding an office of emolument under the Government, irrespective of whether they work on a full-time or part-time basis. As such, the Administration does not consider it necessary to provide for a different definition of the term "public officer" in the Bill.

43. The Bills Committee has noted that if a CA member appointed under clause 8(1)(a) subsequently becomes a public officer, the member concerned will have to resign under clause 8(5). Dr Hon Margaret NG has suggested that instead of stipulating that a member appointed under clause 8(1)(a) must resign from the CA upon becoming a public officer, clause 8(5) should be amended to the effect that the appointment will lapse immediately upon the member becoming a public officer. Having examined the suggestion, the Administration agrees to move a CSA to amend clause 8(5) to the effect that the office of a non-official member would become vacant if the member becomes a public officer.

Chairperson and vice-chairperson

44. The Bills Committee has questioned that under clause 9(1)(a), the chairperson of the CA must be a non-official member appointed under clause 8(1)(a), but there is no such requirement for the vice-chairperson appointed by the CE under clause 9(1)(b). The Administration has explained that the proposed arrangement is similar to that of the BA where the Permanent Secretary for Commerce and Economic Development (Communications and Technology) is currently the vice-chairperson of the BA. The

Administration considers that the appointment of a public officer to the CA is appropriate and would facilitate good communication between the CA and the Administration.

45. The Bills Committee has enquired about the rationale for the CE to revoke appointment of the chairperson and the vice-chairperson of the CA under clause 9(2), and the rationale for the chairperson or vice-chairperson to resign from office at any time by notice without having to give any reasons under clause 9(3). Some members including Hon WONG Ting-kwong have suggested that the Bill should specify the criteria for the revocation of appointment of the chairperson and vice-chairperson, similar to those for declaring the vacancy of CA members in clause 8(4).

46. According to the Administration, the reasons for which the CE may declare the office of a CA member to be vacant are clearly stipulated in clause 8(4). Under the Bill, an office will be declared vacant if the member –

- (a) has been absent from the meetings of the CA without its permission for a continuous period longer than three months;
- (b) becomes bankrupt and enters into a voluntary arrangement with his or her creditors, within the meaning of the Bankruptcy Ordinance (Cap. 6);
- (c) becomes incapacitated by physical or mental illness;
- (d) ceases to be ordinarily resident in Hong Kong; or
- (e) is otherwise unable or unfit to perform the functions of a member of the CA.

Upon the request of Hon Emily LAU (see paragraph 60(c) below), the Administration will move a CSA to provide for an additional ground (i.e. failure to comply with the disclosure of interest requirements) on which an office will be declared vacant.

47. The Administration has also advised that clauses 9(2) and (3) are standard provisions similar to those in the BAO. Under the administrative law, the CE is required to exercise his power in a reasonable manner. Similar to members of other statutory/advisory bodies, a CA member should also have the discretion to resign by notice in writing. In view of members' concerns, the Administration will move a CSA to clause 9(2) to the effect that the CE may revoke any appointment of the chairperson or vice-chairperson if he is of the opinion that the chairperson or vice-chairperson is unable or unfit

to perform the functions of chairperson or vice-chairperson due to any reason referred to in section 8(4) or other sufficient cause.

Meetings (clause 10)

48. Regarding clause 10 which makes provisions for meetings of the CA, Hon LEE Wing-tat, Hon Emily LAU, Hon Mrs Regina IP and Dr Hon Samson TAM have requested the Administration to consider opening the meetings (except when involving sensitive information) of the CA and its committees to the public, and posting the minutes of meetings on the website of the CA to enhance transparency of its operation and public accountability.

49. The Administration has advised that overseas legislation in the UK, the US, Australia and Canada does not require the unified regulators to open their meetings to the public. The Administration considers it inappropriate to mandate the CA to open its meetings to members of the public. Given the vast amount of commercially sensitive information it would handle, the CA should have the flexibility to decide whether and when meetings would be open to the public. Under clause 10(5), the CA may make standing orders to regulate, among other matters, the procedures to be followed at its meetings, which may allow public participation therein or the posting of agendas and minutes of meetings on its website. It is anticipated that the CA would consider opening the meetings of some of its committees to the public as appropriate, as is the current practice of the BA. The CA would account for its work no less transparently than is presently the case, such as issuing press releases to explain its decisions, consulting the trade and public on various regulatory issues, and submitting annual reports to LegCo.

50. On participation in meetings by telephone, video conferencing or other electronic means under clause 10(6), the Chairman and some members of the Bills Committee including Hon Emily LAU have expressed concern about possible abuse of such means by the CA members, and the confidentiality issues given the vast amount of commercially sensitive information the CA would discuss during its meetings. To safeguard against possible abuse and to ensure security of information, the Chairman has proposed that clause 10(5) should be amended to provide for the CA to set specific rules/standing orders governing member participation in CA meetings by electronic means.

51. The Administration has advised that in keeping with technological advancement, similar provisions are provided for newly set up statutory/advisory bodies to enable members who are unable to attend the meeting in person to participate in the discussion. To address the Chairman's concerns, the Administration agrees to move CSAs to amend clauses 10(5) and 10(6) to the effect that the CA is to make standing orders,

including those to ensure that the confidentiality of the meeting would not be compromised if participation through electronic means would be allowed.

52. At the request of the Bills Committee, the Administration has also undertaken to inform the ITB Panel of the rules/standing orders made by the CA for the purpose of regulating the number of meetings to be held by the CA in any year, the meeting procedures (such as notice of meeting, casting of votes, members' participation in meetings by telephone, video conferencing or other electronic means, and the supply of documents or information relating to any matter to a member who has or may have an interest in the matter).

Transaction of business by circulation of papers and request for meeting
(clauses 11 and 12)

53. Clauses 11 and 12 of the Bill allow the CA to transact any business by circulation of papers, and enable any member of the CA to request such business to be transacted at a meeting of the CA.

54. Hon Cyd HO has expressed reservation about the transaction of any business by circulation of papers among CA members. She suggests amending clause 11 to the effect that the CA should not transact business by circulation of papers except for administrative matters.

55. The Administration has advised that it has reservation about imposing such restriction as it would unreasonably constrain the operation of the CA. Moreover, it would be difficult to define the scope of "administrative matters". The Administration considers that the CA, as an independent statutory authority, should be given the flexibility to enable it to carry out its functions effectively and efficiently. Similar practices are adopted by other statutory bodies in Hong Kong. Moreover, there is already safeguard under the Bill (clause 12) whereby any member of the CA may request any business which is being transacted by the circulation of papers to be transacted at a meeting of the CA.

Disclosure of interests (clause 13)

56. Clause 13 of the Bill makes provisions for disclosure of interests by members of the CA. Under clause 13(1), if a member of the CA has a pecuniary interest, whether direct or indirect, or a personal interest greater than that which the member has as a member of the general public, in any matter under discussion at a meeting of the CA, the Broadcast Complaints Committee (BCC) or any committee appointed under clause 16, the member must disclose the nature of the interest at the meeting.

57. The Administration has subsequently informed the Bills Committee that the requirement for the disclosure of interest under clause 13 as originally drafted applies to members of the CA only in matters under discussion at the meetings of the CA and its committees. Members of the committees who are not members of the CA would not be subject to such requirements. The Administration will move CSAs to remove the discrepancy so that the disclosure requirements also apply to members of committees who are not members of the CA.

58. The Bills Committee has noted that clause 13(2) sets out the arrangements limiting a member's participation in a meeting of the CA if he has disclosed interest in respect of a matter under discussion. The requirements for a quorum, withdrawal from discussion and withdrawal from voting on a matter are as follows –

- (a) the member must withdraw from the meeting if so required by the member presiding; and
- (b) the member must not vote on any resolution concerning the matter or be counted for the purpose of establishing the quorum unless determined otherwise by the member presiding.

59. The Chairman and some members of the Bills Committee consider that such powers of the member presiding may give rise to concern. The Administration has advised that while the current formulation appears in some ordinances, there are also statutory provisions under which it is the majority of the other members present who determine whether the member disclosing an interest could stay during the deliberation of the item concerned, and vote in and form a quorum for that deliberation. To address the concerns of the Bills Committee, the Administration has subsequently proposed that the decision should be made by the majority of the other members present instead of by the member presiding. The Administration will move a CSA to amend clause 13(2)(c) accordingly.

60. Hon Emily Lau has proposed that CSAs be adopted to –

- (a) mandate that the CA must establish and maintain a register for recording the interest of its members or members of its committees, and members would be required to register his or her interests as appropriate;
- (b) require that meeting documents would not be passed to a member of the CA who has a conflict of interest in the matter under consideration; and

- (c) introduce arrangements similar to section 5(1)(d) of Schedule 5 to the Competition Bill, i.e. the CE may declare the vacancy of the office of a member should he fail to comply with a disclosure of interest requirement under the Bill.

61. Having thoroughly examined Hon Emily LAU's suggestions, the Administration has proposed to make CSAs to add a new clause 12A to mandate the registration of interest by the CA members and members of its committees. The Administration will also propose a CSA to amend clause 8(4) of the Bill to the effect that the CE may declare the office of a member to be vacant if the member fails to comply with the disclosure of interest requirement set out under the proposed clause 12A or clause 13.

62. As regards meeting documents, the Administration considers that there may be different scenarios that may warrant the withholding of documents from a member or otherwise, even if the member has disclosed an interest in respect of a matter under discussion. Therefore, the Administration considers it best to allow the CA the flexibility to determine the circumstances under which meeting documents could be passed to or be withheld from a member who has disclosed interest in a matter under consideration. The Administration considers that such matters should most appropriately be addressed in the standing orders to be made by the CA. The Administration therefore proposes to amend clause 10(5) of the Bill to the effect that the standing orders to be made by the CA will also regulate the supply of documents or information relating to any matter to a member who has or may have an interest in the matter.

63. The Chairman of the Bills Committee has questioned the necessity of clause 13(7) which provides that the validity of the CA's proceedings is not affected by the failure of a CA member to comply with the disclosure of interest requirement under clause 13. He considers it necessary to reflect in the Bill that the CA and its committees could review their own decisions or take necessary remedial actions in case a CA member fails to comply with the disclosure of interest requirement.

64. The Administration has advised that clause 13(7) is intended to avoid the chaos which could be caused by rendering invalid a decision taken in contravention of such requirement. Without this provision, the discovery of a conflict of interest, even many years after the decision was taken, may render the decision invalid and require the unwinding of all arrangements including contractual commitments based on that decision. This could adversely affect the interest of third parties, e.g. the unwinding of contracts concluded and completed long ago.

65. The Administration has further advised that provisions similar to clause 13(7) are widely available in various legislation governing other statutory bodies. A similar formulation is also found in the case of the Office of Communications Act in the UK. The provision does not prevent the CA from reviewing its earlier flawed decision, if appropriate, or if the decision has not been made public, substituting a different decision for it. The Administration considers that the operation of clause 13(7) will not prohibit the CA from taking such measures, and it is not necessary to provide specifically for the CA to do so in the Bill.

66. The Chairman has suggested that unified and prudent requirements for disclosing interests should be set out in the future standing orders of the CA, in line with clause 13 and with reference to the relevant provisions of the standing orders of the BA, and also the guidelines on "Declaration of Interests by Members of Public Sector Advisory and Statutory Bodies: Guidelines for a One-tier Reporting System" recommended by the Independent Commission Against Corruption. Such standing orders should include circumstances under which disclosure of interest must be made, definitions of direct and indirect personal and pecuniary interests, and interests held by the family members or close relatives of members of the CA, etc. At the Bills Committee's request, the Administration has undertaken to inform the ITB Panel in future of the standing orders made by the CA in respect of disclosure of interests by a member of the CA.

Director-General, OFCA and Committees (clauses 14, 15 and 16)

67. Clauses 14, 15 and 16 make provisions in relation to the DG Com, the OFCA, and committees of the CA.

Director-General

68. Regarding the role of the DG Com in supporting the CA as provided for in clause 14, the Chairman has suggested that the status of the DG Com as a public servant should also be stipulated. The Administration has advised that it is common in various ordinances to refer to public officers with their titles without further defining them. The DG Com will be a full-time public officer ranked at Directorate Six level. The Administration will seek the approval of the Establishment Subcommittee and the Finance Committee on the creation of the post, subject to the advice of the Standing Committee on Directorate Salaries and Conditions of Service, when the Administration makes submission on the organization structure of the OFCA after the passage of the Bill.

69. As regards the Chairman's suggestion to use "Director-General of Communications" in each of the provisions concerned instead of defining it in clause 2, the Administration has maintained the view that the present approach of defining the term under clause 2 is appropriate and consistent with that adopted in various other ordinances in Hong Kong.

Office of the Communications Authority

70. Hon Emily LAU has referred to some of the deputations' view that the executive arm of the CA should be an independent organization rather than a Government department staffed by civil servants. She has asked the Administration to make reference to the relevant practices in overseas jurisdictions, and consider establishing a non-civil service organization as the executive arm of the CA.

71. The Administration has advised that it would be unwieldy to go for the establishment of the unified regulator and the creation of a non-civil service executive organization concurrently as it would distract the new regulator from its focus on the main policy, strategic and regulatory challenges. In fact, creating a non-civil service executive arm of the CA is a complex and controversial subject which would affect the civil service status of the current staff in the OFTA and the TELA, and requires in-depth study and great care so as not to affect, among other things, the staff morale in the OFTA and the TELA.

72. The Administration has further advised that while the Australian Communications and Media Authority, the Canadian Radio-Television and Telecommunications Commission and the Federal Communications Commission of the US are serviced by civil servants, such a set-up has not affected their operation. The Administration is of the view that without a thorough examination of the proposal and its implications, it is premature at this stage to consider if the CA's executive arm should be a non-civil service organization. Nevertheless, the Administration agrees not to rule out the idea of setting up an independent executive arm as a longer term proposition. The Administration would examine this idea in light of the future operational experience of the CA and the OFCA.

Staffing arrangements

73. According to the Administration, the future OFCA will take over the functions of the OFTA. Under section 7 of the Trading Funds Ordinance (Cap. 430), the statements of the annual accounts of the OFCA Trading Fund would be examined and audited by the Director of Audit. As a government department, the OFCA would be subject to the same codes and requirements

which apply to all government departments, including the value for money audits. The TELA's functions will be transferred in the following manner –

- (a) the broadcasting functions will be transferred to the OFCA. These activities will be funded under the future OFCA Trading Fund and will remain under the policy purview of the Commerce and Economic Development Bureau (CEDB);
- (b) non-broadcasting related functions which concern the control of obscene and indecent articles, film censorship, and matters relating to newspaper registration, will be transferred to the OFCA. These activities will continue to be funded by the Government under a new general revenue head outside the ambit of the OFCA Trading Fund. Control of obscene and indecent articles as well as film censorship will remain under the policy purview of the CEDB, whereas newspaper registration will remain under the policy purview of the Constitutional and Mainland Affairs Bureau. The Administration is considering giving divisions in the OFCA responsible for the non-broadcasting functions currently in the TELA a distinct identity so as to avoid giving an impression that these functions are related to the work of the CA; and
- (c) matters relating to the issuance of entertainment licences under the Amusement Game Centres Ordinance (Cap. 435), the Gambling Ordinance (Cap. 148) and the Miscellaneous Licences Ordinance (Cap. 114), which are currently under the policy portfolio of the Home Affairs Bureau, will be taken up by the Home Affairs Department.

74. The Administration has advised that the transfer of the TELA staff to the OFCA will largely follow the transfer of functions as stated in paragraph 73 above. The staff of the OFTA and the TELA had been consulted on the merger and were satisfied with the transitional arrangements. The Administration has assured the Bills Committee that the civil service status, salary and conditions of service of the staff transferred will not be affected. The disbandment of the TELA and the subsequent transfer of its functions will not result in any redundancy of civil service or non-civil service contract staff. It is anticipated that the OFCA will have an establishment of around 500 staff. The establishment of the OFCA is cost-neutral in respect of staffing and will not involve the creation of additional civil service posts.

75. The Bills Committee has enquired how the DG Com and the different divisions of the OFCA would be funded under the OFCA Trading Fund and the new general revenue head. In this connection, Hon Cyd HO has

expressed reservation about the separate funding arrangements for the OFCA under the OFCA Trading Fund and the new general revenue head, as such an arrangement would be too complicated to execute. She has suggested that a unified source of funding should be adopted.

76. The Administration has advised that for staff members of the OFCA whose schedule of work falls entirely within the divisions of the OFCA not related to telecommunications and broadcasting (the non-trading fund divisions), their staff costs would be paid out of the new general revenue head. For staff members who would oversee or provide support to both the trading fund and non-trading fund divisions, their staff costs would be apportioned between the two sources of funding in accordance with the respective duties and responsibilities. In respect of the DG Com, the post will be partly funded by the OFCA Trading Fund and partly by general revenue, in accordance with the division of responsibilities between the telecommunications and broadcasting part of the post and the non-telecommunications and broadcasting part of the post.

Committees

77. Hon Cyd HO has opined that the statutory committees to be appointed by the CA should be clearly spelt out in the Bill. Hon Andrew LEUNG and Hon CHAN Kam-lam are however of the view that it is undesirable to stipulate in the Bill all the committees (except those which are strictly necessary) to be appointed by the CA, as any change in future would involve legislative amendments.

78. According to the Administration, the only committee to be established by the CA on a mandatory basis would be the BCC, which is responsible for handling complaints made to the CA in respect of broadcasting contents. The governing provisions in respect of the BCC are already comprehensively set out in the B(MP)O. As the BCC is part and parcel of the complaint-processing mechanism enshrined in sections 10, 11 and 11A of the B(MP)O, and the B(MP)O already provides the legal basis for the BCC, the Administration considers it unnecessary to set out any governing provisions for the BCC in clause 16 of the Bill. To provide for cross-reference in the Bill, the Administration will propose a CSA to amend clause 16(1) so that readers would know that the CA has the power to appoint other committees in addition to the BCC to support its operation.

79. In response to the Chairman's suggestion that the chairperson of a committee appointed by the CA should be a member of the CA, the Administration agrees to move a CSA to amend clause 16(2) to this effect.

Delegation of functions to committees, Director-General and public officers
(clause 17)

80. On clause 17 which provides for delegation of functions by the CA, Dr Hon Margaret NG and Hon Cyd HO have suggested that clause 17(3) (delegation of functions to committees, DG Com and public officers) should be amended to include shorthand descriptions of the subject matter of the sections of various ordinances cited, in order to enhance understanding of the Bill. The Administration has taken on board members' suggestion and will amend the clause by way of a CSA.

Immunity (clause 18)

81. Clause 18 of the Bill provides for immunity of the CA and persons acting in good faith in connection with the performance of any functions of the CA. No civil liability would be incurred by individual members of the CA as a result of anything done or omitted to be done in good faith in connection with the performance or purported performance of functions conferred on the CA.

82. The Bills Committee has noted that the OFCA trading fund would be responsible for the future funding for litigation costs. The OFCA, being a government department, could seek legal advice from the Department of Justice, whereas the CA could seek independent legal advice or engage legal representatives funded by the OFCA trading fund as it sees fit. Members of the Bills Committee have expressed concern whether the financial position of the OFCA Trading Fund would be significantly affected by litigation or legal costs incurred by the CA, and whether the Government would be responsible for the future injection of funding into the OFCA Trading Fund in the event that it would be depleted by litigation costs, if any, to be incurred by the CA.

83. The Administration has explained that the legal costs incurred by the OFTA and the TELA over the past few years have stood at less than 3% of their total annual operating expenses. Judging from past experience, the Administration has concluded that the impact of the CA's engagement in litigation on the financial situation of the OFCA Trading Fund would not be significant. In the very unlikely event that the OFCA Trading Fund is insufficient to meet its litigation costs, the Government, where necessary, is prepared to seek the approval of the Finance Committee for a standby loan facility to the OFCA Trading Fund. The terms of the loan would be determined when that need arises.

84. To address the Bills Committee's concern as to who would meet the liabilities of the CA, i.e. third-party costs arising out of litigation, the Administration has advised that it will introduce a CSA to add a new clause

19A to provide that the OFCA Trading Fund is to pay any sums payable by the CA "as a result of anything properly done or omitted to be done by the [CA] in connection with the performance or purported performance" of its functions. The Bills Committee has noted that the new clause would make clear that the remuneration of CA members could be met by the OFCA Trading Fund and that the proposed language of clause 19A is a new formulation because similar provisions in existing Ordinances⁵ relating to the payment of costs or expenses properly incurred in the performance of statutory functions do not contain references to "purported performance". According to the Administration, the new clause is so drafted to avoid doubts and ensure that it will cover the proper acts conducted by the CA.

Payments (clause 19)

85. Clause 19 of the Bill provides for receipts of payments to the CA and for certain licences and permits. The policy intention of clause 19(1) requires that all sums of money payable, owing or paid to the CA must on receipt be credited to the account of the OFCA trading fund.

86. Hon WONG Yuk-man considers that the wordings "一經收取" in the Chinese version of clauses 19(1), 19(2) and 19(3) are redundant and should be deleted to avoid semantic inconsistency with "已繳付" in the main clause of the sentence. The Administration has advised that the Chinese phrases of "須繳付", "已繳付", "拖欠" are adopted to describe the status of the concerned sum of money, while the phrase "一經收取" (i.e. "on receipt") is used to pinpoint the time of the action required. The Administration considers it necessary to retain the phrase "一經收取" in the Chinese text which accurately reflects the policy intention. Having examined these clauses, the Administration will propose CSAs to replace "須繳付或已繳付" with "繳付或須繳付".

Exemption in relation to transfer of custody of records etc. and their use (clause 20)

87. Clause 20 of the Bill provides for exemption from the Personal Data (Privacy) Ordinance (Cap. 486) in relation to data etc. transferred to the CA, the OFCA or a relevant department and the powers of the Privacy Commissioner for Personal Data in relation to those data etc.

88. Some members of the Bills Committee including Hon Emily LAU and Hon Cyd HO have enquired about the protection of personal data

⁵ E.g. section 256 of the Companies Ordinance (Cap. 32), section 12(1) of the Electoral Affairs Commission Ordinance (Cap. 541) and section 73(4) of the District Councils Ordinance (Cap. 547).

involved in the transfer of data and records to the CA and the OFCA. The Administration has advised that the Office of the Privacy Commissioner for Personal Data had been consulted on the drafting of clause 20, and its views and suggestions had been incorporated. The telecommunications and broadcasting licensees concerned will be notified of the transfer of the data, records or documents upon the establishment of the CA and the OFCA.

Offence to give or disclose information obtained or received officially
(clause 21)

89. Clause 21 of the Bill provides that it is an offence for a person to give or disclose to another person certain information obtained or received by virtue of the person's position with the CA or the OFCA. It also sets out situations in which the giving of information or disclosure commit an offence. Under clause 21(2)(g), the power to disclose information in the form of a summary is limited to the CA, or a person authorized by the CA or the OFCA. The summary should be so compiled as to ensure that no particulars relating to the business or identity, or trading particulars, of any of those persons who have produced or furnished the information, or any person to whom the information relates, may be ascertained from it. Under clause 21(4)(a), it is a defence for a person charged with the offence to show that at the time of the alleged offence, the defendant believed that there was lawful authority for the defendant to give or disclose the information to the other person and the defendant had no reasonable cause to believe otherwise.

90. The Chairman and some members of the Bills Committee have enquired whether clause 21(2)(g) would be effective in ensuring that the disclosure of information authorized by the CA or the OFCA in the form of a summary compiled could prevent the particulars concerned from being identified. Hon Cyd HO has opined that the defence provided under clause 21(4)(a) is too arbitrary and suggested it be deleted to avoid uncertainty in enforcement.

91. The Administration has explained that clause 21(2)(g) has the essential function of enabling the CA or the OFCA to present summary information (such as the overall performance of the telecommunications and broadcasting sectors) by drawing on the business information submitted by individual operators. This facilitates the compilation and promulgation of generic industry related information from materials which may include confidential information without prejudicing the latter's confidentiality. A party which gives or discloses the information has a responsibility to comply in full with the conditions in clause 21(2)(g). A failure to comply with such conditions would result in the disclosure of confidential information in contravention of clause 21(1) which would be an offence. Whether a

disclosure would allow the particulars referred to in paragraph 89 above to be ascertained is a matter of fact to be determined.

92. As regards the defence provided under clause 21(4)(a), the Administration has advised that while this is a subjective test depending on the belief of the defendant, there is an objective element in that the defendant has to show that he has no reasonable cause to believe otherwise. The defence imposes a burden upon the defendant to establish its elements. The reasonable grounds on which the defendant would rely are a matter of fact to be determined by the court. The Administration considers that the proposed defence provides an appropriate balance to clause 21 which would otherwise impose onerous criminal sanctions for a breach of confidentiality.

93. The Bills Committee has enquired whether clause 21 should follow the procedures set out in the related provisions in the TO, the BAO, the BO and the UEMO, whereby the authorities concerned shall, before disclosing any confidential information obtained, seek representations from persons who might be affected by any such proposed disclosure.

94. The Administration has explained that the situations in which the authorities concerned shall seek representations before disclosing information have been set out in the relevant provisions in the TO, the BAO, the BO and the UEMO. These requirements apply to specific types of disclosure of information, such as disclosure that may have an adverse effect on the lawful business of a licensee (section 7I and 35A of the TO), disclosure of information obtained from investigations into suspected breaches of the legislation (section 36D of the TO and section 37 of the UEMO), disclosure of information obtained from the investigation into the business of licensees, other than to members of the BA or public officers in the performance of duties (section 23 of the BAO), and disclosure of confidential information other than to members of the BA or public officers in the performance of duties (section 27 of the BO). The Administration has further explained that clause 21 of the Bill is a general confidentiality clause imposing criminal liability for the unlawful disclosure of confidential information. The operation of clause 21 works together with and does not affect or derogate from the restrictions in the relevant provisions. The disclosure of information under the relevant provisions will still have to comply with the specific restrictions and procedures as set out in those provisions.

Amendment to Telecommunications Ordinance (clause 22)

95. Clause 22 of the Bill amends section 33 of the TO to provide that an investigation in relation to the question of compliance with an order made by the CE under that section for the interception of a class of messages may only

be initiated on a request by the CE and in accordance with any conditions imposed by him.

96. Hon WONG Yuk-man has expressed strong objection to the proposed amendment to section 33 of the TO under clause 22. He has opined that the amendment would be tantamount to extending the powers of the CE in respect of the execution of prescribed authorizations for telecommunications interception.

97. The Administration has explained that section 33 of the TO already provides for the power of the CE to make orders for interception of any class of messages for provision of facilities under section 33(1). The proposed amendment seeks to make clear that, for orders issued by the CE under section 33(1)(b)⁶ of the TO in respect of telecommunications interception, investigations into the compliance or otherwise of these orders will also be initiated by the CE and in accordance with any conditions the CE may have imposed. The conduct of intercepting contents of telecommunications by the Administration is governed by the ICSO instead. An order made by the CE under section 33(1) of the TO enables only any class of messages to be intercepted but does not of itself authorize the obtaining of the contents of any individual message (i.e. section 33(2) of the TO). The proposed amendment will serve to clarify the powers and responsibilities of the CA and the circumstances in which it can investigate into matters relating to the compliance with an order made by the CE under section 33(1)(b) of the TO. This amendment will not broaden any powers which are currently vested in the CE in the issue of such order.

98. Dr Hon Samson TAM has requested that the Administration should seek the views of the telecommunications industry/organizations to examine if they have any particular concerns about clause 22. The Administration has subsequently sought the advice of major industry organizations, namely the Communications Association of Hong Kong, the Hong Kong Call Centre Association, the Internet Professional Association and the Hong Kong Wireless Technology Industry Association, which had previously expressed views on the Bill. All the four bodies confirmed that they had no comments on clause 22.

Related and consequential amendments (clause 26)

99. Hon Paul TSE has expressed concern about the approach of specifying all the related and consequential amendments in the Schedule under clause 26. The Administration has explained that the consequential

⁶ Orders made for the purpose of providing or making available facilities reasonably required for the execution of prescribed authorizations for telecommunications interception that may from time to time be issued or renewed under the Interception of Communications and Surveillance Ordinance (ICSO) (Cap. 589).

amendments are primarily changes to the references to former authorities in various ordinances. The clarity of the TO, the BO and other relevant ordinances in respect of the stipulation of the powers of the CA will not be affected.

100. The Bills Committee has noted that sections 39 to 41, 44 and 45 of the Schedule to the Bill in relation to the Telecommunications Regulations (Cap.106 sub leg. A) (especially the proposed repeal of Schedules 1, 2 and 3 to the Regulations) appear to be technical amendments unrelated to the establishment of the CA. According to the Administration, the regulations and Schedules in Cap. 106A referring to the powers to grant licences, etc. as mentioned in sections 39 to 41, 44 and 45 of the Schedule to the Bill cover the requirements for the forms, validity periods, fees, etc. of certain licences. These have become obsolete or fallen into disuse, and the relevant requirements are currently either stipulated in the Telecommunications (Carrier Licences) Regulation (Cap.106V) and the Telecommunications (Examination, Certification and Authorization of Radiocommunications Personnel) Order (Cap. 106W), or are published by the TA under the power in section 7(6) of the TO. As the relevant provisions in Cap. 106A carry references to the TA, and such references, if retained, would have to be amended to refer to the CA, retaining them may cause confusion to the public, giving them the impression that these powers will continue to be exercised by the CA. The Administration has therefore taken the opportunity to repeal them in this exercise.

101. Section 97 of the Schedule to the Bill sets out a consequential amendment to The Ombudsman Ordinance (Cap. 397) to such effect as replacing the OFTA and the TELA with the OFCA in its Schedule 1. According to the Administration, the amendment would not involve any change to the scope of responsibility of The Ombudsman.

102. According to the Administration, the TELA and the OFTA are currently the executive arms of the BA and the TA respectively and are responsible for carrying out the administrative functions of the BA and the TA. Under The Ombudsman Ordinance, its Schedule 1 sets out the bodies which The Ombudsman can investigate under section 7 of The Ombudsman Ordinance in the case of maladministration. Although the BA and the TA are not on the Schedule, both the TELA and the OFTA are listed on the schedule, thus the administration of the functions of the BA and the TA are subject to the scrutiny of The Ombudsman.

103. With the establishment of the CA and the OFCA as the CA's executive arm, the existing TELA will be disbanded and its broadcasting division will merge with the OFTA to form the OFCA. There will be consequential amendment (section 97 of the Schedule to the Bill) to The

Ombudsman Ordinance whereby the TELA and the OFTA will be removed from Schedule 1 and be replaced by OFCA. This seeks to preserve the current legal position. Status quo will thus be maintained. The OFCA will be responsible for the future administrative functions of the CA and these would be subject to the scrutiny of The Ombudsman.

104. The Administration has informed the Bills Committee that at present, the Office of The Ombudsman deals with complaints in respect of matters related to the maladministration of the TELA and the OFTA. Since the public may not be able to differentiate clearly between the TA and the Director-General of Telecommunications being the head of the OFTA (as they are the same person), The Ombudsman has been taking up complaints directed at the TA, and the OFTA has also been responding to The Ombudsman's inquiries where the subject matters of such complaints were considered to be related to the administration of the TA's functions, which is an OFTA activity. Upon the establishment of the CA and the OFCA, the Office of The Ombudsman will advise the public that they should continue to approach The Ombudsman if they are aggrieved by actions related to the administration of the CA's functions by the OFCA. The Administration will also publicize in the publicity programme about the CA and the OFCA that there is no change to the scope of activities under The Ombudsman's scrutiny. The Ombudsman has been consulted and he agreed with this approach.

Enforcing the future Competition Ordinance

105. The Bills Committee has noted that the policy proposal under the Competition Bill is to have a single competition law which can effectively and consistently deal with anti-competitive conduct in all sectors of the Hong Kong economy. Accordingly, the existing competition provisions under the BO and the TO will be repealed. Hon Paul TSE has enquired about the enforcement of the relevant provisions under the future competition law in the broadcasting and telecommunications sectors to ensure fair competition in the communications market.

106. According to the Administration, the Competition Bill provides that the existing sectoral competition regulators, i.e. the TA and the BA, would have concurrent jurisdiction with the proposed Competition Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in the telecommunications and broadcasting sectors respectively. Regulators sharing jurisdiction will have to sign a memorandum of understanding covering areas such as how to perform their functions, the provision of assistance to each other, information exchange on the progress of cases. The concurrent jurisdiction will be taken up by the CA in the future upon the merger of the TA and the BA. Meanwhile, the existing adjudicative functions of the TA and the BA, i.e. to decide whether

there is a breach and to impose sanctions, will be transferred to the proposed Competition Tribunal.

Committee Stage amendments

107. A set of CSAs to be moved by the Administration is in **Appendix III**. The Bills Committee will not move any CSAs in its name. Dr Hon Margaret NG has indicated her intention to move CSAs to the long title and clause 4 of the Bill as outlined in paragraph 23 above.

Recommendation

108. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 29 June 2011.

Follow-up actions to be taken by the Administration

109. During the deliberations of the Bills Committee, the Administration has undertaken to take the following actions –

- (a) the Acting SCED will make clear in his speech in moving the resumption of Second Reading debate on the Bill the policy intention and commitment on the review of the TO and the BO (paragraph 13 above);
- (b) the ITB Panel will be informed in future if a decision is made for the appointment of a full-time chairperson of the CA (paragraph 40 above);
- (c) the ITB Panel will be informed in future of the rules/standing orders made by the CA for the purpose of regulating the number of meetings to be held by the CA in any year, the meeting procedures, members' participation in meetings by telephone, video conferencing or other electronic means, and the supply of documents or information relating to any matter to a member who has or may have an interest in the matter (paragraph 52 above); and
- (d) the ITB Panel will be informed in future of the standing orders made by the CA in respect of disclosure of interests by a member of the CA (paragraph 66 above).

Advice sought

110. Members are requested to note the deliberations and recommendation of the Bills Committee.

Council Business Division 1
Legislative Council Secretariat
16 June 2011

Bills Committee on Communications Authority Bill

Membership List

Chairman	Hon LAU Kong-wah, JP
Deputy Chairman	Dr Hon Samson TAM Wai-ho, JP
Members	Dr Hon Margaret NG
	Hon CHAN Kam-lam, SBS, JP
	Dr Hon Philip WONG Yu-hong, GBS
	Hon Emily LAU Wai-hing, JP
	Hon Timothy FOK Tsun-ting, GBS, JP
	Hon LEE Wing-tat
	Hon Andrew LEUNG Kwan-yuen, GBS, JP
	Hon WONG Ting-kwong, BBS, JP
	Hon Ronny TONG Ka-wah, SC
	Hon Cyd HO Sau-lan
	Hon Mrs Regina IP LAU Suk-yea, GBS, JP
	Hon Paul TSE Wai-chun
	Hon WONG Yuk-man

(Total : 15 members)

Clerk Ms YUE Tin-po

Legal Adviser Mr Bonny LOO

Bills Committee on Communications Authority Bill

List of organizations/individuals that have given views to the Bills Committee

1. OurTV.hk
2. Community Development Initiative
3. Internet Professional Association
4. Hong Kong Human Rights Monitor
5. Communications Association of Hong Kong
6. Dr XU Yan, Associate Professor, Business School, Hong Kong University of Science and Technology

7. Mr Martin OEI, Political Commentator
8. Hong Kong Internet Forum
9. Cable & Satellite Broadcasting Association of Asia
10. Hong Kong Call Centre Association
11. Hong Kong Wireless Technology Industry Association
12. League of Social Democrats*
13. Hutchison Telecommunications (Hong Kong) Limited*
14. PCCW Limited*
15. Metro Broadcast Corporation Limited*
16. CSL Limited*
17. Wharf T&T Limited*
18. SmarTone Mobile Communications Limited*
19. Auspicious Colour Limited*
20. A member of the public*

* submitted written views only

COMMUNICATIONS AUTHORITY BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Commerce and Economic
Development

<u>Clause</u>	<u>Amendment Proposed</u>
2	In the Chinese text, in the definition of “營運基金”, by adding “辦公室” after “管理局”.
4	<p>By adding –</p> <p>“(4) Without limiting any other matters to which the Authority may have regard, in performing its functions, the Authority must have regard to such of the following as appear to it to be relevant in the circumstances –</p> <ul style="list-style-type: none">(a) to foster an environment that supports a vibrant communications sector to enhance Hong Kong’s position as a communications hub in the region;(b) to encourage innovation and investment in the communications market;(c) to promote competition and the adoption of best practices in the communications market for the benefit of the industry and consumers; and(d) to act in a manner consistent with the provisions of the Hong Kong Bill of

Rights Ordinance (Cap. 383).”.

8(1)(a) By deleting “who are not public officers and who are ordinarily resident in Hong Kong and have been so resident for at least 7 years”.

8 By adding –

“(1A) The Chief Executive may appoint a person under subsection (1)(a) only if the person –

- (a) is not a public officer;
- (b) is ordinarily resident in Hong Kong and has been so resident for at least 7 years; and
- (c) is, in the opinion of the Chief Executive, a person having –
 - (i) extensive knowledge of, experience in or exposure to, communications services; or
 - (ii) knowledge of or experience in management, accounting, finance, education, law or community service, or such professional or other experience as would render the person suitable for the appointment.”.

8(4) (a) In paragraph (d), by deleting “or”.

(b) By adding –

“(da) fails to comply with section 12A or 13; or”.

8 By deleting subclause (5) and substituting –

“(5) The office of a member of the Authority appointed under subsection (1)(a) becomes vacant if the member becomes a public officer.”.

8 By adding –

“(9) The Chief Executive may determine the remuneration and the terms and conditions of any appointment under this section.”.

9 By deleting subclause (2) and substituting –

“(2) The Chief Executive may revoke any appointment made under subsection (1) if the Chief Executive is of the opinion that the chairperson or vice-chairperson is unable or unfit to perform the functions of chairperson or vice-chairperson due to any reason referred to in section 8(4) or other sufficient cause.”.

10(5) (a) By deleting “may” and substituting “is to”.

(b) In paragraph (a), by deleting “and”.

(c) In paragraph (b), by deleting the full stop and substituting a semicolon.

(d) By adding –

“(c) the conduct of any meeting to which subsection (6)

applies, in order to ensure that the confidentiality of the meeting, if any, is not compromised; and

- (d) the supply of any documents or information relating to any matter to a member who has or may have an interest in the matter.”.

10(6) By adding “compliance with standing orders made under” before “subsection (5)”.

New By adding –

“12A. Register of interests

(1) A member of the Authority, a member of the Broadcast Complaints Committee or a member of a committee appointed under section 16 must disclose to the Authority any interest that the member has which is of a class or description determined by the Authority under subsection (2) –

- (a) on the member’s first appointment;
- (b) at the beginning of each calendar year after the appointment;
- (c) on becoming aware of the existence of an interest not previously disclosed under this subsection; and
- (d) after the occurrence of any change to an interest previously disclosed under this subsection.

(2) The Authority may, for the purposes of this section –

- (a) determine the class or description of the interest required to be disclosed;

- (b) determine the details of the interest required to be disclosed and the manner in which such interest is to be disclosed; and
- (c) from time to time change any matter determined under paragraph (a) or (b).

(3) The Authority is to establish and maintain a register relating to any disclosure required to be made under subsection (1) (“the register”) at the principal office of OFCA.

(4) If a person makes a disclosure as required by subsection (1), the Authority must cause the person’s name and the particulars of the disclosure to be recorded in the register, and if a further disclosure is made, the Authority must cause the particulars of the further disclosure to be recorded in the register.

(5) For the purpose of enabling any member of the public to ascertain the particulars of any disclosure required to be made under subsection (1), the Authority must, by such means as it considers appropriate, make available the register for inspection by the public at any reasonable time.”.

13(1) By deleting “the Broadcast Complaints Committee or any committee appointed under section 16,”.

13(2)(c) By deleting “member presiding” (wherever appearing) and substituting “majority of the other members present”.

13 By adding –

“(8) Subsections (1), (2) and (7) apply to a member of the Broadcast Complaints Committee or a committee appointed under section 16, as if any reference to the Authority in subsections (1) and (7) were a reference to the Broadcast Complaints Committee or the committee appointed under section 16, as the case may be.”.

- 16(1) By deleting “The” and substituting “Without prejudice to the appointment of the Broadcast Complaints Committee, the”.
- 16(2) By adding “a member of the Authority who is also” after “and may appoint”.
- 17(3) (a) In paragraph (b), in the English text –
- (i) by deleting “submit” and substituting “submission of”;
 - (ii) by deleting “section 16 (appoint” and substituting “16 (appointment of”.
- (b) In paragraph (c), by deleting “13C, 13CA or 13E” and substituting “13C (grant of licence), 13CA (issue of guidelines) or 13E (renewal of licence)”.
- (c) In paragraph (e), by deleting “10(1), 19, 21 or 24” and substituting “10(1) (appointment of Broadcast Complaints Committee), 19 (issue of Codes of Practice), 21 (inquiry by Authority) or 24 (imposition of financial penalties)”.
- (d) In paragraph (f), by deleting “3, 4, 8, 9, 10, 11, 28, 31, 32 or 33” and substituting “3 (approval of codes of practice), 4 (publication of guidelines), 8 (to whom licence may be granted), 9 (recommendations on licence applications), 10

- (grant of licence), 11 (extension or renewal of licence), 28 (licensee to pay financial penalty), 31 (suspension of licence), 32 (revocation of licence) or 33 (inquiry by Authority)”.
- 19(1) In the Chinese text, by deleting “須繳付或已繳付” and substituting “繳付或須繳付”.
- 19(2) In the Chinese text, by deleting “須繳付或已繳付” and substituting “繳付或須繳付”.
- 19(3) In the Chinese text, by deleting “須繳付或已繳付” and substituting “繳付或須繳付”.
- New By adding –
- “19A. Payment out from trading fund**
- Despite any provisions in the Trading Funds Ordinance (Cap. 430), any sums payable by the Authority as a result of anything properly done or omitted to be done by the Authority in connection with the performance or purported performance of functions conferred on the Authority are to be paid out of the trading fund.”.
- 21(2)(g) (a) By deleting “prevent” and substituting “ensure that no”.
- (b) In the English text, by deleting “the trading” and substituting “trading”.
- (c) In the English text, by deleting “from being” and substituting “may be”.
- 23(1) In the Chinese text, by adding “辦公室” after “通訊事務管理局”.

23(2) In section 2 of the proposed Schedule 3, in the Chinese text, by adding “辦公室” after “管理局”.

Schedule,
section 30(16) In the Chinese text, by deleting everything after “廢除” and substituting ““電訊管理局”而代以“通訊事務管理局辦公室”。”.

Schedule,
section 138(3) In the Chinese text, by deleting everything after “廢除” and substituting ““電訊管理局”而代以“通訊事務管理局辦公室”。”.