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16 May 2018

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Permanent Secretary for Commerce & Economic Development
(Communications & Creative Industries)
Commerce & Economic Development Bureau
21/F, West Wing
Central Government Offices
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Eliza,

Phase 1 Review of Television and Sound Broadcasting Regulatory Regimes: Response to the Government's Consultation Document of 20 February 2018

1. The Chamber welcomes the Government's decision to kick start a review exercise on the Broadcasting Ordinance ("BO") and Telecommunications Ordinance ("TO"), which has long been awaited by industry players and overdue since the merger of the Broadcasting Authority (BA) and Telecommunications Authority (TA) into the Communications Authority ("CA") in 2012.

2. Many of the existing statutory requirements are indeed very outdated and have become a hindrance to media development in that industry players cannot take advantage of technological advancement and convergence to innovate, invest in and expand their businesses, thereby limiting the growth of the broadcasting industry and consumer choices. The Chamber has therefore been advocating that a timely update, alignment and rationalization of the BO and TO is required and necessary to reflect market and technological advancement, remove unnecessary provisions and reduce business costs while ensuring that they remain fit for purpose. To this end, the Chamber has set up a Working Group under the Chamber's Digital, Information and Telecommunications Committee, to conduct a thorough and comprehensive review of these two pieces of law section by section; and submitted its proposals[1] to the Government in 2014 on how they could be modernized and amended.

[1] The Chamber submission can be found at this link:
http://www.chamber.org.hk/FileUpload/20141125163126568 2/TO-BO20141125.pdf

3. While a full-scale update of the BO and TO may take some time, it is only by doing so that they could better serve the regulatory objective of reflecting the converged and new media realities. We are somewhat surprised that the Government has taken six years to prepare for this review, and that the review takes a narrow rather than holistic approach, focusing only on four sound and TV broadcasting regulatory issues. Real and extensive changes are required to the restrictions enshrined in the BO and TO, as well as the licences issued thereunder, which deter traditional industry players from competing and investing in the broadcasting industry, in view of the growing popularity and prevalence of over-the-top services.

4. We would therefore like to resubmit our previous proposals and strongly urge the Government to reconsider them and expedite the process. We would be pleased to discuss further with the Government our proposals and explain the underlying rationale behind them. Likewise, we should be grateful if the Government would share with us their considerations, and any concerns, about our suggestions which are not being taken forward.

5. The wider the gap between Hong Kong regulation, on the one hand, and technological advancement and market development, on the other, the greater the likelihood is that we will lose our competitiveness to other jurisdictions.

Yours sincerely,

Shirley Yuen
CEO

cc: Ordinance Review Team, Communications and Creative Industries Branch, Commerce & Economic Development Bureau (email: BOTOReview@cedb.gov.hk)

PROPOSED AMENDMENTS TO THE TELECOMMUNICATIONS ORDINANCE (Cap 106) AND THE BROADCASTING ORDINANCE (Cap 562)

Working Group on Reviewing the Telecommunications Ordinance and Broadcasting Ordinance

Hong Kong General Chamber of Commerce

November 2014

1. INTRODUCTION

1.1 It is accepted as an international best practice that (a) before any new regulatory intervention such as legislation is introduced, a full regulatory impact assessment has been carried out showing that the benefits of the intervention exceed the costs and (b) regulatory requirements are regularly reviewed, and withdrawn if they can no longer be shown to have net benefits. The Hong Kong Government's "Be the Smart Regulator" initiative is a good example of such practice.

1.2 Consistent with this practice, the Hong Kong Government has committed to reviewing, and if necessary updating, the Telecommunications Ordinance ("TO") and Broadcasting Ordinance ("BO"). To assist the Government in this process, the Hong Kong General Chamber of Commerce ("HKGCC") has conducted its own review of these Ordinances. We present in this submission a series of reasoned recommendations as to how these Ordinances can be amended in a way which reflects convergence, new technologies and the state of competition as well as removing unnecessary red tape and reducing business costs, while at the same time ensuring that they remain fit for purpose.

2. BACKGROUND

2.1 On 30 June 2011, the Legislative Council passed the Communications Authority Bill. This legislation creates a unified regulator, reflecting the increased convergence between telecommunications and broadcasting. The Communications Authority ("CA") and the Office of the Communications Authority ("OFCA") were formally established on 1 April 2012. These entities replaced the Telecommunications Authority ("TA"), the Office of the Telecommunications Authority ("OFTA"), the Broadcasting Authority ("BA") and the Television and Entertainment Licensing Authority's Broadcasting Division. OFCA is made up of the employees of the replaced entities.

2.2 In merging the regulatory bodies, it was made clear that a substantive review of the TO and BO would be a priority for the CA. The need for this review was based on the same reasons for merging the regulators: the convergence of the telecommunications and broadcasting industries as well as other factors such as the high levels of competition in the telecommunications markets, new technologies, and the rise of the Internet. The blossoming of broadcast-type mobile TV services has exemplified multimedia convergence. The recent incident involving a Hong Kong company's announced plan to launch mobile TV services under its telecommunications licence has drawn attention to the overlapping regulatory requirements under the current TO and BO. While the TO and BO had been amended periodically, they had never been comprehensively reviewed to address this deficiency. The Government should take initiatives and expedite the process in updating the regulatory regime in response to the emergence of new technologies.

2.3 As stated in paragraphs 3, 4(a), (b) and 12(a) of the Administration's Legislative Council Background Brief (LC Paper No. CB(1)274/11-12(04)) published in November 2011:

> *"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.*
>
> *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, TO and other relevant ordinances, and*

administer all matters currently under the purview of the BA and 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.

12. During the deliberations of the Bills Committee, the Administration undertook to take the following actions –

(a) review the TO and the BO as a matter of priority immediately upon the establishment of the CA. The review would 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 would devise a more detailed plan together with the CA upon its establishment on the areas to be reviewed and the relevant timetable;"

2.4 In paragraph 7 of another government paper, LC Paper No. CB(1) 274/11 – 12(03), the Administration further stated:

"7. As committed to the Legislative Council during the examination of the CA Bill, the Administration will prepare for the review of the Telecommunications Ordinance (TO) (Cap. 106) and the Broadcasting Ordinance (BO) (Cap. 562) together with the CA after its establishment. The OFCA will support the CA on the review."

2.5 Previously, the Administration at paragraphs 3, 3(b) and 4 of CTB (CR) 9/19/13(10) stated:

"3. We propose to establish a unified regulatory body, namely the Communications Authority (CA), to cover the electronic communications sector. The proposal includes the following key arrangements to be implemented -

(b) Pending a review to rationalize the BO and the TO after the establishment of the CA, there will be no substantive changes to the existing regulatory and licensing arrangements for broadcasting and telecommunications under the two Ordinances.

4. We have taken a conscious decision to adopt a staged approach in building up the institution of the CA. We will establish the CA as soon as possible through the structural merger of the TA and the BA. This will enable the early establishment of a unified regulator to deal with increasing market convergence. The Administration and the new regulator will then carry out a comprehensive review of the existing regulatory regimes and introduce legislative changes to update and rationalize the existing TO and the BO."

2.6 In view of the Administration's stated intent to substantively review the TO and BO as a priority, the HKGCC set up a working group under its Digital, Information and Telecommunications Committee to review the TO and BO. We are pleased to present in this submission a series of proposed amendments to the TO and BO following an extensive review of these two ordinances by the working group. These amendments reflect convergence (i.e., the convergence of telecommunications and broadcasting, as well as computing), the competitive markets that characterize the landscape, the rise of the Internet, global best practices, etc. The proposals are presented in narrative form, and in some cases specific legislative language is also presented. We see our review as a timely 'fresh look' at the TO and BO, and the beginning of a conversation with the Administration and other relevant stakeholders. The recommendations are presented in two parts, amendments to the TO and amendments to the BO (and where relevant to related regulations).

3. PROPOSED AMENDMENTS TO THE TELECOMMUNICATIONS ORDINANCE

3.1 The working group has identified the following issues in the TO that should be addressed in the proposed Communications Bill:

(A) Licence Fees
(B) Spectrum Fees
(C) Tariffs
(D) Accounting Practices
(E) Provision of Information
(F) Access Rights
(G) Protection of Telecommunications Facilities and Plant
(H) Competition Provisions
(I) Interconnection
(J) Term of Carrier Licence
(K) Regulatory Impact Assessments
(L) Ombudsman

(A) Licence Fees

3.2 Section 7 of the TO gives the Chief Executive in Council, the Secretary (i.e. the Secretary for Commerce and Economic Development) and the Authority (i.e. the CA) the power to impose licence fees, including the grant and renewal of licences. As OFCA runs as a trading fund with the Trading Fund Ordinance (Cap 430) ("TFO") providing more details, the two ordinances must be read together so as to determine the total fee amounts to be imposed.

3.3 The imposed licence fees are paid into OFCA Trading Fund. Pursuant to Section 6(6) of the TFO, OFCA Trading Fund is to be managed with the objective of:

(a) providing an efficient and effective operation that meets an appropriate standard of service;

(b) within a reasonable time, meeting expenses incurred in the provision of the government service and financing liabilities of the trading fund out of the income of the trading fund, taking one year with another; and

(c) achieving a reasonable return, as determined by the Financial Secretary, on the fixed assets employed.

3.4 OFCA and the CA, via OFCA Trading Fund, is therefore intended to generate only enough revenue to cover the running expenses/liabilities of OFCA and the CA, and then make a reasonable return on fixed (invested) assets. The target rate of return on fixed assets was set at 8.5% per annum for the period from 2006-07 to 2011-12 and 6.7% for 2012-13.

3.5 According to the three most recent Trading Fund Reports from OFCA and OFTA (the predecessor of OFCA) for the period from 2010-11 to 2012-13, licence fee income made up around 85% of OFTA's/OFCA's total revenue. Hence, the level of licence fees has a direct impact on the level of profit earned by OFCA.

3.6 The Trading Fund Reports for the past seven years showed that OFTA/OFCA made significant profits and generated returns well in excess of its targeted return. The fact that there were excess profits and returns means that OFTA/OFCA could have charged a lower level of licence fees and would still be able to cover its costs and meet its targeted return per the TFO requirements. It appears that neither the Commerce and Economic Development Bureau ("CEDB") nor the TA/CA took into consideration the extent of the surplus profits earned by OFTA/OFCA (or accurately estimated revenue and expenditure) when setting the licence fees in the past.

3.7 This issue is important because the annual licence fees paid by licensees constitute a significant expense to the telecommunications industry which is directly passed onto consumers. When setting licence fees, the CEDB/CA should compute a fee level consistent with Section 6(6) of the TFO, that is, a level that would allow OFCA to earn no more than its targeted return on fixed assets.

3.8 Any reduction in licence fees would result in additional investments by the telecommunications operators in infrastructure, developing advanced and innovative services, and lower retail prices to consumers.

3.9 Furthermore, there should be a regular annual review of licence fee levels paid by licensees and a requirement to refund to licensees any surplus funds at the end of each financial year. Such an arrangement would be comparable to international practice. For example in the UK, Ofcom will prepare in advance and publish an outline of the proposed budget for the immediately following financial year.[1] Based on that budget, Ofcom will apply a set of published charging principles[2] to determine the level of administrative fees payable by electronic communication providers for the following financial year.[3] Consistent with the legislative requirement that Ofcom should balance its expenditure with its income,[4] the charging principles include a requirement that, on a year by year basis, the aggregate amount of charges payable is sufficient to meet, but does not exceed, the annual cost to Ofcom of carrying out its relevant functions.[5] Any surplus funds arising at the end of the financial year are to be rebated to the relevant stakeholders.[6] Certainly, fees could be set somewhat conservatively with subsequent refunds or credits.

3.10 To ensure future annual reviews on licence fees would be transparent and equitable, we recommend that a structured approach be adopted. A review on fees would be conducted by OFCA and CEDB on a regular interval, and the industry would be given the opportunity to submit their views. The review findings and the process leading to such findings should be made completely transparent to the industry and subject to the scrutiny of the Panel on Information Technology and Broadcasting of the

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1 Ofcom, Annual Plan 2014-15, 31 March 2014, <http://www.ofcom.org.uk/files/2014/03/Annual-Plan-1415.pdf> accessed on 24 April 2014.

2 Ofcom, Statement of Charging Principles, 8 February 2005, <http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging_principles.pdf> accessed on 24 April 2014.

3 Ofcom, Ofcom's Tariff Tables 2014-15, 31 March 2014, <http://www.ofcom.org.uk/files/2014/03/Tariff-Tables-2014_15.pdf> accessed on 24 April 2014.

4 UK, Office of Communications Act 2002, Schedule, paragraph 8(1), <http://www.legislation.gov.uk/ukpga/2002/11/contents> accessed on 24 April 2014.

5 UK, Communications Act 2003, s. 38(4)(a), <http://www.legislation.gov.uk/ukpga/2003/21/contents> accessed on 24 April 2014.

6 Ofcom, Annual Report 2012-13, p. 65, <http://www.ofcom.org.uk/files/2013/07/Ofcom_Annual-Report_AD600_ACC-2_English.pdf> accessed on 24 April 2014; UK, Communications Act 2003, s. 38(10).

Legislative Council.

Recommendation 1

(a) The licence fees which may be determined for carrier licences by the Secretary pursuant to Section 7(2) of the TO and the Telecommunications (Carrier Licences) Regulation or for non-carrier licences by the CA pursuant to Section 7(6) of the TO should more explicitly be made subject to a requirement that the licence fees are set at a level commensurate with OFCA's relevant expenditures and the rate of return objective of OFCA Trading Fund.

(b) Furthermore, there should be an annual review of licence fee levels paid by licensees and any surplus should be refunded or credited to the relevant licensees.

(c) We suggest adding for clarity purposes the following to the end of Sections 7(2)(b) and 7(6)(e) of the TO:-
"***Such fees shall simply recover the cost of providing a service by the Authority.***"

(B) Spectrum Fees

3.11 Spectrum is a public resource and those using a public resource to operate a business should ordinarily pay a reasonable fee to the Treasury. However, there comes a time when all or almost all members of the public use a resource and thus any related fees paid become simply an indirect tax. If such fees paid become very high, then an indirect and regressive tax has been instituted, contrary to the public interest and the Basic Law (Articles 108 and 118). Such indirect taxes harm the public and often have unintended negative consequences on the economy, especially when the public

resource is critical to consumers in terms of the service provided and the benefits received.

3.12 When this 'tipping point' is reached, fees paid to the Treasury serve little or no purpose. Consumers and the economy are harmed via such indirect and non-progressive taxes. This is why access to public parks, playgrounds, public streets, libraries, sidewalks, swimming pools, etc are all generally free (or available at a nominal fee).

3.13 Hong Kong has a mobile penetration rate of over 200%. Mobile services are used by all members of the public and businesses, as well as visitors. Mobile voice and broadband services are an important social and business tool which has a multiplier effect as to economic and social benefits. At present, high spectrum fees are simply flowed through to consumers as an indirect tax. The tipping point has been reached. Accordingly, the charges for spectrum should be based on achieving the best outcome for society, rather than generating short-term revenue for the Government. The public interest would be maximised if spectrum fees were set to just recover the cost of administering the spectrum. The benefits of a decrease in spectrum fees will immediately be flowed through to consumers with a substantial multiplier effect in terms of new investment, greater innovation and lower retail prices, which are good for consumers and a services-based economy.

Recommendation 2

The following clarifying amendments should be made to Sections 32G and 32I of the TO in relation to spectrum management and spectrum utilization fees.

(a) Section 32G(1):

"The Authority shall promote the ~~efficient allocation and~~ use of the radio spectrum as a public resource of Hong Kong ***in order to enhance the efficient allocation of spectrum, to encourage investment and innovation, to promote the business and social use of wireless services, to enhance penetration rates and to***

sustain market competitiveness. The efficient allocation of spectrum shall include spectrum trading, spectrum swapping and other arrangements which in the opinion of the Authority would meet the aims of this Section."

(b) Section 32I(3):

"A spectrum utilization fee may be calculated on the basis of a royalty***, auction, tender*** or any other basis that includes ~~an~~ ***a minimal*** element in excess of the simple recovery of the cost of providing a ***spectrum management*** service by the Authority. ***It is not the purpose of the spectrum utilization fee to maximize revenues or act as a direct or indirect tax on licensees, consumers or businesses.***"

(c) New Section 32I(3B):

"***Spectrum trading shall be implemented by the Authority by 1 April 2015.***"

(C) Tariffs

3.14 The power of the CA to require the filing and publication of tariffs (i.e. rates, terms and conditions) should be removed from the TO.

3.15 The filing and publication of tariffs are unnecessary as the Hong Kong market is competitive enough to restrain telecommunications service prices and monitor prices in general, and tariff-type information is easily accessible online or by other means such as advertisements, hotlines and shops. This would match the practice in other competitive industries, where prices are market driven, flexible and routinely negotiated. Indeed, the filing of tariffs has been criticised by competent competition authorities as a way to signal prices to competitors and thus raising competition concerns (e.g. price fixing).

3.16 There is no significant consumer interest in knowing the maximum price of individual telecommunications service. Likewise, there is no significant consumer

benefit from requiring publication of tariffs. Consumers are likely to be more interested in finding the most attractive promotional prices, which are readily available either by contacting the service provider's customer hotline, viewing its website, visiting its store or referring to marketing materials appearing in print publications. Consumer protection is ensured via other existing mechanisms such as the Trade Descriptions Ordinance, the Competition Ordinance, various codes of practice such as the Industry Code of Practice for Telecommunications Service Contracts, Customer Complaint Settlement Scheme, Consumer Council and advertising guidelines.

3.17 As far as we are aware, there has not been a significant number of consumer complaints arising from matters that are the subject of tariffs, such as the maximum price, product description or product special terms. In addition, the latest amendments to the Trade Descriptions Ordinance provide consumers with new protections. The new Competition Ordinance will also provide added protection to consumers.

Recommendation 3

Section 7F of the TO, which provides that a licensee shall publish its tariffs in accordance with the requirements of its licence or directions issued in writing by the CA, should be removed.

(D) Accounting Practices

3.18 The general power of the CA to determine the accounting practices for the provision of accounts to it should be removed from the TO.

3.19 Basically, the responsibility of the CA is to regulate telecommunications and broadcasting issues. It is not its responsibility to regulate and inform itself of the market practitioners' commercial and financial matters.

3.20 Commercial and financial matters are dealt with in the Companies Ordinance (Cap 622) and administered by other relevant authorities, e.g. Companies Registry and Securities & Futures Commission. The Companies Ordinance in Section 357 *et seq* set out general requirements for companies to keep proper accounting records, prepare financial statements (including forward-looking business analysis) and appoint auditors. Telecommunications licensees, like other business operations, have to comply with such general accounting requirements and file financial reports. Especially in the light of the new Companies Ordinance which significantly bolsters the general accounting and financial reporting requirements of companies, duplicate administration on such matters by the CA is unnecessary and creates additional costs as well as inconsistent approaches.

3.21 Any requirement for licensees to furnish accounts to the CA should be confined to the specific circumstances where the legislation requires such accounting information, namely for the purposes of calculation of royalty-based spectrum utilisation fee payments or the cost of the universal service obligation. This means that only the mobile carrier licensees and the holder of the universal service obligation (at most and only to the extent required) would be subject to the accounting obligations, while all other licensees would be excluded.

3.22 The removal of the requirement to furnish accounts would not prejudice the ability of the CA to investigate statutory or licence breaches under Sections 7I and 35A of the TO. These Sections allow the CA to request a licensee to provide relevant information, and such information requests are more appropriately dealt with on a case-by-case basis where the CA has a reasonable ground to suspect that the service provider is in breach of the law.

Recommendation 4

Section 7H of the TO, which broadly provides that "a licensee shall adopt the accounting practices, consistent with accounting principles generally accepted,

that the CA specifies" should be abolished, except to the extent when accounting information is specifically required (e.g. for the purposes of calculation of royalty-based spectrum utilisation fee payments or the cost of the universal service obligation to the extent required).

(E) Provision of Information

3.23 Sections 7I and 35A of the TO confer excessively broad powers on the CA to require licensees to provide information and for the CA to inspect records. Making use of such powers, OFCA has often requested or required licensees to provide information which is excessive, unnecessary, and therefore wasteful of resources. For example, on an annual basis since 2005, OFCA has requested licensees to provide the "Compliance Status on the 9 Best Practice Indicators", giving detailed confidential information on their sales and complaint-handling processes. It is in each licensee's own interests to ensure that it has adequate processes in place to comply with the statutory and licence obligations, and therefore it is unnecessary for such information to be requested and provided, except perhaps where repeated infringements call into question the effectiveness of a particular licensee's compliance system. An example of excessively frequent reporting is OFCA's request for quantity of subscriber numbers on quarterly basis for calculation of licence fees, even though licence fees are only payable on an annual basis.

3.24 These Sections should be amended to ensure that these powers are exercised appropriately, by making clear that the CA or its representative may request information or enter a licensee's premises to inspect and made copies of documents or accounts, only when the CA has reasonable grounds to suspect that the licensee is in breach of the TO, its licence, a direction or a determination.

Recommendation 5

Sections 7I and 35A of the TO in relation to information and inspection should be amended as follows.

(a) Section 7I:

At the end of Section 7I(1), add: "***Such requests by the Authority to a person who provides or offers a public telecommunications service shall only be made where the Authority has a reasonable ground to suspect that the person is in breach of this Ordinance, its licence, a direction or a determination.***"

(b) New Section 7I(7): "***Notwithstanding the above, the Authority may obtain market data and statistics from a licensee if such data and statistics are necessary for the Authority to fulfil its statutory functions and are requested no more often than is necessary.***"

(c) Section 35A(1):

"***When t***~~T~~he Authority or a person whom it authorizes in writing ***has a reasonable ground to suspect that the licensee is in breach of this Ordinance, its licence, a direction or a determination, it*** may at all reasonable times…."

(F) Access Rights

3.25 Hong Kong is a very vertical city. In many cases, the resident or business occupying part of a building does not necessarily control access to the relevant building or floor. Instead, developers, landlords and/or building management offices may control such access, which can create obstacles for entry. Similarly, the Mass Transit Railway Corporation ("MTRC") and private tunnel operators control access to

their facilities. The current Section 14 of the TO, with respect to installation of telecommunications facilities, both fixed and mobile, on third party premises, is one of the most important sections in the TO. Nonetheless, this Section has multiple problems and overall is ineffective in addressing access and bottleneck situations. This ineffectiveness runs to both access and the charges imposed relating to such access.

3.26 The problems with Section 14 can be summarized as follows:-

(a) Access to buildings to install, maintain and operate essential fixed and wireless facilities (including access to bottlenecks) is neither ensured nor timely achieved;
(b) Such access rights do not extend to government buildings or facilities;
(c) There is great difficulty in identifying common parts for single-owned buildings;
(d) The current legal process set out in Section 14 is cumbersome and confusing;
(e) Very often building owners demand for payment or other benefits from operators for access even though the TO does not give them the right and the relevant guidelines from OFCA say that no charges should be imposed for fixed telecommunications installations; and
(f) There are increasing difficulties in finding suitable sites for the installation of telecommunications facilities, especially along the railway network. Yet railways are the backbone of Hong Kong's public transport system which account for about 47% of franchised public transport boarding. The network, not counting the Airport Express Line and Light Rail, carries about 4.3 million passenger trips per day (2013). The Airport Express Line carries about 37,000 passenger trips per day (2013), and the Light Rail carries about 482,000 passenger trips every day (2013).

Recommendation 6

Section 14 of the TO, on the power to place and maintain telecommunications facilities on land should be amended to achieve its desired results:-

(a) Generally improve the process of building access as to both cost and timeliness where the legislation should establish the right for local carrier licensees to access a building or other facilities to install, operate and

maintain telecommunications facilities (obviating the need to obtain any prior authorisation from the CA);[7]

(b) Remove Section 14(9)(a) and thus remove the prerequisite for certificate from the CA for the purpose of initiating enforcement proceedings in the court, and amend Section 14(9)(b) accordingly;

(c) Remove the magistrate action in Section 14(4), which would be redundant especially following the amendments to Section 14(9); and

(d) Extend the access authorisation to government-owned properties, railways, tunnels and highway facilities for installation of telecommunications facilities.

(G) Protection of Telecommunications Facilities and Plant

3.27 The existing Sections 18 and 27 of the TO are inadequate in protecting telecommunications facilities and plant from damage by third parties. The offence under Section 27 applies a criminal standard to liability only for intentional damage.

3.28 Unlike electricity, gas, water and transportation utilities, there is no legislation which provides full (or equal) protection to Hong Kong's telecommunications infrastructure by requiring the taking of reasonable care. A new section in the TO is needed to bring the protection afforded to other critical infrastructure utilities to the telecommunications sector. In a services based economy, telecommunications infrastructure is a critical resource and should be fully protected. Further, the number of cases of negligent contractors appears to be increasing.

[7] Examples include access to TBE rooms, equipment rooms, rooftops, vertical and horizontal ducts, in-building wiring, tunnels, stations, etc. Mall and tunnel access is included in the above although access timing for the latter may be reasonably limited due to vehicle/train usage.

Recommendation 7

Introduce a new section in the TO for protection of telecommunications infrastructure (based on the electricity and gas protection legislation) as follows:-

(a) No person shall carry out, or permit to be carried out, any works in the vicinity of any telecommunications installations or facilities unless he or the person carrying out the works has, before commencing the works, taken all reasonable steps to ascertain the location and position of the telecommunications installations or facilities.

(b) A person who carries out or causes or permits another to carry out any works in the vicinity of any installation or facility used for telecommunications shall ensure that all reasonable measures are taken to prevent the occurrence of any removal, damage or destruction of such installations or facilities, or the interruption to the supply of telecommunications services arising from those works.

(c) A person who contravenes any requirement of subsection (a) or (b) commits an offence and is liable:-

(i) ***if the contravention results in any removal, damage or destruction of telecommunications installations or facilities, or an interruption to the supply of telecommunications services, to a fine of $200,000 and to imprisonment for 12 months; or***

(ii) ***in any other case, to a fine at level 4 and to imprisonment for 6 months, and, in the case of a continuing offence, to an additional fine of $10,000 for each day on which the offence continues.***

(d) In regard to this section, telecommunications installations and facilities include telecommunications installations, telecommunications systems,

telecommunications lines, payphones, radio transmitters, radio communications installations, as well as the computer networks, hardware and software employed in the above.

(H) Competition Provisions

3.29 Section 7Q of the TO concerning exploitative conduct (which is to be added upon the commencement of the Competition Ordinance) should be removed because this Section:-

(a) Is discriminatory in that it applies only to telecommunications licensees;
(b) Does not represent global best practices; and
(c) Is likely to result in the same dispute and case being heard by both the Telecommunications (Competition Provisions) Appeal Board and the Competition Tribunal. This in turn:

(i) would significantly increase (e.g. double) litigation costs;
(ii) would be burdensome to the industry in terms of resources, schedules and internal costs; and
(iii) could result in inconsistent decisions which would require further litigation.

Recommendation 8

Section 7Q of the TO should be deleted. With the elimination of Section 7Q, the Telecommunications (Competition Provisions) Appeal Board would no longer have any legal function and can be eliminated as Section 7Q cases are the only cases within its jurisdiction after the latest amendments to the Trade Descriptions Ordinance and the Competition Ordinance become effective. Even if Section 7Q is not removed, the Appeal Board should be eliminated and any Section 7Q cases

be handled by the new Competition Tribunal for the reasons noted above (i.e. costs, duplication of work, inconsistencies, timing, scheduling, burdens, etc).

(I) Interconnection

(a) *Types of Interconnection*

3.30 The types of interconnection covered by Section 36A of the TO are as defined in Subsection (3D). This, together with the definition of "interconnection' as stipulated in Section 36A, covers virtually any arrangement between two licensees' systems or services.

3.31 The definition of interconnection is too wide as almost any arrangement between licensees' systems or services can be termed as interconnection even when it is not. This not only creates uncertainty to licensees as to what constitutes interconnection, but would also have implications on licensees' compliance burden (e.g. the obligation to facilitate interconnection, and the obligation to meet filing and publication requirements of any interconnection agreements concluded).

3.32 The definition and types of interconnection to be covered in Section 36A of the TO should be more clearly defined in practical terms that are well understood by the industry and reflect the level of competition that now exists in all sectors of the market. Also, it is important that the CA's resources and power specified under Section 36A should be reserved for actual interconnection arrangements that are of public interest and where significant disputes may arise in the future. Accordingly, it is proposed that the definition and types of interconnection should apply to Type I interconnection (carrier to carrier) and Type II interconnection at Point C in respect of copper-based in-building block wiring systems. These are terms that are well understood by both the CA and the industry. Further, this is consistent with the current regulatory policy mandate.

Recommendation 9a

Section 36A of the TO should be narrowed down to cover only the following types of interconnection:-

(a) Type I interconnection (carrier to carrier); and

(b) Type II interconnection at Point C in respect of in-building copper block wiring systems.

(b) *Interconnection - Filing and Publication of Interconnection Agreements*

3.33 Section 36A(5A) of the TO stipulates that parties to an interconnection agreement shall ensure a copy of the agreement is filed with the CA within 14 days of it being made, unless the obligation is waived by the CA under Section 36A(5B).

3.34 Under the former TA Statement titled "Update of the Existing Arrangements for the Filing and Publication of Interconnection Agreements" dated 2 March 2012, carrier licensees are required to file all their interconnection agreements pursuant to Section 36A(5A). The filing requirement is waived only in very limited circumstances, namely if: (i) all the parties to an interconnection agreement are external fixed carriers who do not maintain or operate any submarine cable landing station in Hong Kong; or (ii) any one of the parties to the interconnection agreement is a space station carrier licensee. As regards the publication requirements, three types of interconnection agreements, namely Type I, Type II and block wiring interconnection agreements between carrier licensees, will be published.

3.35 During the consultation of the aforementioned TA Statement, the majority view of the industry is that the proposed updates to the filing requirements would create unnecessary administrative burden to the industry and OFCA. Given that most of the interconnection arrangements today are agreed on a commercial basis without OFCA's intervention, there is no need for any regulatory oversight or close

monitoring as there will not be any market failure. As regards the publication requirements, again the majority of the industry objected to the proposed publication arrangement. It is generally accepted that interconnection agreements contain commercially sensitive information, and the publication of which may encourage homogeneity (which by its nature is anti-competitive). At the end, it is doubtful that the publication of interconnection agreements would facilitate prompt and efficient interconnection.

3.36 Notwithstanding the majority view of the industry, the former TA maintained his view as stated in the Consultation Paper and the proposed requirements were put into effect in September 2012. The updated filing and publication requirements for interconnection agreements have in fact extended the requirements to all carrier licensees (which previously only applied to the incumbent fixed operator) and increased the administrative burden on the industry as a whole. Yet, it is doubtful what benefits the new arrangements have brought to the industry and consumers.

3.37 The filing and publication requirements mean that licensees have to spend considerable resources (and therefore costs) in reviewing interconnection agreements for information which is commercially sensitive, redacting such information from the agreements, discussing such redactions with the other party, and then with OFCA, before the agreements are filed. All of these processes have to be completed within a tight 14-day timeframe, meaning that resources have to be diverted from important and urgent commercial operations. While it is clear that these processes incur costs, there is no clear benefit from the filing and publication requirements.

3.38 In view of the problems highlighted above, it is proposed that the CA should reconsider the filing and publication requirements. The requirements, as stipulated in Subsections 36A(5A) to (5C) of the TO, should be repealed unless there are clear benefits that outweigh the costs on the industry.

Recommendation 9b

Subsections 36A(5A), 36A(5B) and 36A(5C) of the TO should be repealed, unless there are clear benefits that outweigh the costs on the industry.

(J) Term of Carrier Licence

3.39 Licence terms for telecommunications services should be unlimited. Currently, all licences are renewed as a matter of course. Unlimited licence terms would represent less administrative work (and costs) for both the regulator and licensees. Licence fees would continue to be collected annually and calculated, consistent with both the TO and TFO. This is the current practice adopted in the UK and other markets for both fixed and mobile licences.

3.40 This recommendation does not mean that there would be less oversight of the market or the licensees could act inconsistently with their licences, the TO or relevant policies. The CA could still take any enforcement actions deemed appropriate as it does currently, including revocation or suspension of licence if a licensee were found in breach of its licence or the TO.

3.41 Unlimited licence terms would be in consonance with the long-term commitment made by licensees to the Hong Kong telecommunications market. In turn, the resulting regulatory certainty would encourage greater investment, innovation and competition, all of which are important for a service-based economy such as Hong Kong. While this recommendation would have no effect on the CA's powers or licence fee revenue, it would be a positive step forward in line with global trends.

Recommendation 10

Section 7(2) of the TO, in which the Secretary may by regulations prescribe the general terms and fees of a carrier licence, should be amended to state that the period of a carrier licence is unlimited. Moreover, once the rationalisation of both the TO and BO is completed, as recommended in this submission, a logical next step would be to review the terms of the carrier licences to update them and remove any conditions which are redundant, inappropriate or over-intrusive in the current market environment.

(K) Regulatory Impact Assessments

3.42 When the UK government conducted a similar review of telecommunications and broadcasting legislation a decade ago resulting in the adoption of the Communications Act 2003, it took the opportunity to include in the Act new provisions requiring the regulator to keep regulatory provisions and policies under review to ensure that they do not impose unnecessary burdens, and to carry out regulatory impact assessments before introducing new regulatory provisions and policies. The experience of the HKGCC's members has been that, in spite of the Government's "Be the Smart Regulator" initiative, which seeks to ensure that similar reviews and assessments are carried out, the practices of individual Government departments and regulators have not always been consistent in these respects.

Recommendation 11

New provisions should be included in the proposed Communications Bill for Hong Kong modelled on those in the UK Communications Act 2003, to ensure that the CA and relevant Government departments adopt these practices of review and assessment of regulatory policies and provisions. More explicitly, the CA should

be required to review relevant ordinances periodically in order to identify provisions that should be removed (or amended). We suggest that a formal review every 3 years to be required by statute.

(L) Ombudsman

3.43 The Ombudsman was established in 1989 to investigate actions taken by the Government or public authorities to ensure good administration, reasonable conduct and proper procedures. The Ombudsman plays an important role in ensuring good government (i.e. preventing maladministration) and provides a pragmatic "checks and balances" option outside of the expensive and time-consuming judicial review mechanism.

3.44 While the Ombudsman Ordinance (Cap 397) ("OO") explicitly covers OFCA, it does not explicitly cover the CA which is the actual decision maker although the law could be read to cover the CA. We recommend that the OO be made to explicitly cover the CA. In the alternative, the Government could indicate that the CA is covered by the OO, an interpretation consistent with the purpose of the law and good governance.

4. PROPOSED AMENDMENTS TO THE BROADCASTING ORDINANCE

4.1 The working group has identified the following issues in the existing BO that should be addressed in the proposed Communications Bill:-

(A) Complaints Process
(B) Public Service Announcements
(C) Educational Television Programme
(D) Reporting Requirements
(E) Contests
(F) Cross-media Ownership and Disqualified Persons
(G) Foreign Ownership Restrictions
(H) Content Regulation (Language, Positive Programming and Hong Kong Origin Requirements)
(I) Fit and Proper Person Requirement
(J) Appeal and Waiver (Role of CE in C)
(K) Representation Changes

(A) Complaints Process

4.2 Under Sections 11 and 11A of the Broadcasting (Miscellaneous Provisions) Ordinance (Cap 391), the CA is empowered to receive complaints and refer them to the Broadcast Complaints Committee.

4.3 Upon receiving the complaint, the Committee shall -

(a) give the licensee an opportunity to make representations;
(b) consider the representation made;
(c) consider any evidence; and
(d) make recommendations to the Authority (i.e. the CA).

4.4 Under Section 11(3) of the Broadcasting (Miscellaneous Provisions) Ordinance, the CA may refuse to refer the case to the Committee if it is not in writing or if it is trivial or frivolous.

The Problem

4.5 In practice, the Committee sends all complaints to the licensees and invites the licensees to make representations, no matter how trivial or frivolous the complaint is. In addition, the cost of handling such and other public complaints by CA/OFCA is now paid by the licensees in the form of variable fee payable under their programme service licences. The rationale and need of charging the variable fee must be reviewed.

Recommendation 12

(a) We propose that the CA should exercise its power to screen complaints and reject complaints which are trivial or frivolous or not in writing, to save time and costs for both the industry and the Complaints Committee. Further, we propose that the CA should reject anonymous complaints in order to prevent abuse of the complaint mechanism. This would also lessen the burden on both the CA and the licensees. In addition, the CA should require the complainant to provide contact information (e.g. email address or telephone number) to allow the identity of the complainant to be confirmed.

(b) Therefore, we propose the following amendments of Section 11(3) of the Broadcasting (Miscellaneous Provisions) Ordinance:

"The Authority may refuse to refer to the Committee a complaint that –

(i) is, in the opinion of the Authority, trivial or frivolous; ~~or~~

(ii) is not made in writing; or

(iii) is anonymous without providing contact information of the complainant."

(B) Public Service Announcements ("PSAs")

4.6 Licensees are required to broadcast various announcements which the CA deems to be in the public interest under the BO and their licences. Such announcements are required to be provided at no charge by the licensees.

4.7 Both free and pay television licensees are required to include in their services:

(a) "publicity material in order to promote knowledge and understanding of the activities and functions of the [CA]; and

(b) television programmes and other material in the public interest including but not limited to weather programmes and weather forecasts provided by the Government, as the [CA] may provide or direct and at such time, within such period, on such channel, within or without such programme and in such language or dialect as the [CA] may direct."

4.8 Free TV licensees are further required to broadcast the publicity material twice daily for a total of not more than one minute on each language channel between the hours of 6:00 p.m. and 11:00 p.m. subject to a maximum limit of 5 minutes in aggregate each week on each channel. Moreover, free TV licensees are required to broadcast announcements on each channel, provided that such announcements shall not exceed one minute in total in any clock hour on each channel. The CA has insisted on requiring all pay TV channels with airtime breaks to carry APIs and Government/CA advertising despite strong industry views to the contrary and the Director of Audit's call for a comprehensive study on the effectiveness of APIs and Government advertising.

4.9 A considerable part of today's APIs is advertising materials of the Government and CA, which have been widely criticised as being more about political issues than of broad public interest or genuinely important government messages such as those involving public health, safety, weather warnings or disasters requiring prompt delivery to members of the public via free TV. Taking into account the expanded role of RTHK, the opportunity cost of PSAs, the competitive nature of the market and the

availability of other methods and medium to deliver PSAs, we propose that this practice of free announcements come to an end. That is, all PSAs should be paid for like all other advertisements. The Government has substantial resources and should be treated like other customers of the licensees who pay for air time. Air time is the most valuable asset held by a licensee and should not be appropriated without overwhelming public interest reasons (or compensation).[8]

Recommendation 13

We propose that the Government should pay for the air time for all government non-emergency announcements and other publicity materials.

(C) Educational Television Programme

4.10 Section 19 of the BO requires domestic free television licensees to include any educational television programme for schools supplied by the Government.

4.11 This requirement is no longer important to the education system. Students obtain education assistance via the Internet and after-school programmes, and watch the ETV programmes by means of DVD or, more commonly, the free VOD services on various official websites, including RTHK and HKEdCity (which is a wholly owned company of the Hong Kong Government). Further, RTHK as the government broadcasting body, should take up the responsibility to broadcast educational television programmes for schools instead of taking up the air time of a licensee.

[8] Of course, both pay and free TV licensees (and other licensees) will on their own initiative, and without charge, continue to broadcast emergency and other information (e.g. typhoon information, breaking news, etc.) of public interest.

Recommendation 14

We recommend that Section 19 of the BO be deleted.

(D) Reporting Requirements

4.12 The following paragraphs highlight the issues with respect to Reporting Requirements under the BO:

(a) Sections 39 and 26 of the BO (along with the provisions of the terms and conditions of licences) impose frequent, extensive and overly burdensome requirements on broadcast licensees. In an increasingly converged media environment, it is not necessary, and indeed inequitable, to maintain such heavy requirements on one class of media competitors (domestic broadcast licensees) and not on other suppliers of television programming, particularly the Internet or "over the top television".

(b) Detailed reports are required whenever there is any change in corporate ownership. With substantial market trading in media companies, such changes occur with increasing frequency, thus increasing the administrative compliance burden on licensees.

(c) Such reports provide little useful information to the CA, but instead they impose huge compliance burdens. The cost-benefit ratio is extremely poor.

The CA should be empowered to request relevant documentation wherever it has grounds to suspect any wrong-doing, but it should move away from requiring extensive routine reports that no longer serve a useful purpose, e.g. programme log, commercial air time and detailed monthly reports of fulfilment of licence conditions.

Recommendation 15

(a) The Government should simplify annual submissions and generally require less frequent submissions and no submission for immaterial matters.

(b) The Government should improve the Section 26 authority under the BO for the CA to request additional information or documentation where it has reasonable cause to believe a licensee is breaching laws or licence conditions. The Government should make it explicit that the CA's authority to request documentation refers to licensees or other relevant persons as noted above.

(E) Contests

Recommendation 16

(a) Since the word 'Contests' is not found in the Gambling Ordinance (Cap 148), Section 37 of the BO should be clarified by an additional sentence at the end of the Section: "***In the context of this section, contests include games of chance, games of chance and skill combined, and games of skill as well as lotteries.***"

(b) In addition, the clause "***in connection with television programmes included***" should be deleted as its meaning is unclear. In the relevant CA COP, the requirement that no fee be paid should be removed (i.e. "1. No fee is payable either in money or money's worth……" should be deleted.)

(F) Cross-media Ownership and Disqualified Persons ("DPs")

(Schedule 1: Parts 1 & 2 of the BO)

4.13 In respect of the BO, we suggest that the cross media ownership requirements be revised as they are unduly complicated and out-dated. Indeed, the sections concerned are likely to be the most complicated and most mis-understood section in the BO.

Existing Requirements

4.14 Part 2 of Schedule 1 of the BO stipulates that the following and their associates shall be disqualified from holding a licence of, or controlling a licensee of, a domestic free or pay television programme service:

(a) a licensee in the same category of licence;
(b) a licensee in a different category of licence (except that a non-domestic TV licensee can hold a domestic pay TV licence);
(c) a sound broadcasting licensee;
(d) an advertising agency; and
(e) the proprietor of a local newspaper.

The Problem

4.15 With the development of new technologies, the telecommunications and broadcasting industries are converging and the markets of both are increasingly competitive. At the same time, consumers may now get their news and information from new sources (e.g. the Internet and via PCs and mobile handsets) and the importance of the traditional pre-Internet sources has declined. The existing statutory requirements are very outdated and have become a hindrance to media development in that market players cannot take advantage of technological advancements, convergence and economies of scale to expand their businesses, thereby limiting the growth of the broadcasting industry and consumers' choices. The cross-media ownership restriction

should be updated and simplified to reflect the converged and new media realities, to allow flexibility for market players and to encourage investment and innovation.

Recommendation 17

(a) Based on our research of overseas media ownership restrictions (see Table 1), cross-media ownership restrictions do not exist in other jurisdictions. For instance, New Zealand has no cross-media ownership restrictions. In jurisdictions where such restriction exists, media owners are allowed to routinely hold more than one type of licence. For instance, in the UK, the government allows one entity to own up to two out of three types of local media (radio, regional television or newspaper) over specified market share levels. The cross-media ownership restrictions in Australia and Canada permit a person or entity to control two out of three types of media outlets (radio, TV or newspapers) in a single market with limits on the ownership of broadcasting licences to prevent domination of total TV audience share.

(b) The overseas examples illustrate that market diversity of broadcasting services can still be effectively maintained even with the provision of flexibility for media owners. It also takes into account the development of new sources of information (e.g. the Internet, the development of more competition in the market and the evolution of more sources of news and views).

(c) Taking into account both convergence and the development of the Internet and foreign examples, we suggest the following amendments to Part 2 of Schedule 1 of the BO:

(i) Paragraph 6 of Part 2 of Schedule 1, which stipulates that an advertising agency is a disqualified person, should be deleted since it is outdated and no longer relevant, and is not commonly found in other

jurisdictions.

(ii) "an other television programme service licence" in Paragraph 4(1)(b) of Part 2 of Schedule 1 should be deleted because other licensable television programme services, mainly provided to hotel rooms, target tourists (as opposed to Hong Kong people) and serve a very narrow audience. Prior to the enactment of the BO in 2000, a "hotel TV licensee" (which has deemed to be an other licensable TV programme service licensee under the BO) was not taken as a disqualified person. Therefore, there is no genuine need to make an "other TV programme service licensee" a DP.

(iii) "non-domestic television programme service licence" should also be excluded from the categories of licences in Paragraph 4(1)(b) of Part 2 of Schedule 1 because non-domestic television programme services do not primarily target Hong Kong and do not share the same market with domestic free and domestic pay TV services, radio or newspapers. Allowing a domestic free or pay TV licensee to hold a non-domestic TV licence or vice versa would not jeopardize competition or the expression of different views in the local market. The recent trend shows that television broadcasters are currently trying to develop their overseas business. Providing them with flexibility to hold a non-domestic TV licence will enhance the development of the Hong Kong broadcasting industry.

(d) We also suggest that the restrictions set out in Paragraphs 3, 4, 5 and 7 of Part 2 of Schedule 1 should be relaxed by allowing a person or entity to hold three out of four types of media outlets – radio, domestic free TV, domestic pay TV and newspaper, which is in line with the global media trends and developments - without raising any DP or prior approval issue.

(e) The proposed changes will continue to ensure a plurality of voices in broadcasting services because:-

(i) There are a multiple number of TV operators in Hong Kong. As at March 2013, we have 23 licensees providing 429 television programme channels receivable in Hong Kong[9]. Importantly, two new entrants into the free TV market have received "Approvals in Principle" and should begin operations in 2014 or 2015;

(ii) The Internet and over the top content, distributed by fixed and wireless networks, increasingly play a key role in providing news, information and alternate viewpoints. Television simply no longer plays the role it did many years ago as the pervasive source of news, information and viewpoints; and

(iii) The BO and the new Competition Ordinance will provide additional safeguards if any market concentration or other concerns arise.

(f) Separately, the definitions of Associate and Relative are too broad and outdated, and these should be narrowed. Specifically, the definition of "Relative" should be limited to immediately close relatives, i.e., grandparents, parents, spouse, children and grand-children. As to "Associate", it should mean:

(1) where the voting controller holding the voting control is an individual -
    (i) a relative of the voting controller; or
    (ii) a corporation influenced by the voting controller;
(2) where the voting controller holding the voting control is a corporation –
    (i) another corporation influencing or influenced by the corporation;
    (ii) a voting controller who influences the corporation; or
    (iii) a director or principal officer of the corporation;
(3) where the voting controller holding the voting control is a partnership –
    (i) a member of the partnership;

[9] Source: Communications Authority Annual Report 2012-2013, P. 11.

(ii) a corporation influenced by the partnership; or

(iii) a corporation of which a partner of the partnership is a director or principal officer.

The following consequential amendment should be made to the definition of "influence":

"Influence", in relation to a corporation, means the power of a voting controller to ensure that daily operations of the first-mentioned corporation are conducted in accordance with the wishes of the voting controller.

(G) Foreign Ownership Restrictions

(Schedule 1: Part 3 of the BO and the BA's Direction)

Existing Requirements

4.16 The existing major foreign ownership restrictions include:

(a) An unqualified voting controller, who is not qualified as an ordinarily resident in Hong Kong with at least 7 years of residence, shall not hold 2-6%, 6-10%, or more than 10% of the total voting control without the CA's prior approval (Section 20 (1), Part 3, Schedule 1 of the BO);

(b) The total voting control exercised by unqualified voting controllers shall be scaled down by a prescribed formula if it exceeds 49% of the total voting control exercised by both qualified and unqualified voting controllers (Sections 19(1)(b) and 19(1)(c), Part 3, Schedule 1 of the BO);

(c) Domestic free TV licensees shall identify the qualified and unqualified voting controllers before general meetings (Section 22, Part 3, Schedule 1 of the BO); and

(d) Domestic free TV licensees shall notify the CA of the total number of voting

shares, proportion of voting shares held by unqualified voting controllers and any other prescribed information in relation to general meetings. (Section 22, Part 3, Schedule 1 of the BO).

The Problem

4.17 While, in principle, we do not object to restricting foreign ownership of free TV, we have the following concerns with regard to compliance with the above threshold requirements:

(a) It is almost impossible with publicly traded entities to determine the specific levels of ownership or when specific thresholds are crossed. This is especially true with low thresholds. Licensees are generally unaware of whether unqualified voting controllers hold 2% or more of the shares. It is not until someone is in breach of the relevant provision that the CA would inform the relevant licensee of the existence of such unqualified voting controllers.

(b) The administrative work involved in identifying unqualified and qualified voting controllers in public companies and reporting shareholding of each unqualified voting controller is labour-intensive and time-consuming to licensees. The procedure of collecting information and identifying unqualified and qualified voting controllers involves hundreds of parties ranging from the Central Clearing and Settlement System, brokers, banks to individual shareholders, not to mention the licensees' duties of verifying all of the information collected. In cases of overseas shareholders who may not be aware of the statutory requirements, the whole information collection and verification procedure takes much longer time and the task is more difficult for licensees to accomplish.

(c) The licensees have to rely on cooperation of each shareholder and broker to submit reliable information required by the provision, which is not easily attainable in most cases.

(d) The workflow regarding the declaration prescribed under the former BA's direction is too hectic given the complicated procedure.

(e) The prescribed form for collecting shareholders' information is not readily comprehensible or user-friendly to many shareholders. In some cases, shareholders simply refuse to submit the required information as they would rather give up their voting rights at the general meeting. In that event, the exact percentage of shareholding of the unqualified voting controllers cannot be ascertained.

Recommendation 18

To reduce the burden of licensees while keeping the CA's power to regulate significant or meaningful foreign ownership of domestic free TV broadcasting services, we suggest the following amendments:

(a) Paragraph 20 of Part 3 of Schedule 1 of the BO requires foreign shareholders to seek prior approval of the CA before acquiring 2% or more of the total voting shares. We propose to increase the initial threshold to 6% or more in order to reduce unnecessary burdens while still retaining relevant thresholds.[10] Such a proposed amendment is justifiable because:-

(i) The CA and the licensees may more easily keep track of any substantial shareholders who hold 5% or more of voting shares in a listed corporation at Hong Kong Exchanges and Clearing Limited's website (http://sdinotice.hkex.com.hk/di/NSSrchCorp.aspx?src=MAIN&lang=EN). The relevant rule on disclosure of interests is set out in Part XV of the Securities and Futures Ordinance (Cap 571);

(ii) By definition, "exercising control of a licensee" means inter alia being a voting controller of more than 15% voting shares of the licensee. The relaxation of the threshold to "6%" is still far below the triggering point

[10] The 10% threshold would remain as is.

of exercising control of a licensee (i.e. "15%");

(iii) The relaxation would not affect the regulator's control over foreign ownership given the restriction of scaling down the voting control of unqualified voting controllers stipulated in Paragraphs 19 (1)(b) and 19(1)(c) of Part 3 of Schedule 1 of the BO); and

(iv) Such amendment would also reduce the administrative burden of the CA.

(b) The workflow regarding the declaration prescribed under the CA's direction should be lengthened in the following manner to provide adequate time for the licensees to complete the relevant administrative work:-

(i) Changing the Relevant Date specified in paragraph 3 of the CA's Direction, the date which the declaration relates to details of the voting controller of the licensee's voting shares, to 28 days (originally, 21 days) before the general meeting; and

(ii) Changing the deadline for shareholders to return the completed declaration specified in paragraph 4 of the CA's Direction to at least 16 days (originally, 11 days) before the date of the general meeting.

(c) The prescribed form for collection of shareholders' information should be simplified and designed at the discretion of the licensees and subject to the CA's approval of the layout; and

(d) The licensees should be informed by the CA of its decision on the application of foreign shareholders for permission to hold a substantial number of voting shares.

(H) Content Regulation (Language, Positive Programming and Hong Kong Origin Requirements)

(Section 23(2)(a) of the BO and also in terms and conditions of licences)

Existing Requirements

4.18 In relation to content regulation, domestic free TV programme licensees are required to:

(a) provide one Chinese language service (specifically, in Cantonese dialect) and one English language service;

(b) broadcast no less than a stipulated minimum amount of news bulletins, current affairs, documentaries, arts and culture programmes, children's programmes, programmes for young persons and others for senior citizens; and

(c) fulfil the requirement on the stipulated proportion of Hong Kong origin programming in respect of the broadcast of current affairs, documentaries, arts and culture programmes, and children's programmes.

The Problem

4.19 The problems are:

(a) The provision of an English language channel is disproportionate to the size of audience by usual language. According to the 2011 Population Census, Cantonese speakers comprised 89.5% of the Hong Kong population while English speakers comprised only 3.5%. The language requirement, dating back to the colonial era of Hong Kong, no longer meets the needs of Hong Kong people and need not be artificially retained. At the same time, the existing pay television licensees and Internet television operators provide hundreds of English language channels. RTHK is also a source of English language programming and will be launching an English language channel. The English language requirement in domestic free TV

licences substantially increases the commercial licensees' costs and takes resources away from Cantonese programming. The requirement is both outdated and not market driven.

(b) With the launch of its DTTV television programme channels, RTHK can fully satisfy the need for positive programming including arts and culture programmes, children's programmes, programmes for young persons and others for senior citizens with its local production. The positive programming and Hong Kong origin requirements for domestic free TV licensees would duplicate the work of RTHK. At the same time, there is an abundant and ever-growing supply of content from existing pay television licensees, Internet television operators and websites meeting such programming needs. Therefore, such requirements should be removed from the domestic free TV licences or in the alternative substantially reduced once additional competition is introduced.

(c) The market can best determine the mix of programming to the benefit of viewers. These content regulations should be relaxed when additional competition is allowed to enter the market.

Recommendation 19

The provision of English language service by domestic free TV licensees should not be mandatory. In a competitive market, the language used in television programme services should be determined by market forces. Domestic free TV licensees could use the saved valuable resources for improving the quality of their Cantonese TV programmes to satisfy the needs of the general public. Therefore, we suggest that the English language requirement set out in the licence of domestic free TV programme service should be removed, and left to the market when additional competition occurs. It is proposed that the English language channel requirement not be placed in the licences of the two new entrants and removed from the licences of the two incumbents upon their renewal in 2015.

The positive programming and Hong Kong origin requirements should be removed when additional competition exists. RTHK and the market can meet these requirements. Programming in competitive markets is best left to the licensees and the market. These changes can be made for the new licences now and the existing licences upon renewal.

(I) Fit and Proper Person Requirement

(Section 21 of the BO)

Existing Requirements

4.20 Television broadcasters are currently obliged to submit the following information to the CA annually to verify whether the licensee or a person exercising control of the licensee is a fit and proper person:

(a) the business record of the licensee or person exercising control of the licensee;
(b) the record of the licensee or such a person in situations requiring trust and candour;
(c) the criminal record in Hong Kong of the licensee or such a person in respect of offences involving bribery, false accounting, corruption or dishonesty; and
(d) the criminal record outside Hong Kong of the licensee or such a person in respect of offences involving bribery, false accounting, corruption or dishonesty.

The Problem

4.21 The reporting of business record of "each" person exercising control of the licensee is burdensome, in particular, when many of these persons have worldwide businesses or investments. Such a record is not necessarily relevant to the requirement.

Recommendation 20

We propose to simplify the reporting requirement by taking out "*or person*" in paragraphs 4.20 (a), (b), (c) and (d). In other words, the fit and proper person requirement should only be applied to the licensee. With such modification, the CA could still discharge its duty of ensuring that broadcasters are fit and proper. This would also be consistent with international precedents. For instance, in the UK, under Section 3(3) of each of the Broadcasting Act 1990 and the Broadcasting Act 1996, Ofcom, the broadcasting regulator, shall not grant a licence to any entity unless it is satisfied that the applicant is fit and proper to hold it.

(J) Appeal and Waiver (Role of CE in C)

(Sections 34, 35 and 42 of the BO)

Existing Requirements

4.22 The Chief Executive in Council ("CE in C") may:-

(a) determine an appeal from a licensee against a decision of the CA, anything contained in a direction, order, or determination, under the BO or anything contained in a Code of Practice (Sections 34 and 35 of the BO);
(b) specify requirements over the provision of television programme services, the board of directors, or property used or kept by the licensee (Section 42 of the BO);
(c) empower the CA to waive or dispense with the requirements mentioned in paragraph (b) (Section 42 of the BO);
(d) specify requirements with respect to the beneficial ownership or control of any of the voting shares in a domestic free or domestic pay licensee (Section 42 of the BO);
(e) make provision for matters relating to voting controllers and the holding,

acquisition or disposal of rights, titles and interests to or in voting shares in a domestic free TV licensee to ensure that it complies with the foreign ownership restriction (Section 42 of the BO);

(f) specify television programme and advertising standards (Section 42 of the BO);

(g) prescribe anything that may be prescribed under the BO (Section 42 of the BO); and

(h) provide for any matter incidental or ancillary to or necessary to give effect to any matter referred to in paragraphs (b) – (g) (Section 42 of the BO).

4.23 The power of the CE in C under paragraphs (b)-(h) shall be subject to the approval of the Legislative Council (Section 42 of the BO).

The Problem

4.24 The current problems can be summarized as follows:

(a) The current regime, in general, is excessively long.

(b) The power of the CE in C to determine an appeal under Sections 34 and 35 (see (a) above) can be taken over by the courts.

(c) The duties of the CE in C under Section 42 (see (b) – (h) above) can be fully discharged by the CA or the CEDB pursuant to other provisions under the BO.

Recommendation 21

We suggest that Section 42 of the BO be deleted; (the powers to reside with the CA or the Secretary of CEDB).

Appeal mechanisms found in Sections 34 and 35 of the BO should be made through judicial review rather than to the CE in C.

(K) Representation Changes

(Sections 10.1 – 10.4 licence conditions in respect of the rule of requiring a domestic free TV licensee to comply with statements)

Existing Requirement

4.25 A domestic free TV licensee shall comply at all material times with the licensee's proposal. Should there be any changes, it shall seek prior approval of the CA.

The Problem

4.26 The requirement of seeking the CA's prior approval for any changes regardless of the extent, materiality or effect of that change is micro-managing. It creates an unnecessary administrative burden on both the licensee and regulator.

Recommendation 22

We suggest that only substantial and material changes that negatively affect viewers be subject to such a prior approval requirement.

Table 1 CROSS MEDIA OWNERSHIP RESTRICTIONS BY JURISDICTIONS

Countries	Cross Media Ownership Restrictions
Australia	The Broadcasting Services Amendment (Media Ownership) Act 2006 removed all media industry-specific restrictions on foreign investment in Australian media, and modified slightly the existing cross-media ownership provisions. Under the revised Act, an owner may only hold licenses of two of the three types of media operation (commercial television, commercial radio, and newspaper) in the same license area. (This is referred to as the 2-out-of-3 rule.) Ownership of multiple broadcast outlets of the same type (radio or TV) is also restricted. In addition there is a complicated points system designed to maintain media diversity. A full description can be found at the link below. Note: Foreign investment in all companies is subject to review under the Foreign Acquisitions and Takeovers Act 1975. **Source:** http://www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Ownership-and-control-rules/acma---media-reform---key-concepts-relating-to-media-ownership
Canada	The CRTC has established cross-media ownership restrictions, according to which a person or entity will be permitted to control only two of the three types of media outlets — radio, TV, or newspapers — in a single market. The CRTC also imposed limits on the ownership of broadcasting licenses to prevent one party dominating more than 45% of the total television audience share in each market as a result of a merger or acquisition. Finally, the CRTC would not approve transactions between cable or satellite delivery providers that would allow one entity to effectively control the delivery of programming in a market. The policy is prospective only, applying to future mergers and acquisitions. **Source:** http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htmhttp://www.torys.com/Publications/Documents/Publication%20PDFs/TC%202008-2.pdf

Table 1 CROSS MEDIA OWNERSHIP RESTRICTIONS BY JURISDICTIONS

(cont'd)

Countries	Cross Media Ownership Restrictions
France	The CSA (Conseil Superieur de l'Audiovisuel) regulates the governance of the communications industry and manages the issues of media ownership and concentration. The CSA acts as a regulator and shareholders are obliged to report to the CSA when their share of capital ownership exceeds 10%. An owner may not be involved in more than two of the following at the national level: • TV audience area of 4 million people • Radio audience area of 30 million people • Cable audience area of 6 million people • Exceeds 20% share of the national circulation of daily newspapers • Further restrictions are noted at the local level: - A national or local TV license for the area - Owning one or more radio licenses with cumulative audiences of more than 10% for that area - Owning a cable network for the area - Editorial or other control of daily newspapers in the area **Source:** http://www.crtc.gc.ca/eng/publications/reports/mcewen07.htm
Germany	Media ownership is regulated by the länder, not the Federal government. All the länder apply the "Principle of Predominate Impact" which in general limits companies to no more than 30% of all consumers over a year, and for television 25% of viewers over a year. (There is a system of assessment that provides percentage allowances for regional programming, independently produced programming, and shares of a company's ownership that reduces the impact of the aforementioned percentage thresholds.) There are no specific restrictions on cross-ownership other than obliging to the principle stated above. **Source:** http://www.crtc.gc.ca/eng/publications/reports/mcewen07.htm

Table 1 CROSS MEDIA OWNERSHIP RESTRICTIONS BY JURISDICTIONS

(cont'd)

Countries	Cross Media Ownership Restrictions
Japan	We were unable to locate official government English-language materials describing the details of Japan regulations on cross-media ownership. However, research from other sources provided the following insights: • Cross-ownership of more than one fundamental broadcasting company is tightly restricted. • Beyond that, in theory, simultaneous ownership of newspaper, radio, and television companies is prohibited. However, when this rule was created existing arrangements were grandfathered and there are other exceptions. So in practice, five highly influential media groups each control at least one national daily, one TV station plus several magazines. • With regard to foreign investment, full ownership is permitted in cable and telecom companies, while only 20% foreign ownership is permitted in satellite and terrestrial broadcasting companies. **Source:** http://www.cnc-communications.com/fileadmin/user_upload/Publications/2010_03_Japans_Media_Booklet_2nd_Ed_JL.pdf http://www.fas.org/irp/dni/osc/japan-media.pdf
New Zealand	There are no media-specific foreign ownership rules and no cross media restrictions. (Foreign ownership of all "significant business assets" is potentially subject to restriction.) **Source:**http://www.crtc.gc.ca/eng/publications/reports/mcewen07.htm

Table 1 CROSS MEDIA OWNERSHIP RESTRICTIONS BY JURISDICTIONS

(cont'd)

Countries	Cross Media Ownership Restrictions
UK	The government can intervene in media mergers that raise public interest considerations. A series of media ownership rules governs different aspects of the media industry: Local cross-media ownership prevents one entity owning all three different types of local media (radio, regional television, newspaper) over specified market share levels. National cross-media Channel ownership prevents one entity owning both a Channel 3 Licence and greater than a 20% market share in one or more national newspapers. Broadcasting licences prevents or limits control of television and radio by certain owners whose influence might cause concern. Appointed news provider ensures Channel 3 sources its news from an independent news source. Public interest test enables the Secretary of State to intervene in media mergers on "public interest grounds". OFCOM has the right to investigate mergers that could potentially impose damaging effects on plurality, diversity or standards to prevent unacceptable levels of cross media dominance and ensure minimum level of plurality. In addition, OFCOM has just (June 2012) proposed a new system of regular reviews of media power. However, it declined to propose changes in the existing rules. Any changes would have to come from Parliament. OFCOM is required by law to review its media ownership rules at least every three years. **Source:**http://stakeholders.ofcom.org.uk/consultations/morr/summary

Table 1 CROSS MEDIA OWNERSHIP RESTRICTIONS BY JURISDICTIONS

(cont'd)

Countries	Cross Media Ownership Restrictions
USA	The FCC administers a complicated set of complementary ownership rules: Local Television Ownership Rule: • In general, an entity may not own two "full-power" television stations in the same market area. (This rule has been somewhat liberalized in recent years by addition of a number of exceptions, including for markets where there are more than 8 independently owned television stations.) Local Radio Ownership Rule: • An entity may own up to 5, 6 or 8 local radio stations depending on the size and structure of the markets where they are located. Newspaper/Broadcast Cross-Ownership Rule: • Existing rules prohibit common ownership of a daily newspaper and a full-service broadcast station (radio and TV) in the same market. • However, the FCC has proposed a substantial liberalization, in the form of several exceptions and waivers to this rule, including the "8 media voices test" used under the local television ownership rule. Said the Commission: "…the opportunity to share newsgathering resources and realize other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information….newspapers and broadcast stations do not compete in the same product market and, therefore the (blanket prohibition) rule is not necessary to promote our competition goal." Newspaper ownership of the top four stations in a market would continue to be prohibited. Radio/Television Cross-Ownership Rule: • Currently, the number of commercial radio and television stations an entity may own in the same market is limited, with the degree of common ownership permitted depending on the size of the relevant market. • The FCC has proposed repealing this rule. "We are persuaded...that the rule is not necessary to ensure sufficient diversity in local markets." Dual Network Rule: • Mergers among the top four broadcast networks (ABC, CBS, NBC, Fox) are prohibited. <u>The FCC is required by statute to review these rules every four years. The Commission is obliged to repeal or modify any regulation it determines is no longer in the public interest.</u> Separate laws theoretically restrict foreign ownership of terrestrial broadcast stations (television or radio) to 25%. The government has announced that it would use available waiver authority to allow up to 100% foreign investment from other WTO member countries. (There is no restriction on foreign investment in satellite or cable television operators or cable/satellite TV channels, and therefore no need for waiver authority.) **Source:** http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-66A1.pdf