

**Submission to
Second Consultation on
Development of Mobile TV Services**

**By
SmarTone Mobile Communications Limited and
SmarTone 3G Limited**

1. INTRODUCTION

1.1 SmarTone Mobile Communications Limited and SmarTone 3G Limited ("**SmarTone-Vodafone**") is pleased to provide its comments on the Second Consultation Paper on the Development of Mobile Television Services issued by the Commerce and Economic Development Bureau ("**CEDB**") and the Office of the Telecommunications Authority ("**OFTA**") on 28 January 2008 ("**Second Consultation Paper**").

1.2 SmarTone-Vodafone has provided its comments on the first consultation paper entitled "Digital Broadcasting: Mobile TV and Related Issues" issued by CEDB in January 2007. Some of the comments submitted herein will reiterate the issues raised in our response to the first consultation paper as the issues are common to both consultation papers.

2. SPECTRUM AVAILABILITY

2.1 With respect to the use of S Band, SmarTone-Vodafone is of the view that it should be reserved for the expansion of 3G services since demand for 3G services in Hong Kong is increasing at a fast pace. The S-Band as mentioned in the Second Consultation Paper is overlapping with the 3G extension band in 2.5/2.6GHz. Without going into details of the interference analysis between the China Multimedia Mobile Broadcasting ("**CMMB**") satellite based services and 3G

services, it is our view that the spectrum should not be allocated for CMMB as it would potentially cause interference to 3G services.

3. SPECTRUM ALLOCATION

3.1 As mentioned in our submission to the first consultation paper, it is our view that mobile TV operators should be confined to operating mobile TV service only (i.e., not for providing telecommunications services). This is similar to the existing licensing arrangement for the fixed carrier licence granted to terrestrial TV broadcasters for the transmission of terrestrial TV programme services. We consider that the same licensing arrangement should be adopted for mobile TV to preclude mobile TV operators from offering similar telecommunications services as 3G operators without subject to the same licence obligations such as payment of spectrum utilization fee (“**SUF**”), account separation, coverage and transmission rate commitment, open network access requirement and location services obligation, etc.

4. SPECTRUM ASSIGNMENT

4.1 SmarTone-Vodafone supports that the relevant spectrum in the UHF and Band III should be assigned by auction. This is consistent with the prevailing practice and the Spectrum Policy Framework published by the Government in April 2007. The SUF of the spectrum should be determined by auction, and the licensee should be subject to appropriate rollout obligations and performance bond.

4.2 There should be sufficient safeguards in the auction design to deter collusive behaviour as in the case of the auction of 3G spectrum. Details on the auction rules should be released well before the auction so that interested parties can make comment.

4.3 As regards the proposal that there should be no ownership or cross-holding restriction on mobile TV operators, SmarTone-Vodafone has reservation on such proposal.

4.4 The purposes of the cross media ownership control are to avoid conflict of interest, the build-up of monopoly of the media and editorial uniformity across different media platform. Pursuant to section 3(2)(b) of Schedule 1 to the Broadcasting Ordinance (“**BO**”) (Cap. 562), a person shall not exercise control of a domestic free television programme service licensee or a domestic pay television programme service licensee if that person is a disqualified person, unless the CE-in-Council, upon application by the licensee, is satisfied that the public interest so requires and approves otherwise. Disqualified persons include another licensee under the BO, a sound broadcasting licensee under Part IIIA of the Telecommunications Ordinance (“**TO**”) (Cap. 106), an advertising agency and a proprietor of a newspaper printed or produced in Hong Kong, as well as their controllers and associates.

4.5 SmarTone-Vodafone considers that cross media ownership control should apply to mobile TV licensees, such that the definition of disqualified persons will include mobile TV licensees. This would require a domestic free or pay television service licensee to first obtain the CE in C’s approval before it can obtain or control a mobile TV licence.

4.6 The above control is necessary in view of the potential competition issues that may arise out of cross ownership of media/broadcasting and telecommunications licensee. For instance, a company with ownership across telecommunications and broadcasting may seek to bundle its services with a view of extending its market power which the company has in one market into another market. It would be of particular concern if the company has a dominant or significant market power in one of the markets. A cross-sectoral operator having control on media content may restrict the supply of content to its telecommunications business arm only or impose harsher terms when offering the same content to non-affiliated operators so as to make it difficult for the other non-affiliated telecommunications operators to compete. A cross-sectoral operator may also refuse other telecommunications operators from placing advertisement in its TV channel with a view to limiting the promotional channel of its competitors. It can be seen from these examples that a cross-sectoral operator can act strategically to create barriers so as to limit the capability of other operators to compete effectively in the market.

4.7 The cross ownership control is particularly important given that the existing competition provisions in the BO and TO may be insufficient to address cross-sectoral competition issues. The sector specific competition provisions in the TO deal with competition issues in the telecommunications market only, while that in the BO cover specifically competition issues in the downstream television service market. In this regard, the potential cross-sectoral competition issues as mentioned in paragraph 4.6 above would not be effectively dealt with under the existing legislative framework.

4.8 With the above in mind, it is our view that the cross ownership control should apply to mobile TV licensees. In the event that the Government considers that such control should not be applied to mobile TV licensees, the mobile TV licence should at least contain licence conditions that are necessary to prevent the licensees from engaging in cross-sectoral anti-competitive practices. Licence conditions, such as account separation, non-discriminatory treatment to non-affiliated company, restriction on service bundling and sharing of customer information, etc, should apply when granting the spectrum to a company which is also a TV programme service licensee or affiliated to a TV programme service licensee.

5. LICENSING ARRANGEMENT

5.1 The Second Consultation Paper has suggested two regulatory approaches for mobile TV for consultation purpose:

- Regulated by general laws (e.g. Control of Obscene and Indecent Articles Ordinance) and self-regulatory codes of practice (“**CoP**”).
- Regulated under the BO, as a new category of TV programme service and subject to Broadcasting Authority (“**BA**”)’s CoP.

5.2 It is also suggested that broadcast-type and streaming-type mobile TV services should be treated in the same way to maintain a level playing field and regulatory symmetry.

5.3 SmarTone-Vodafone however considers that the issues concerning licensing arrangement for mobile TV involve other aspects which are not covered by the Second Consultation Paper.

5.4 From technical point of view, mobile TV can be regarded as service provided on the Internet. We have elaborated this point in our response to the first consultation paper. The packet-switched domain in 3G mobile network is just one of the interconnected computer networks in the worldwide Internet, and mobile TV service is one of the services offered over the mobile Internet. In accordance with Schedule 3 of the BO, "any service provided on the service commonly known as the Internet" is currently exempted from the licensing requirement under the BO.

5.5 A regulatory asymmetry may arise if mobile TV is specifically required to subject to the licensing requirement under the BO. It can be illustrated in the following example. A mobile TV operator providing broadcast-type mobile TV service and a 3G mobile operator providing streaming-type mobile TV services would be subject to the BO licensing under the current proposal. However, a third party providing mobile TV service without operating a mobile network (either broadcast or streaming type) but merely allowing mobile customer to access its mobile TV service via the mobile Internet would not be subject to licensing requirement under Schedule 3 of the BO. It is particularly unfair if such third party is marketing its service in Hong Kong and targeting the same group of customers as the licensed mobile TV and 3G operators. We note that similar regulatory asymmetry has already existed in the domestic pay TV market whereas pay TV services offered in Hong Kong but provided over the Internet is currently exempted from licensing under the BO.

5.6 To prevent the above regulatory asymmetry it is our view that the current exemption on Internet should be removed. Instead of distinguishing service based on the delivery platform to which the service is provided to customer, the distinction should be based on the nature of the TV programme service provided, namely (i) whether it is a linear or non-linear TV programme service and (ii) whether the service is marketed and offered in Hong Kong. We consider that these two service aspects are the most relevant considerations in determining whether a TV service should be subject to the licensing framework under the BO.

5.7 The first aspect is whether the concerned mobile TV service is a linear or non-linear TV programming service. Linear programming refers to conventional TV service where viewer watches a scheduled TV program at the particular time it is offered, and on the particular channel it is offer on. Opposite of this would be video on demand to which a viewer choose what and when to watch. We believe licensing under the BO should be required for linear programming service, be it mobile or not. These kinds of programmes warrant more content regulation as they are “pushed” to the viewers and therefore the need to protect public morals and children is more imminent. On the contrary, the non-linear mobile TV service is provided based on the request of the viewer and therefore it is more personal to the viewer. Based on the existing practice of the streaming-type mobile TV services provided by 3G mobile operators in Hong Kong, there will be sufficient safeguard in preventing a person under age 18 to have access to any adult content.

5.8 The second consideration is whether the concerned TV service is marketed and offered in Hong Kong. It is recognized that there would be enforcement issue if the licensing regime extended to any TV service accessible by the public in Hong Kong given the popularity of Internet nowadays. An individual in Hong Kong can easily access a TV programme supplied in an overseas website. We therefore consider that the exemption on Internet may continue apply to those services, but not services marketed and offered to Hong Kong customers. If a TV programme provider is promoting its service in Hong Kong and providing contractual service to Hong Kong customers, then it should be subject to the licensing framework under the BO, regardless of whether it is providing over the Internet or operating any telecommunications infrastructure in Hong Kong. It is necessary both for content regulation as well as to maintain a level playing field among TV programme service providers in Hong Kong.

5.9 We would also like to point out that the consideration as to whether a service is offered in Hong Kong is a relevant consideration under the licensing framework of the TO. Under Section 8(1)(aa) of the TO, a service provider offering telecommunications service in Hong Kong without establishing any telecommunications means is subject to a class licence under the TO. Although there is no registration for such class licence, the class licensee does fall under

the jurisdiction of the TO which empower the TA to take appropriate action pursuant to the TO when the class licensee is engaged in anti-competitive or misleading conduct.

5.10 To sum up, it is our submission that whether mobile TV should be subject to the licensing framework under the BO should depend on two factors, namely (i) linear or non-linear programming and (ii) whether the service is marketed and offered in Hong Kong. The current exemption concerning service provided on the Internet should be suitably amended in order to prevent the regulatory asymmetry as abovementioned.

SmarTone Mobile Communications Limited and
SmarTone 3G Limited
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