



Consultation on Establishment of the Communications Authority
Submission by
The Cable and Satellite Broadcasting Association of Asia (CASBAA)
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This submission is made on behalf of the Cable and Satellite Broadcasting Association of Asia (CASBAA). Headquartered in Hong Kong, CASBAA is an industry association with members and activities in 14 Asia Pacific markets. The Association is dedicated to the promotion of multi-channel television via cable, satellite, broadband and wireless video networks across the Asia-Pacific region and represents some 110 corporations, which in turn serve more than 3 billion people. Member organizations include I-Cable, TVB Pay Vision, PCCW's now TV, Celestial Pictures, STAR Group, Time Warner, Turner Broadcasting, Sony Pictures Television International, Discovery Networks Asia, National Geographic Channel Asia, HBO Asia, MTV Networks Asia-Pacific, AsiaSat, APT Satellite, IBM, Nokia, Sun Microsystems, HSBC, Standard Chartered Bank, PricewaterhouseCoopers and Boeing Space Systems.

Hong Kong is a hub of the Asian broadcasting industry. The industry's ongoing growth and development brings major economic benefits to the SAR. We estimate that the industry is responsible for creating around 2,000 high-paying posts in the international sector and another 8-9,000 jobs in the local distribution platforms. With a forecast average growth of about 13% per annum over the next five years, this is a dynamic, high-tech industry that will continue to make a very important contribution to Hong Kong's economic growth for the foreseeable future – as long as the SAR continues the policies which have favored the industry's growth.

CASBAA's member companies work in an industry which is rapidly converging, both commercially and technologically. Pay-TV content is today available to consumers in Hong Kong through distribution platforms using cable, satellite, proprietary broadband, internet, and mobile telephony. The distinctions between the "broadcasting" and "telecommunications" industries are rapidly blurring, and are likely to virtually disappear within the next decade. New business models are rapidly evolving, as industry players gain a surer knowledge of consumers' desires, and willingness, to purchase content over various transmission platforms.

It is, therefore, no surprise that we strongly favour a regulatory regime that is open, transparent, even-handed, technologically neutral, protective of creative freedoms, and flexible enough to permit evolution of new business models. It is to Hong Kong's credit that the existing regulatory system in the SAR largely embodies those attributes; it is even more to Hong Kong's credit that the SAR government is considering updating that system through creation of the Communications Authority.

CASBAA believes that the creation of a single, updated regulatory framework is completely consistent with the trends in the content transmission industries; we believe that the same regulatory principles should be applied to the transmission of content by all means. We therefore are broadly supportive of the Government's goals in proposing creation of the Communications Authority. We hope to contribute to the successful evolution of Hong Kong's regulatory framework, by our participation in this consultation exercise and also by virtue of our continuing constructive dialogue with the SAR's regulatory and governing bodies.

The following are specific reactions to concepts put forward by the CITB in its consultation paper on Establishment of the Communications Authority:

1. Basic Principles:

The Government is wise to focus on the Mission and Core Values of the Communications Authority. These are essential underpinnings for the regulatory system, and should be defined by the executive and legislature and embodied in the legislation establishing the Communications Authority. We applaud the consultation paper's statement that "a key mission of the proposed CA must therefore be to continue to uphold freedom of speech..." which is already guaranteed by the SAR's laws. We fully expect that Hong Kong will continue its successful administration of a content regulation system founded on industry self-regulation on the basis of clear published guidelines. We also fully expect Hong Kong to continue to espouse the principle of technology-neutrality in its regulatory system; we believe that, in establishing the Communications Authority, Hong Kong should set as its goal to implement a system of content regulation that is transparent and applicable across all modes of delivery.

However, we would suggest that a companion key mission for the Communications Authority should be to continue to advance the principle of competitive market regulation – sustaining a regulatory environment that allows industry players the freedom to develop and implement business strategies designed to compete in an open marketplace.

The practice of competitive market regulation is one of the reasons the SAR's regulatory framework was judged to be superior to many others in the region, in the recent CASBAA "Regulating for Growth" study. We note that the consultation paper comments with approval on European statements that market regulation should be imposed only where there is not effective competition; we would suggest incorporating into the Communication Authority's basic mission a legislated endorsement of this principle of regulatory tolerance (versus a philosophy of constant regulatory intervention that is practiced in some other Asian jurisdictions).

2. Framework for Action:

The consultation paper suggests a “staged approach” of establishing the Communications Authority immediately, and then proceeding to engage in necessary revisions of the Broadcasting and Telecommunications Ordinances. CASBAA believes that this is a wise course of action: the overall direction of regulatory policy should be set, in accordance with basic principles as noted above, before the Communications Authority and the relevant parts of the government proceed to a detailed rewriting of the applicable legislation.

We note that the Consultation Paper includes some detailed thoughts on how the competition regime to be administered by the Communications Authority might be organized. These are important questions, and it is useful to have an indication of the Government’s thinking. However, we assume that these ideas are not for inclusion in the initial Communications Authority Ordinance. They should not be settled at this initial stage, but rather should be the subject of further discussion when the Communications Authority and the government revise and amalgamate the Broadcasting and Telecommunications Ordinances.

3. Timetable:

The Consultation Paper indicates that the Government hopes to introduce draft legislation for the Communications Authority Ordinance before the end of this year. That would presumably mean passage of the legislation early in 2007. Beyond that, we understand that it is then believed that the second stage (of legislative revision) will need to take a number of years. We believe the Government should set more ambitious goals with regard to the length of this process. We strongly advocate moving as rapidly as possible to achieve the necessary unified legislation. This will require that the Communications Authority, the Administration and the Legislature set this process as a high priority and understand the urgency of putting in place a regulatory framework that will provide a large measure of certainty to accommodate new investments by industry. Convergence of content delivery technologies and the adjustment of business models is already proceeding at a highly rapid pace; the regulatory/legislative process needs to accommodate these real-world developments by moving as rapidly as can be done.

4. The Communications Authority:

The Consultation Paper sets out a conceptual framework involving establishment of the Communications Authority as a committee supported by a government department. We believe this structure would be deeply flawed, and not suitable for regulation of the converged communications industries. We urge the Government to consider carefully the experiences of several overseas jurisdictions which have already implemented converged communications regulatory structures, and create a new type of structure for Hong Kong.

a) The Communications Authority itself is proposed to be a 7-member committee, almost all of whose members are part-time volunteers. This is the way the current Broadcasting Authority functions. We believe that the principle of incorporating the participation of distinguished members of the community on a part-time basis is most

relevant to questions of content regulation, where the question of defining contemporary community standards is of key importance.

However, we believe this model is ill-suited to effectively administering the other parts of Hong Kong's converged broadcasting and telecommunications regulatory system, which include issues of spectrum allocation, system management and competition regulation – highly technical issues where the ideal regulator has substantial accumulated expertise that permits consistent, fact-based decision-making, and where removal from political decision-making is an absolute necessity. A body made up wholly of part-time representatives of the community would have neither the time nor the interest to master the complexities of such issues; the inevitable result would be that while formal decision-making might remain in the hands of the Communications Authority Board of Directors, the reality of control would reside with the civil service bureaucracy which would conduct the preparatory work for Communications Authority decisions. We have the greatest respect for Hong Kong's civil service, which is efficient and committed to decision-making that benefits the SAR, but its operating principles are not akin to those used in the private sector, and it is not prone to risk-taking or creative leadership. We believe that regulation of this dynamic sector should be vested in a body that would embody a more businesslike orientation.

We therefore recommend that Hong Kong adopt several of the features that characterize the UK's converged regulator, Ofcom. The Ofcom Board of Directors itself is a hybrid, composed of three full time "Executive" members and six part-time "Non Executive" Board members (including a Non Executive chairman). The Ofcom Board of Directors is collectively responsible for decisions on all matters but it has devolved decisions on most content regulation issues to a subsidiary body, the Ofcom Content Board, whose 11-person membership includes several representatives of the community who are chosen for the express purpose of bringing community input into the crucial, non-technical decisions on content regulation. A distinction can and should be made between the community representatives who participate in these decisions and the Board of Directors members, who should be drawn from industry, government, and academia in Hong Kong or abroad, and who should encompass a range of expertise to benefit of the Board's decisionmaking.

We note that the vast majority of overseas jurisdictions which have established converged regulatory mechanisms have opted for substantial participation of full-time members on their Boards of Directors. This is true of Ofcom in the UK, the FCC in the USA, and ACMA in Australia. In Asia as well, several regulators have been established with full-time Boards. While other organizational characteristics of these bodies vary widely, we find it significant that all these jurisdictions have concluded that effective management of a converged regulatory environment requires a core of decision makers to be committed to this task on a full-time basis.

b) Transitional arrangements aside, we believe it would be unwise for Hong Kong to continue over the long term with administration of communications regulation by a non-specialist, civil-service-based government department. Rather, the Communications Authority should be established as a quasi-governmental body. (The consultation paper itself posits the Securities and Futures Commission as one

example of such a body whose staff is not civil-service-based; other examples can be found overseas.)

The Communications Authority Board of Directors should have the authority and the mandate to manage its own staff, and it should appoint a Chief Executive (or Managing Director) who would be responsible for recruiting and managing a highly-qualified staff and administering the Communications Authority's day-to-day business. We do not agree with the Consultation Paper's proposal that this CEO should be a civil service officer; rather the Board of Directors should have the ability to hire and fire him/her at will, and compensate him/her in accordance with the responsibilities s/he will undertake. As to funding, we fully support the position that the Communications Authority should be managed in such a way that its fees just cover its costs – with the proviso that it must be managed according to private-sector standards of efficiency to keep costs down. The Ofcom example is again instructive, as that organization publishes detailed annual plans and budgetary targets for public scrutiny.

c) Of course, appropriate transitional arrangements will be required. We agree with the consultation paper that staff redundancies should not be envisaged. Many current staff of the TA and BA will, we expect, migrate to the new quasi-governmental Communications Authority. Civil Servants who do not wish to migrate should be gradually re-absorbed within the civil service. It may not be appropriate to specify all of these transitional arrangements in the initial Communications Authority Ordinance, as the Board of Directors and CEO should have a role in working out the necessary arrangements. However, the initial legislation should clearly provide for migration to a non-civil-service-based staffing model as soon as the Communications Authority is prepared to do so.

5. A Pro-Active Stance for Hong Kong

The communications industries are vital to Hong Kong's economic development and to its unique status as China's window upon the world. The Communications Authority must be given an explicit mandate to advance the market-driven development of these industries, for the benefit of the SAR and the nation. Its role and mandate must include participation where appropriate in international discussions on matters such as spectrum allocation and copyright protection, where essential decisions are undertaken that affect the industry and its growth prospects. Hong Kong should not be reticent to recognize and defend its unique interests on issues such as these. We recognize that working on international discussions will require intensive liaison with the Central government, as envisioned under the Basic Law. The Communications Authority should be given unambiguous responsibility for carrying that process forward, and the SAR government as a whole should support it.

In closing, CASBAA wishes to once again commend the Hong Kong SAR Government for its forward-looking attempt to provide a world-class framework for regulation of our industries. While we have not agreed with every aspect of the Consultation Paper's proposals, we warmly welcome their basic thrust. As an Association and as representatives of an industry which is proud to thrive in and contribute to modern Hong Kong, we look forward to continued dialogue on these questions.