



16 June 2006

Our ref.: LG83709A

Communications and Technology Branch  
Commerce, Industry and Technology Bureau  
2/F Murray Building  
Garden Road  
Hong Kong

By Fax 2511 1458 and Post

Dear Sir,

**Re : Consultation on the Establishment of the Communications Authority**

We refer to above consultation paper issued by the Commerce, Industry and Technology Bureau on 3 March 2006. We are pleased to submit our comments as attached.

Thank you for your kind attention.

Yours sincerely,  
For and on behalf of  
SmarTone Mobile Communications Limited

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Encl. 7 pages

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**SMARTONE MOBILE COMMUNICATIONS LIMITED****SUBMISSION TO  
CONSULTATION ON THE ESTABLISHMENT  
OF THE COMMUNICATIONS AUTHORITY****1. SUMMARY OF MAIN POINTS**

1.1 SmarTone Mobile Communications Limited ("SmarTone-Vodafone") welcomes the opportunity to provide its comments on the consultation paper entitled "Consultation on the Establishment of the Communications Authority" issued by the Commerce, Industry and Technology Bureau ("CITB") on 3 March 2006 (the "Consultation Paper"). The following sets out our comments on the major issues of the Consultation Paper:

- SmarTone-Vodafone supports the Government's proposal to establish the Communications Authority ("CA") as the convergent telecommunications and broadcasting regulator in Hong Kong.
- SmarTone-Vodafone supports the staged approach of implementing the CA first and then to consolidate the existing Telecommunications Ordinance ("TO") and Broadcasting Ordinance ("BO") in the next stage.
- In addition to the proposed priority review items stated in the Consultation Paper, the Government should also conduct a review of the existing cross media ownership rules and the associated competition issues in the light of the emergence of new form of media provided by Internet, mobile and fixed operators.
- Moreover, there is a need to rationalize the differential licence fee regime between telecommunications and broadcasting licensees with a view to eliminating regulatory asymmetries and promoting a level playing field for effective cross-sectoral competition.
- A key mission of the CA should be to promote the long-term interests of the communications industry, alongside the interests of the consumers.
- SmarTone-Vodafone supports that the CA should be a committee.

- The reserve of the OFTA trading fund should not be injected to the trading fund for the Office of Communications Authority ("OFCA") as it would constitute to a cross-sectoral subsidization.

## 2. COMMENTS ON KEY ISSUES

- 2.1 As the Consultation Paper has invited comments on three specific areas regarding the establishment of the CA, our comments on the Consultation Paper are therefore structured correspondingly as follows.

*CITB: We seek comments on the proposed staged approach of setting up the CA in the first place, without making changes to the existing licensing and regulatory frameworks for telecommunications and broadcasting, and on the proposed priority items for review in the next stage.*

- 2.2 There is no doubt that the boundary between telecommunications and broadcasting is becoming indistinct. Technological development has driven the convergence of telecommunications and broadcasting. Convergence is a worldwide phenomenon and it is noted that a number of overseas jurisdictions have already established a unified regulator for their electronic communications sectors. A convergent regulatory framework is therefore a logical and necessary development for Hong Kong to maintain an up-to-date regulatory regime over the electronic communications sector. Having a unified regulator would enable the Government to formulate comprehensive electronic communications policy after taking into account all aspects of telecommunications and broadcasting.

- 2.3 It is considered that the proposed staged approach is a practical way to approach the issues. The staged approach has the advantage of first establishing the CA as soon as practicable, and then the CA can pool the necessary resources and expertise to deal with the more complicated issues concerning the rationalization and consolidation of the TO and BO. It is noted that Australia has also adopted similar approach in formulating its newly unified regulator ACMA.

- 2.4 As regards the priority items for review by the CA in the second stage, the Consultation Paper has proposed two issues, namely the consolidation of competition provisions in the TO and BO and expanding the Telecommunications

(Competition Provisions) Appeal Board to act as the single appellate body on competition matters for the entire electronic communications sector. SmarTone-Vodafone has no objection to the proposed items, as these proposals aim to remove the discrepancy in the regulatory framework between the telecommunications and broadcasting sectors. In addition to these issues, we submit that there are two important issues that should also be given priority in the second stage review by the CA.

### **Cross Media Ownership Control Rules**

- 2.5 SmarTone-Vodafone submits that there is a need to review the existing cross media ownership control rules in light of the emergence of new form of media provided by Internet, mobile and fixed network licensees.
- 2.6 At present, under the BO, cross media ownership control is applicable to the domestic free and domestic pay television programme service licensees. It is specified that no "disqualified person" shall exercise control of a domestic free and a domestic pay television programme service licensee except with the prior approval of the Chief Executive in Council. "Disqualified Person" is defined in Part 2 of Schedule I to the BO as:
- (a) a licensee under the BO (except that a non-domestic licensee is not a disqualified person in relation to a domestic pay licence);
  - (b) an advertising agency;
  - (c) a sound broadcasting licensee;
  - (d) a proprietor of a newspaper printed or produced in Hong Kong;
  - (e) a person who exercise control over the categories mentioned in (a) to (d) above; and
  - (f) an associate of any of the above-mentioned categories of persons.
- 2.7 The cross media ownership restrictions can be traced back to 1964 since the inception of the Television Ordinance. The objective of the restrictions is to protect plurality of views, encourage diversity of content, promote competition in media markets and avoid editorial uniformity. The restrictions have been updated from time to time in the light of technological and media market developments.

For instance, the restrictions were amended in 1993 to extend the definition of "disqualified person" to cover the first subscription television licensee and an associate of any disqualified person. In 1996, the definition was further extended to cover a publisher of a newspaper published in Hong Kong.

- 2.8 The growth of new technologies and services has expanded the range of media-type services and the way these services are delivered to the audiences. Traditional media, such as TV and newspaper, are no longer the only source that people would turn to for news or other media-type services. New media networks, such as Internet, mobile and fixed networks, have been providing TV or media-type services to the public. The question is whether the cross media ownership rules should be extended to these new media in order to maintain media plurality and encourage competition in the electronic communications market. SmarTone-Vodafone submits that the rules need to be updated in order to cope with the development of convergent technologies and services.
- 2.9 Of equal importance is that competition issues may arise not only within telecommunications or broadcasting sectors but across the two sectors in light of the convergence of the markets. 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 so as to make it difficult for the other non-affiliated telecommunications operators to offer similar services to compete effectively with it. 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. SmarTone-Vodafone therefore submits that there is an imminent need for the Government to conduct a review of the cross-media ownership rules and the competition issues in light of the convergence of the broadcasting and telecommunications industries.

### **Rationalization of Licence Fee Regime**

- 2.10 Currently there are a number of disparities in the licence fee regime among mobile, fixed and broadcasting licensees. Mobile operators currently pay an annual licence fee of \$18 per mobile subscriber, whereas fixed operators pay \$7 per fixed line subscriber. For domestic pay TV programme service licensee, the annual licence fee per subscriber is even lower, at \$4 only. Furthermore, mobile operators are required to pay spectrum utilization fee ("SUF") for the use of radio frequency while fixed operators and broadcasting licensees are not required to pay any SUF although they are also using radio frequency for their services.
- 2.11 There is an immediate need to review the licence fee regime to ensure a level of playing field in the age of convergence. The differential licence fee regime creates regulatory asymmetries among fixed, mobile and broadcasting licensees, which would restrain cross platform competition. It is a barrier to the convergent process and is contrary to the technology neutrality principle. SmarTone-Vodafone submits that the CA should be tasked to conduct a review of the licence fee applicable to all licensees in the electronic communications sector as soon as possible with a view to removing any disparity in the licence fee regime.

### ***CITB: We seek comments on the public mission, core values and regulatory approach of the CA***

- 2.12 It is proposed in the Consultation Paper that the public mission of the CA will include the following:
- To promote the interests of consumers
  - To ensure fair competition in the market
  - To facilitate innovation and investment in the communications industry
  - To maintain a vibrant communications sector to enhance Hong Kong's competitive advantage as a communications hub in the region
  - To uphold freedom of speech
- 2.13 SmarTone-Vodafone submits that one of the key missions of the CA should be to promote the interests of the industry, alongside with the interests of consumers. The CA should strike to maximize the economic welfare, not just the interests of

consumers. In order to create a vibrant communications sector in Hong Kong, it is vital that there is a conducive environment for long-term investment in new technologies and innovative services. A robust electronic communications market will provide consumers with more choice and innovative services. The regulator should therefore ensure that there is a level playing field for effective and fair competition and facilitate long-term investment in the industry by removing any regulatory asymmetries and unnecessary regulatory risks.

*CITB: We seek comments on the proposed structure that the CA should be a committee supported by a government department*

- 2.14 SmarTone-Vodafone supports the proposal that the CA should be a committee consisted of a board of committee members. Such governing body model is widely adopted overseas and Hong Kong should follow the international practice.
- 2.15 As regards the funding of the Office of the Communications Authority ("OFCA"), the executive arm of CA, the Consultation Paper proposed that the current trading fund model operated by OFTA should be extended to OFCA to enable it to receive and keep all incomes from the administration of telecommunications and broadcasting licences, and that there will be no new upfront capital injection from the Government.
- 2.16 SmarTone-Vodafone has no objection to adopting the trading fund model to OFCA, but we would have concern if the reserve of OFTA trading fund were to be transferred to OFCA for its future operation. The OFTA trading fund was established in accordance with the Trading Funds Ordinance (Cap 430) in which it was specified that the scope of services was primarily for telecommunications matters. As at 31 March 2005, the OFTA trading fund has a reserve of \$831.2 million, within which a substantial portion was accumulated from the licence fee levied from the telecommunications licensees. On the other hand, the executive arm of the Broadcasting Authority, TELA, has been operated on Government's funding and has no reserve.
- 2.17 In view of the above, SmarTone-Vodafone submits that the reserve of OFTA trading fund should not be injected to OFCA for regulating the

telecommunications and the broadcasting sectors. It would not only deviate from the original purpose of the OFTA trading fund but also constitute an unfair subsidization from the telecommunications sector to the broadcasting sector. A more appropriate approach is to set up a new trading fund for OFCA to which both the telecommunications and broadcasting licensees will contribute an equitable share by way of licence fee payment. The OFTA trading fund should be frozen at the abolition of OFTA and the future use of the reserve should be subject to further review and consultation with the telecommunications industry.

SmarterTone Mobile Communications Limited

16 June 2006