

WHARF T&T LIMITED

**SUBMISSION TO THE COMMERCE, INDUSTRY AND TECHNOLOGY
BUREAU (“CITB”) ON THE CONSULTATION PAPER ON “THE
ESTABLISHMENT OF THE COMMUNICATIONS AUTHORITY”**

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1. INTRODUCTION

- 1.1 Wharf T&T Limited (“**WTT**”) welcomes the opportunity to respond to the Consultation Paper issued by the CITB on 3 March 2006 on “The Establishment of the Communications Authority” (“**Consultation Paper**”).
- 1.2 In the Consultation Paper the CITB invites comments to the proposal to merge the Telecommunications Authority (“**TA**”) and the Broadcasting Authority (“**BA**”) to create a new, integrated regulator that will acquire the TA’s and BA’s respective functions and powers under the Telecommunications Ordinance (Cap. 106) (“**TO**”) and the Broadcasting Ordinance (Cap. 562) (“**BO**”). It is proposed that the new unified regulator will eventually implement and enforce a new legislation converging and subsequently replacing the existing TO and BO.
- 1.3 WTT supports the merger of the TA and BA and the formation of a new unified regulator. WTT agrees with the various reasons as set out in the Consultation Paper. It is not a question of whether Hong Kong should have a unified regulator, rather how do we implement the proposal, what shape and form should the new regulatory body take, what role it should play and how it should function.
- 1.4 In WTT’s view, the Consultation Paper is merely an expression of the government’s intention to structurally integrate the TA and the BA. It falls short of serving as a blueprint for reference to the industry, as it is intriguingly lacking in details on the structure and implementation of the proposed new regulator that are essential for keeping the industry fairly informed of the proposed changes. The lack of information on the structure, composition of the new regulator and implementation only raises concerns and caution on implementation.
- 1.5 In view of such lack of details on the new regulator, WTT expects CITB to consult the industry further following its deliberation of submissions to this Consultation Paper.

2 PROPOSALS FOR REGULATORY CONVERGENCE

- 2.1 The Consultation Paper sets out CITB’s proposals to implement the following:
- (a) Merging the TA and the BA into a unified regulatory body to be called the Communications Authority (“**CA**”), which will take over the TA’s and the BA’s respective powers and functions under the TO and BO; and

- (b) Office of Telecommunications Authority (“**OFTA**”) and the Broadcasting Division of the Television and Entertainment Licensing Authority (“**TELA**”) will be amalgamated to form a new government department called the Office of the Communications Authority (“**OFCA**”). OFCA will be headed by a Director-General, serve as the executive arm of the CA and operate as a trading fund.

2.2 It is proposed that the CA will comprise of 7 members being:

- (a) 1 non-official Chairman;
- (b) 4 non-official members;
- (c) 1 official member appointed by the Chief Executive on the advice of the Secretary for Commerce, Industry and Technology; and
- (d) 1 ex-officio member being the Director-General of OFCA.

There are no indications as to the qualifications or functions of each of the members in the Consultation Paper; nor explanation as to why the proposed 7 members board.

2.3 The Consultation Paper outlines the proposed CA’s public mission, core values, and regulatory approach. The public mission of the proposed CA is to promote consumer interests and ensure fair competition, core values and regulatory approach of the CA. The CA’s core values are to be open and transparent, fair and consistent, as well as engaging and supportive. In respect of the CA’s regulatory approach, it is proposed that it will be “light and proactive.”

2.4 The proposals recommend the following two stages in which the process of regulatory convergence will be conducted:

- (a) Introduction of the Communications Authority Ordinance in November 2006, a piece of legislation enabling the setting up of, and transfer of TA’s and BA’s powers to, the CA. The said enactment will be followed by appointment of CA members within one month. The CA will commence operation four months after this enabling legislation comes into force. It will manage and enforce the TO and the BO;
- (b) The CA, as a matter of priority will review and rationalize the existing TO and BO, at the same time consolidating anti-competition provisions in the BO and TO, in preparation for the enactment of a consolidated Communications Ordinance (“**CO**”). As soon as the CO comes into force, the TO and BO will be abolished. The CA will have in place a

mechanism for appeal against decisions in competition matters of the entire electronic communications sector.

2.5 The Consultation Paper identifies two options for setting up of the CA, namely a non-civil service, statutory organization like the TA; and a governing body or committee supported by OFCA as a government department. The CITB favours the adoption of a governing body supported by a government department at least initially for the following three reasons:

- (a) The first option involving a regulator with a non-civil executive wing would involve unsettling changes that may impact the future of the new regulator's staff, which may distract the new regulator from its main points of focus;
- (b) There's no overriding urgency for implementation of the first option. Both OFTA and TELA have been effective so far, and in any case the most immediate arguments for change are more due to the existing structural fragmentation in regulation; and
- (c) There is sufficient flexibility in terms of recruitment in OFTA and TELA. Both organizations are staffed mainly with civil servants as well as non-civil service staff with specialized expertise.

3. ISSUES FOR COMMENTS

3.1 CITB invites comments on the proposals in the Consultation Paper, and specifically on the following:

- (a) 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;
- (b) The public mission, core values and regulatory approach of the CA; and
- (c) The proposed structure that CA should be a committee supported by a government department.

3.2 WTT sets out its comments on the proposals in the Consultation Paper in this submission.

4 A UNIFIED REGULATOR

4.1 WTT supports the proposed merging of the TA and the BA into a new, integrated regulator.

- 4.2 Existing regulatory regime for telecommunications and broadcasting is industry-specific; the TA regulates the telecommunication sector under the TO and the broadcasting services technical standards, whilst the BA regulates television and radio broadcasting under the BO and Part IIIA of the TO.
- 4.3 Hong Kong's communications industry, like those in other leading communications hubs are moving away from provision of single or restricted range of services delivered over a limited types of media platform towards provision of a wide range of services over various types of networks. We agree that retaining the current regime of having two separate regulatory bodies implementing the BO and the TO that address similar issues whilst focusing on different segments of the communications market would increase the risk of regulatory inconsistency and uncertainty. A merged regulator would minimize regulatory overlap and inconsistencies, and would be more likely to advise the Hong Kong government on the industries that it regulates in a consistent manner.
- 4.4 We believe the proposed CA would enhance the level of coordinated response to increasingly converged communications services, as well as ongoing issues, including spectrum allocation and management. The unified CA would be better placed to tackle technological and regulatory challenges posed by a converging market.
- 4.5 Further and equally important we believe a unified regulator would help to achieve a leaner and more efficient body thereby saving valuable public resources and reduce costs to the industry.
- 4.6 The most important matter of concern for WTT is how do we set up the new regulator who would be robust, highly competent, professional, effective, efficient and who would truly appreciate and understand the business and market dynamics and able to collaborate effectively with the industry, and at the same time remain independent.

5 TWO STAGED PROCESS TOWARDS COMPREHENSIVE CONVERGENCE

- 5.1 The scope of the current consultation is limited to the recommended structural merger of the TA and BA with minimal changes in the proposed stage one. At the same time, as pointed out in paragraph 28 of the Consultation Paper, the ultimate goal of this movement of convergence is the enactment of a comprehensive CO to replace the TO and BO which would be enforced and implemented by the CA.
- 5.2 WTT appreciates CITB's desire to set up a unified regulator without delay given that the eventual consolidation of the TO and BO would be, as pointed

out by the CITB in paragraph 29 of the Consultation Paper, “complex and protracted” exercise. We would not object to the two-staged process towards comprehensive convergence.

6 CONSOLIDATION OF THE COMPETITION PROVISIONS AND PROPOSED APPEAL MECHANISM FOR COMPETITION

- 6.1 Regulatory and legislative convergence will necessarily demand an effectively converged regime of protecting the market from anti-competitive conduct, particularly in the light that one aspect of the CA’s public mission is to ensure fair competition in the market. Fair competition is essential for encouraging innovation and investment by any industry player as well as promoting consumers interests.
- 6.2 WTT notes the importance for the TO and BO provisions defining anti-competitive behavior and abuse of position to be harmonized and rationalized. WTT does not object to the rationalization of the relevant competition provisions and appeal mechanism found in the TO and the BO at an early stage to make it functionally easier for the new CA.
- 6.3 The CITB should conduct a comprehensive review, in consultation with the industry on how the competition provisions of the TO and BO would be consolidated and the basis thereof. WTT also would like to see a timeframe for the CITB to make and consult the industry on such proposals.

7 PUBLIC MISSION, CORE VALUES, AND REGULATORY APPROACH OF THE CA

- 7.1 The Consultation Paper acknowledges the need for the CA to put in place the appropriate mechanism and practices setting out the processes and justifications for regulatory decisions, consulting the industry and consumers and publishing findings forming the basis for policy making and intervention.
- 7.2 The Consultation Paper does not provide for consideration any preview as to how the CA would operate, how decisions would be made, how it would determine and enhance the basis on which it would establish regulatory compliance, what would be the possible mechanisms for investigating breaches, procedures and methods of enforcing the prospective CO and the form in which it would administer its regulatory decisions. For the proposed merger to be a genuinely open and transparent process, we believe it is important for all stakeholders to be well-informed as to how the CA would operate, implement the proposed public mission and core values once it comes into operation.
- 7.3 To provide regulatory certainty, we believe the CA should undertake the proactive task of ensuring that all industry players, regardless of the varying

services they provide, clearly understand the basis upon which regulatory decisions would be made.

8 STRUCTURE OF THE CA

8.1 We believe the board of the CA should be lean and efficient that:

- (a) Is robust and responsive;
- (b) Adopts a balanced approach of regulation;
- (c) Is not afraid or averse to making difficult decisions;
- (d) Is not fearful of oppressive operators; and
- (e) Has a clear service pledge.

8.2 In our view, a board consisting of 7 members is not proportionate to the size of the Hong Kong's market. WTT recommends that a board consisting of 5 members would be more appropriate, in the light that Australia has 7 members on the board of the Australian Communications and Media Authority and a population of around 20,264,082; and the UK has 9 members on the Office of Communications board and a population of around 60,609,153, as opposed to Hong Kong's estimated 6,940,432.

8.3 An equally important issue is the full-time, part-time status of its members. WTT is of the view that a full-time, executive chair of the board is essential for an efficient working of the CA. Whether or not the rest of the members of the board should be full-time or part-time would depend on further information concerning the division of responsibility between CITB and the CA board.

8.4 WTT is in support of a CA comprising of non-civil service staff. With due respect we believe non-civil senior staff is more likely to be able to work well with industry players and would be in better position to understand the business dynamics.

8.5 WTT is of the view that the proposed Director-General of the CA should be re-named as the "General Manager," who should be a full-time employee of the CA and appointed by the CA board. The said General Manager should not be a member of the CA board, given the apparent need for impartiality and independence on the part of the board, resulting from the potential conflict of interest that the General Manager may face in his/her day-to-day support of the CA through OFCA's recommendations, execution of regulatory decisions, handling of operators' complaints and appeal from CA's decisions.

- 8.6 We believe there should be more transparent and comprehensive rules on how board members would be appointed and removed. We also believe the term of appointment of each board member should be 2 to 3 years. Board members must be appropriately qualified and experienced to effectively handle and resolve a range of issues involved.
- 8.7 Given the wider regulatory scope of the CA, its board structure should be supplemented with specialized sub-committees as seen in OFCOM in the UK. The CA may establish sub-committees to focus on different technologies or industry issues, such as a specific sub-committee on interconnection. Sub-committees should comprise of representatives of the industry and/or members of the public so that views from a wider spectrum of the market may be represented.
- 8.8 With communications technologies being fast-changing, the CA should be equipped with a board that possesses the necessary expertise to be able to quickly and effectively identify and resolve complex, technology-related, competition and regulatory issues. The need for expertise should be taken into consideration when considering the composition of the board. Board members should be encouraged to have close liaison with industry players. This would achieve better communication necessary for securing industry's confidence and support in the works of the CA, which would in turn encourage technological innovation and investment.
- 8.9 Special consideration should be devoted to the sectors of the industry or otherwise from which the board member should be appointed, and in what proportion. Representation of industry sectors on the board should be appropriately balanced, in view of future convergence issues. CITB should also consider appointment of board members from commercial backgrounds to foster greater understanding and collaboration with the industry. The most effective means of ensuring a right composition of the board would inevitably be by way of further industry consultation.
- 8.10 The Consultation Paper mentions that the governing body of the CA would amongst other things be tasked with approving processes to ensure transparency and accountability. It is pertinent that the CA would, as soon as possible after coming into operation finalize the clearly defined responsibility of each role on, and the accountability structure of, the board of the CA and the various departments of OFCA. The CA would need to do this in order to facilitate more effective and productive liaison with industry and develop a better framework of regulation in the long run.

- 8.11 Above all, WTT urges the CITB to consult further with the industry on the composition, appointment of members of the board of the CA and the operating mode of the CA as well as the organization of OFCA as soon as possible following this round of consultation.

9 OFCA AS A GOVERNMENT DEPARTMENT

- 9.1 Whilst there are justifications for following the Australian model of introducing minimal changes to the unified organization and temporarily eliminating the possible distraction of downsizing to the integrated regulator, the minimal change approach should not be taken entirely irrespective and at the expense of the industry and the public.
- 9.2 As we suggested earlier, the CA should not be simply another regulator that has taken over the functions of two existing separate regulators. It must be a better, more efficient and effective regulator than its predecessors.
- 9.3 Merging the TA and BA whilst maintaining the existing number of staff in each of the two regulators would inevitably result in redundant and less efficient human resources. By placing an unnecessarily high emphasis on avoiding any immediate distraction arising from downsizing of the CA, industry and ultimately consumers would forcibly be subsidizing any redundant resources.
- 9.4 The reluctance to introduce reasonably necessary staff changes seems to defeat the purpose of having a unified regulator. We believe the CA should have a comprehensive review of the converged position in terms of human resources, competencies and organizational needs so that it could minimize any unnecessary and unjustifiable costs to the public. This will ensure that Hong Kong will reap as much benefits of a unified regulator as early as possible.
- 9.5 Finally, the Consultation Paper has not given consideration to any possibility of reforming the dynamics between the CITB and CA. As things stand, there seems to remain a division of responsibility between the CITB and the CA in that the CITB will continue to be the policy maker whilst the CA implements policies and regulations. With a compact, and efficient CA board comprising of members with appropriate expertise and talents, it seems to us that there is no reason why the CA cannot take over decision making in both policies and administration matters.

10 BUDGET AND FINANCE

- 10.1 CITB envisaged in paragraph 59 of the Consultation Paper that the new CA would initially face increased operating expenses from the streamlining of regulatory practices along with major review of legislative provisions, and the

- resulting impact on licence fees to be borne by the industry would be assessed about three years after the commencement of the CA's operation.
- 10.2 We should add that implementation of the new regime would also increase costs for the industry and certain degree of uncertainty. In order to encourage continued investment in the industry, enhance market competition and adapt to changing conditions of a converging market, we believe CITB should make it a priority to conduct a comprehensive review on level of licence fee.
 - 10.3 The proposed CA would evidently continue to adopt and further embrace the light-handed regulatory approach long taken by the TA. The light-handed approach, coupled with the developed state of the Hong Kong market should mark a significant drop in administrative costs and expenses resulting from lesser regulation.
 - 10.4 Hong Kong's communications market is now fully developed. There is plummeting need for active regulatory enforcement. Moreover, OFTA as the existing regulator has gradually and largely replaced the prescriptive, sector-specific *ex-ante* regulatory approach with the more market driven *ex-post* approach based on anti-competitive provisions. Even remnants of *ex-ante* regulation in the form of mandatory type II interconnection are scheduled for a phase-out with very limited exceptions shortly.
 - 10.5 Administration of FTNS/FC licences for local and external telecommunication facilities is therefore inexorably becoming more simple and straight forward rather than costly.
 - 10.6 The drastic fall in the number of determinations made by the TA in recent years inexorably demonstrates falling administrative costs and expenses. The number of determinations completed has dropped from 3 in 2004 with 1 subsequently suspended, to 2 and 1 in 2005 and 2006 respectively. At present, the total number of proceedings in progress is 4, 3 of which are requests for determination and 1 application under section 14(1A) of the TO. As for the TA's work in conducting mediation, the trading report for the year 2004/2005 stated that the TA had mediated as few as 7 cases during the relevant year under review, of which 3 cases were settled and four remained in progress during the year.
 - 10.7 OFTA's shrinking role in road opening works should further signify a corresponding fall in its administrative costs and expenses. OFTA acts as the coordinator liaising with government departments and developers in road opening works by operators in new or major routes. It also conducts road opening co-ordination including maintenance of the online road opening coordination summary for major road opening in a major road exceeding 100 meters, any other road opening exceeding 300 meters, and any road opening

across a public road. Currently, road opening on major roads or routes are not as frequent as in the early years of market liberalization, which correlates a decreased level of regulatory administration.

- 10.8 Further, the significant rise in the number of FTNS/FC licensees since 2000 and the new Service-Based Operator licence, the corresponding rise in the amount of revenue from these licensees would only help absorb the TA's administrative costs in administering them. The financial result of the year 2004/2005 indicates that OFTA has development reserve of \$559,425,000 in 2005, an increase from 526, 381,000 in 2004.
- 10.9 In our view it is neither fair nor justifiable for continuing the imposition of the current licence fees on FTNS/FC licensees in the light of the regulatory and market developments highlighted above. Moreover, any failure of the CA to reduce and minimize the said licence fees resulting from administrative inefficiency would unreasonably penalize licensees despite their long-standing and continuing commitment to investment and technological innovations.

11 CONCLUSION

- 11.1 In our view the Consultation Paper serves as no more than an announcement of the government's intention to structurally combine the TA and BA to form a new regulator. Other than proposing a 7-member board, the paper has not offered any explanation for the number, expertise required or any preview of how the CA would operate in order to effectively tackle the various tasks and challenges ahead.
- 11.2 Whilst it is understandable that the government aims to put the proposed CA into operation as soon as possible so that it could set in motion the process of implementing and fine-tuning the complex details of a comprehensive legislative convergence without delay, we believe it is important that the industry is clear of the structure of the CA and its operation.
- 11.3 The CA cannot operate effectively in the first place without having put in place a properly reviewed and consulted system of accountability, clearly defined roles of board members and other staff, a clear policy as regards to the industries or disciplines from which board members would be drawn, and carefully drawn-up processes and procedures.
- 11.4 The government would agree that a purely structural integration of two separate regulators with limited reforms is not sufficient to achieve the aims of the proposed regulatory convergence. We need a converged regulator and converged regulations that are above all workable and better than those of the existing regime. We believe the government should ensure that the new body would achieve greater efficiency gains with a lean and efficient regulatory body.

- 11.5 We do not agree that the government should defer review of licence fees. An underlying and long-term objective of the CA would be to ensure fair competition and promote investment and innovation. The new regulator should review the licence fee payable in keeping with the decreasing administrative costs and expenses of the regulator.
- 11.6 Finally in view of the lack of information on the structure, composition and qualification of the CA board as well as the operation framework of the new CA, we believe it is very important that the government further reviews and consults the industry on this subject following this round of submissions, as it would have had the opportunity to gauge the responses from the public on this important subject matter.

Submitted by Wharf T&T Limited
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