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# THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THIRD EDITION

EDITOR  
JOHN P JANKA

LAW BUSINESS RESEARCH

# THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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THIRD EDITION

Editor  
JOHN P JANKA

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## EDITOR'S PREFACE

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The digital revolution continues to alter both local culture and the world in ways that few could have imagined when the seeds of the Internet were sown more than 40 years ago. The Internet allows ideas, news and other information to flow more freely than ever before, making it increasingly difficult for nations to control this flow at their geographical borders. Moreover, the Internet is forcing changes in many long-standing business models. It now serves for many as the preferred means of communication and media delivery, displacing or supplementing other means, such as traditional copper phone service, print media, subscription TV services and broadcast networks, in the process. The Internet now also serves as a new marketplace for goods and services, as well as a primary research tool for many.

New technologies place into our hands more computing power than was used by astronauts when the Internet was in its infancy. The proliferation of these mobile devices – smartphones and tablet computers – leads many to employ texting, e-mail and blogging instead of communicating by the spoken word. We expect to have constant access to the networks that we use in this manner to stay in contact with our social circles and the rest of the world. And our most intimate thoughts are often now memorialised for the long term, in ways that can be potentially used by third parties for purposes we have not truly anticipated.

The legal frameworks in many jurisdictions are now straining under these disruptive changes. The old adage that technology outpaces the law is more true today than ever. No doubt, the ‘hands-off’ approach to the Internet that many lawmakers and regulators once took has facilitated many of these developments. At the same time, policymakers are now struggling with new types of concerns, as broadband Internet access service becomes more and more essential to our lives. Is the marketplace responding to the needs of consumers? Are broadband networks being deployed everywhere that they are needed? Are the capabilities of those networks adequate? If not, how should government ensure that none of its citizens is left behind? Is it appropriate for government to invest in broadband infrastructure in a manner similar to its historical investment in roads,

bridges, and other critical infrastructure? Is it fair to liken broadband service to a utility, or does the state of competition make that an unfair analogy? Can government provide the best overall solution, or should it just fill in any infrastructure 'gaps' not closed by commercial providers? Should government establish 'ground rules' upfront, or should it intervene when it perceives that abuses of market power exist? How does government avoid skewing the competitive marketplace by (inadvertently or otherwise) preferring one type of technology over another and thus effectively picking the winners and losers who otherwise might emerge in the marketplace, and challenge the incumbents? Who are the new 'gatekeepers' in the Internet broadband distribution chain, and is it enough to focus on regulating the network operators when others further up the chain, such as application service and equipment providers, have more influence than ever before on what information we access and how we access it?

This expectation of instant and continuous mobile connectivity, and the development of bandwidth-intensive 'apps', create an increasing demand on the limited radio frequency spectrum asset. While digital technologies allow more efficient use of spectrum than ever before, the laws of physics still render some spectrum bands more valuable than others for mobile communications. The demand for wireless spectrum outstrips the supply in many markets, and regulators are increasingly being forced to 'refarm' spectrum bands that were designated for other purposes before the mobile broadband revolution was a glimmer in anyone's eye.

This third edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern these types of issues in 29 jurisdictions around the world. Although the authors cannot fully address each of these topics in the following articles, we hope this book provides a helpful framework for starting your analysis.

**John P Janka**

Latham & Watkins LLP

Washington, DC

September 2012

# LIST OF ABBREVIATIONS

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3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
ARPU	Average revenue per user
BIAP	Broadband Internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node

*List of Abbreviations*

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FTT <sub>x</sub>	Fibre to the <i>x</i>
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling-public call offices
UAS	Unified access services
UASL	Unified access services licence
UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation

*List of Abbreviations*

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UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over Internet protocol
WiMAX	Worldwide interoperability for microwave access

## Chapter 9

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# HONG KONG

*Simon Berry and Viola Jing<sup>1</sup>*

### I OVERVIEW

Hong Kong has one of the most developed telecommunications and Internet services markets in the world. Its legal and regulatory system promotes competitiveness while at the same time striving to enhance and facilitate business investment.

In terms of telecommunications, there are in total five mobile network operators,<sup>2</sup> 18 local fixed network operators,<sup>3</sup> and 292 external fixed telecommunications service providers<sup>4</sup> serving Hong Kong's population of slightly over 7.1 million in a land area of approximately 1,000 square kilometres. The residential fixed line penetration rate is 101 per cent<sup>5</sup> and the mobile subscriber penetration rate is 221.3 per cent.<sup>6</sup> The competition for Internet services is also intense with a total of 185 ISPs.<sup>7</sup> The number of registered customer accounts with broadband access exceeds those with dial-up access by approximately 1.45 million, and the household broadband penetration rate is 86.5

---

1 Simon Berry is a partner and Viola Jing is an associate at Latham & Watkins.

2 As at August 2012, provided by the Office of the Communications Authority ('OFCA').

3 Those who are authorised to provide facility-based local fixed telecommunications services under FTNS licence, FCL or UCL using wireline or wireless technology (as at August 2012, provided by OFCA).

4 Those who are authorised to provide facility-based external telecommunications services ('ETS') under FTNS licence, FCL, UCL and service-based ETS under SBO licence (as at August 2012, provided by OFCA).

5 Residential fixed line penetration rate is equivalent to the number of fixed lines divided by the number of households (as at June 2012, provided by OFCA).

6 As at June 2012, provided by OFCA.

7 Those who are authorised to provide Internet access services under FTNS licence, FCL, UCL and SBO licence.

per cent.<sup>8</sup> According to OFCA, there are nearly 1.2 million IPTV subscribers in Hong Kong,<sup>9</sup> and there is, according to government census, around 2.38 million households in Hong Kong.<sup>10</sup> This means more than half of all households in Hong Kong are using IPTV services. These figures demonstrate that the use of telecommunications services is advanced and widespread in Hong Kong.<sup>11</sup>

Looking at television broadcasting, Hong Kong is a peculiar place in that, despite the fact that there is no limit to the number of licences that can be granted, there have only been two domestic free-to-air television programme service providers in about the past 30 years. Further, prior to 2000, there was a monopoly in domestic pay-TV programme service in Hong Kong. Given the potential influence of television programmes (whether domestic free-to-air, domestic pay or others) on the general population, the Broadcasting Ordinance<sup>12</sup> contains stringent requirements with regard to the programmes that are broadcasted and generic codes of practice for programme, advertising and other standards.

Apart from domestic free-to-air and domestic pay-TV service providers, there are two other main categories of television broadcasting licences: non-domestic pay-TV programme service licences and other licensable television programme service licences. Oddly, the four categories of licences are granted by different authorities: domestic television licences are granted and renewed by the Chief Executive in Council (with recommendations from the Broadcasting Authority ('the BA')) while the BA issues and renews the licences for the remaining two categories. Confusingly, post-licensing, the responsibility of regulating compliance with rules and regulations and monitoring compliance and non-compliance rests mainly on the BA.

There are in total three providers of analogue sound broadcasting services operating 13 radio channels. Of the three providers, only one is funded by the government (and it does not hold a sound broadcasting licence). Although officially, there are only 13 radio channels, given the proximity of Hong Kong to mainland China, it is not uncommon for radio signals from radio stations of mainland China to be picked up in Hong Kong. In March 2011, the government granted sound broadcasting licences to three providers for the provision of DAB services in Hong Kong. They are required under the licences to provide 24-hour DAB services within 18 months of the licences being granted and launched in stages, with a wide variety of programmes. As of August 2012, there are four providers of DAB services operating 18 radio channels. Of these four providers, one is funded by the government and does not hold an audio broadcasting licence.

The Chief Executive in Council is responsible for the issuing of sound broadcasting licences. Unlike for television, there is no categorisation for radio licences.

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8 As at June 2012, provided by OFCA.

9 The 2010/2011 Trading Fund Report issued by the former Office of Telecommunications Authority ('OFTA').

10 According to statistics from April 2012 to June 2012, provided by Census and Statistics Department of Hong Kong.

11 Certain service providers are permitted to provide more than one type of services and therefore the total number of service providers may be larger than the total number of licensees.

12 Chapter 562 of the Laws of Hong Kong.

## II REGULATION

### i The regulators

#### *The Telecommunications Authority and the Office of the Telecommunications Authority*

Prior to 1 April 2012, the Hong Kong telecommunications industry was regulated by the Telecommunications Authority ('the TA') through its executive arm, OFTA. OFTA advised and regulated the telecommunications industry with a view to formulating macro-supervisory policies, while at the same time, oversaw licensing of telecommunications services providers (such as unified carriers, space station carriers and mobile virtual network operators). Its other roles included enforcing fair competition in the market, formulating, allocating and managing radio frequency spectrum and satellite coordination. OFTA was also the regulator responsible for supervising and overseeing the implementation and enforcement of measures against unsolicited electronic messages. Finally, OFTA represented Hong Kong in the International Telecommunication Union and other international forums.

#### *The Broadcasting Authority and the Television and Entertainment Licensing Authority*

Prior to 1 April 2012, the broadcasting industry in Hong Kong was regulated by the BA, an independent statutory body established under the Broadcasting Authority Ordinance,<sup>13</sup> and comprising members appointed by the Chief Executive of Hong Kong. The BA's responsibilities included handling licence applications and renewals, handling complaints, conducting enquiries, overseeing the enforcement of fair competition and levying sanctions on licensees who breached the laws, rules and regulations. It relied on the Commissioner of the Television and Entertainment Licensing Authority ('TELA') to discharge executive functions.

As the executive arm of the BA with regard to broadcasting regulation, TELA was mainly responsible for dealing with complaints against the contents of broadcasting programmes, complaints regarding anti-competitive behaviour and processing applications (new and renewals) for television programme service licences, which were different from those granted by OFTA in that television programme services licences issued by the BA were only for the contents, and the programme service providers needed to apply separately for a carrier licence from OFTA for use of the allocated frequencies.

Further, being not only Hong Kong's broadcasting regulator but also the regulatory agency responsible for the entertainment, film and newspapers industries, TELA also monitored publications, handled film censorship and processed applications for other entertainment and gaming licences (such as amusement arcade licences and mahjong licences) and registration of newspapers.

#### *The Communications Authority and the Office of the Communications Authority*

In light of the continued blurring of the roles of the BA and the TA, on 1 April 2012, the Communications Authority Ordinance<sup>14</sup> came into operation and the Communications

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13 Chapter 391 of the Laws of Hong Kong.

14 Chapter 616 of the Laws of Hong Kong.

Authority ('the CA') was set up as a unified regulator to service the broadcasting and telecommunications industries, and the functions of the BA and the TA were transferred to the CA and – like the TA – the CA operates through an executive arm, the Office of the Communications Authority ('OFCA'). OFCA is a combination of the broadcasting arm of TELA (other existing TELA functions are transferred to other government departments) and OFTA. The Office for Film, Newspaper and Article Administration under OFCA takes over TELA's previous functions in relation to film classification, control of obscene and indecent articles and newspapers registration, but the issuance of entertainment licences has been transferred to the Home Affairs Department. The CA takes over all powers and functions of the BA and the TA and the BA were both dissolved on 1 April 2012.<sup>15</sup>

The major pieces of legislation administered by OFCA are:

- a the Communications Authority Ordinance
- b the Telecommunications Ordinance;<sup>16</sup>
- c the Unsolicited Electronic Messages Ordinance ('the UEMO');<sup>17</sup>
- d the Broadcasting Ordinance; and
- e the Broadcasting (Miscellaneous Provisions) Ordinance.<sup>18</sup>

The purpose of the Telecommunications Ordinance is to 'make better provision for the licensing and control of telecommunications, telecommunications services and telecommunications apparatus and equipment'.<sup>19</sup> For this purpose, the ordinance contains provisions regulating, *inter alia*, licensing, preventing some anti-competitive practices and imposing some restrictions on ownership.

The UEMO 'provide[s] for the regulation of the sending of unsolicited electronic messages and for connected purposes'<sup>20</sup> and was adopted in 2007. All forms of commercial electronic messages with a 'Hong Kong link' are regulated so as to monitor and regulate 'professional spamming activities'. Users of telecommunications services in Hong Kong now have an option to register on facsimile, short messages and pre-recorded message 'do-not-call registers'. As of May 2012,<sup>21</sup> more than 2.4 million numbers have been registered. However, the effectiveness of this piece of legislation is sometimes queried as service providers in various industries still manage to circumvent the regulations and restrictions and shamelessly make relentless unnecessary and irritating marketing calls, facsimiles and text messages.

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15 Part 2, Section 7 of the Communications Authority Ordinance.

16 Chapter 106 of the Laws of Hong Kong.

17 Chapter 593 of the Laws of Hong Kong.

18 Chapter 391 of the Laws of Hong Kong.

19 Telecommunications Ordinance, Long title.

20 UEMO, Long title.

21 Based on the Registration Statistics on Do-not-call Registers published by OFTA.

*The Office of the Privacy Commissioner for Personal Data*

The Office of the Privacy Commissioner for Personal Data ('the Privacy Commissioner') is the only independent privacy commissioner in Asia. The Privacy Commissioner has formulated operational policies and procedures relating to the implementation of privacy protection provisions and is responsible for ensuring the protection of the privacy of individuals with respect to personal data and for overseeing the administration and supervision of the Personal Data (Privacy) Ordinance ('the PDPO'),<sup>22</sup> the legislation that regulates the collection and use of personal data in Hong Kong.

There are six data protection principles under the PDPO that must be adhered to, and the fourth principle deals with the security of personal data. Telecommunications and broadcasting service providers must be prudent at all times to safeguard personal data that are in their possession against unauthorised or accidental access, processing, erasure or other use. There have been several recent incidents in Hong Kong regarding alleged breach of this principle. For example, the leakage of personal data by members of the Hong Kong police force as a result of a peer-to-peer application that was installed on their personal computers. Their alleged lack of awareness of the potential impact of such programmes led to the leakage of important personal data to the public via the Internet. A second example is the alleged misuse of personal data of more than 2 million individuals in Hong Kong that had registered under a rewards programme run by the service provider of the biggest electronic payment system in Hong Kong ('Octopus').<sup>23</sup> The leak of the personal data of Octopus users was so significant that, for the first time ever, the Privacy Commissioner issued an interim report on its investigation into the matter at the end of July 2010. The final report was published in October 2010.

The Privacy Commissioner has published codes and guidelines on personal data privacy protection regarding the Internet for information technology practitioners and also mobile service operators.

*Sources of law*

As previously mentioned, Hong Kong's laws governing broadcasting, communications, media and the publication of books and newspapers are scattered in multiple legislation the including:

- a* the Communications Authority Ordinance;
- b* the Broadcasting Ordinance;
- c* the Film Censorship Ordinance;<sup>24</sup>

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22 Chapter 486 of the Laws of Hong Kong.

23 Octopus runs a rewards programme for customers to incentivise the usage of the Octopus card. When one registers for the Octopus reward programme, certain personal data is provided to Octopus. In summer 2010, it was revealed that Octopus had been selling personal data of those registered for the reward programme to other unrelated service providers (such as insurance companies) for direct marketing purposes. Octopus has made a total of HK\$44 million selling personal data since early 2006.

24 Chapter 392 of the Laws of Hong Kong.

- d* the Interception of Communications and Surveillance Ordinance;<sup>25</sup>
- e* the Telecommunications Ordinance;
- f* the UEMO;
- g* the Books Registration Ordinance;<sup>26</sup>
- h* the Registration of Local Newspapers Ordinance;<sup>27</sup> and
- i* the PDPO.

The Communications and Technology Branch of Hong Kong's Commerce and Economic Development Bureau ('the CEDB') is the policy bureau responsible for the policies for broadcasting and telecommunications. However, the responsibility for supervision rests with the CA.

## ii Ownership restrictions

### *The Telecommunications Ordinance*

The CA has the power to control the ownership of carrier licence holders by refusing to grant consent to any proposed change in a carrier licence holder. This power also allows the CA to determine whether competitiveness will be affected in the telecommunications market as a result of such change.<sup>28</sup> The CA may conduct investigations whenever a person (whether on its own or together with its associated persons)<sup>29</sup> becomes the beneficial

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25 Chapter 589 of the Laws of Hong Kong.

26 Chapter 142 of the Laws of Hong Kong.

27 Chapter 268 of the Laws of Hong Kong.

28 Sections 7P(1), (6) and (16) of the Telecommunications Ordinance.

29 'Associated person' includes:

*a in the case of a natural person:*

*i a relative of such natural person;*

*ii a partner of such natural person and a relative of that partner;*

*iii a partnership in which the natural person is a partner;*

*iv a corporation controlled by the natural person, by a partner such natural person or by a partnership in which the natural person is a partner; or*

*v a director or principal officer of a corporation referred to in subparagraph (iv);*

*b in the case of a corporation:*

*i an associated corporation, which refers to a corporation over which the person has control, a corporation which has control over the person or a corporation which is under the same control as is the person;*

*ii a person who controls the corporation and where the person is a natural person, a relative of the person;*

*iii a partner of a person who controls the corporation and, where the partner is a natural person, a relative of the person;*

*iv a director or principal officer of the corporation or an associated corporation and a relative of the director or principal officer; or*

*v a partner of the corporation and, where the partner is a natural person, a relative of the partner;*

owner or voting controller of (1) 15 per cent (except for those who do not acquire more than 30 per cent and are not or do not concurrently become the beneficial owner or voting controller of more than 5 per cent of the voting shares in any other carrier licence holder (nor exercise any power over the affairs of such other carrier licence holder)), (2) 30 per cent or (3) 50 per cent or more of the voting shares in a carrier licence holder, or acquires the power (whether or not in the form of voting shares) to control the affairs of the carrier licence such that the carrier licence holder must act in accordance with such person's instructions.<sup>30</sup>

The Telecommunications Ordinance disqualifies two categories of persons from controlling an entity with a sound broadcasting licence. Subject to exemptions, disqualified persons are restricted from exercising control (or increasing control) over a sound broadcasting licence holder.<sup>31</sup> 'Disqualified persons' include advertising agents, suppliers of broadcasting materials to other sound broadcasting licence holders, another sound broadcasting licence holder and any person who (as its business) transmits sound or television material, whether in Hong Kong or outside Hong Kong, and domestic free-to-air or a domestic pay-TV licensees, or associate of any of the foregoing persons.<sup>32</sup> The second category of 'unqualified persons' refers to persons who are not for the time being ordinarily resident in Hong Kong<sup>33</sup> and who have not at any time been resident

- 
- c in the case of a partnership;*
- i a partner of the partnership and, where the partner is a natural person, a relative of the partner;*
  - ii a corporation controlled by the partnership, a partner in the partnership or where a partner is a natural person, a relative of the partner;*
  - iii a corporation of which a partner is a director or principal officer; or*
  - iv a director or principal officer of a corporation referred to in subparagraph (iii).*

30 Sections 7P(16) and (17) of the Telecommunications Ordinance.

31 Section 13G of the Telecommunications Ordinance.

32 Section 13A of the Telecommunications Ordinance.

33 'Ordinarily resident in Hong Kong':

- a in the case of an individual, means:*
  - i resident in Hong Kong for not less than 180 days in any calendar year; or*
  - ii resident in Hong Kong for not less than 300 days in any two consecutive calendar years; and*
- b in the case of a company, means a company:*
  - i that is formed and registered in Hong Kong under the Companies Ordinance (Cap 32);*
  - ii in the case of which:*
    - A if not more than two of its directors take an active part in the management of the company, each of those directors is for the time being ordinarily resident in Hong Kong and each of them has at any time been resident for a continuous period of not less than seven years; or*
    - B if more than two of its directors take an active part in the management of the company, a majority of those directors are each of them, for the time being ordinarily resident in Hong Kong and each of them has at any time been resident for a continuous period of not less than seven years; and*
  - iii the control and management of which is bona fide exercised in Hong Kong.*

for a continuous period of no less than seven years; or in the case of a company, is not a company that is ordinarily resident in Hong Kong.<sup>34</sup> The aggregate of the voting shares that can be held by ‘unqualified persons’ may not exceed 49 per cent of the total number of voting shares of a sound broadcasting licence holder.

The CA also imposes a disposal restriction within a three-year period after the grant of a sound broadcasting licence.<sup>35</sup> Unless the CA otherwise agrees, the right, title or interest in 15 per cent or more of the shares in a sound broadcasting licence holder may not be transferred or acquired, directly or indirectly, within the three years after the grant date. Any agreement or similar arrangement or understanding that breaches this requirement is void.

### *The Broadcasting Ordinance*

As previously mentioned, the Chief Executive in Council grants licences under the Broadcasting Ordinance for domestic free-to-air and domestic pay-TV programme services, whereas the CA is responsible for granting licences for non-domestic and other licensable television programme services.<sup>36</sup>

Control restrictions for broadcasting licences are set out in Section 8(4) of the Broadcasting Ordinance. In relation to domestic free-to-air and domestic pay-TV programme service licences, such restrictions are as follows:

- a It must be proven that the exercise of the control and management of the licence holder is *bona fide* in Hong Kong, and where there are two or more directors (the majority being individuals as opposed to corporates), the individuals who actively participate in the company must satisfy residency requirements.<sup>37</sup> The residency requirement is equally applicable to those directors who actively participate in management and operations, and on the principal officers (being those in charge of the selection, production or scheduling of television programmes) of the licence holder.
- b As previously mentioned, no disqualified person or their controlling entities or persons or associates (unless otherwise disclosed in the licence application) can exercise control (or remain in control) over the licence holder. The purpose of this is to restrict cross-media ownership.

The restrictions are less stringent for non-domestic and other licensable television programme service licence holders, which are only required to have at least one director or principal officer to have satisfied the residency requirement.

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34 Section 13I of the Telecommunications Ordinance.

35 Section 13J of the Telecommunications Ordinance.

36 Sections 8(1) and (2) of the Broadcasting Ordinance.

37 Such individuals must be ordinarily resident in Hong Kong, which means the individual must reside in Hong Kong for no less than 180 days in a calendar year or have done so for no less than 300 days in any two consecutive years (ordinarily resident) and further, such individuals must have ordinarily resided in Hong Kong for a period of not less than seven years.

***Broadcasting licences ownership and voting restrictions***

Restrictions regarding the holding, acquisition or exercise of voting control of a licence holder (except for domestic pay-to-air television programme licence holders) are set out in Schedule 1, Part 3 of the Broadcasting Ordinance. There are restrictions on the percentage of voting control of unqualified voting controllers in Schedule 1, Part 3(19) in that unqualified voting controllers cannot exercise voting control in excess of 49 per cent of the total voting control at the time. Further, prior approval of the CA is required for the holding, acquisition or exercise of voting control by an unqualified voting controller of 2 per cent to 6 per cent or 6 per cent to 10 per cent, or more than 10 per cent of a licence holder. If an unqualified voting controller holds more than 10 per cent, only up to 10 per cent of the voting rights can be exercised by such controller. An ‘unqualified voting controller’ is a controller who is not a qualified voting controller, and a qualified voting controller refers to a voting controller who satisfies the ordinarily resident requirement and who, in the case of an individual, has resided in Hong Kong for a period of no less than seven years or in the case of a corporation, whose directors satisfy the Hong Kong residency requirement.

An additional hurdle for obtaining a domestic free-to-air television programme service licence would be that the licensee must not be a company that is a subsidiary of a corporation.

**iii Competition measures**

Competition provisions governing the broadcasting and telecommunications industry are currently set out in the Broadcasting Ordinance and the Telecommunications Ordinance, respectively. For the telecommunications industry, they are found in Sections 7K (anti-competitive practices), 7L (abuse of position) and 7N (non-discrimination) of the Telecommunications Ordinance. Under Section 7K, any licensee licensed under the Telecommunications Ordinance shall not (unless otherwise exempted pursuant to Section 39 of the Telecommunications Ordinance) engage in acts with the intention of restricting or that would restrict competition in the telecommunications market. When assessing whether certain conduct amounts to anti-competitive behaviour, the CA would consider, without limitation, (1) whether there is a price-fixing element, (2) whether the action would result in the prevention or restriction in the supply of goods or services to competitors, and (3) agreements regarding the sharing of markets on agreed geographical or customer lines. Certain actions prescribed under Section 7K(3) are deemed anti-competitive, such as, for example, entering into agreements, arrangement or understanding that would lead to (1) anti-competitive conduct, (2) making provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, (3) giving an undue preference to, or receiving an unfair advantage from, an associated person placing a competitor at a significant disadvantage or preventing or substantially restricting competition. The CA has the power to determine whether an act is anti-competitive.

Section 7L of the Telecommunications Ordinance states that licensees licensed under the Telecommunications Ordinance that are in a dominant position are not to abuse their position. The CA has the discretion to determine whether an operator is

in a dominant position or not, taking into account guidelines set out in the provision and if, in the opinion of the CA (following guidelines set out in the provision), the conduct in question has the purpose or effect of preventing or substantially restricting competition in a telecommunications market then such conduct would be deemed abuse of dominant position. In addition to the foregoing, as part of the competition measures under the Telecommunications Ordinance, no licensees are permitted to discriminate service recipients on charges or on terms of supply.

The Broadcasting Ordinance also has its own competition provisions, similar to the Telecommunications Ordinance, which prohibit anti-competitive behaviour and abuse of dominance. Section 13 (prohibition on anti-competitive conduct) prohibits a licensee under the Broadcasting Ordinance from engaging in conduct that ‘has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market’. When determining whether there is anti-competitive behaviour, the CA will look at, without limitation, (1) whether there is a price-fixing element; (2) whether the action would result in the prevention or restriction in the supply of goods or services to competitors; and (3) agreements regarding the sharing of markets on agreed geographical or customer lines. Any agreement permitting anti-competitive behaviour shall be void. Section 14 (prohibition on abuse of dominance) is similar to Section 7L of Telecommunications Ordinance as it prohibits a dominant market player from abusing its position in the television programme service market. In this regard, the CA will follow guidelines and exercise discretion when assessing whether an entity is in a dominant position and whether there is abuse of such position. The conduct of an associate of a licensee, or the position of the associate in a television programme service market, may be considered when the CA assesses the situation. Where it is of the CA’s view that there is anti-competitive behaviour or abuse of position, the CA has the right to serve a cease-and-desist notice on the licensee,<sup>38</sup> to be complied with by a particular date.

### **III SPECTRUM POLICY**

#### **i Development**

Spectrum policy in Hong Kong encompasses management, pricing, supply and rights relating to spectrum. It was monitored and regulated by the former TA prior to 1 April 2012 and is now monitored and regulated by the CA. Since 2007, the approach adopted by the Hong Kong government regarding spectrum management has been the market-based approach<sup>39</sup> and it will not depart from this approach unless there is a public policy reason to do so. The CA is open about the availability of spectrum and pursuant to the Radio Spectrum Policy Framework announced in April 2007, a spectrum release plan governing a three-year period going forward was released. Under the spectrum release plan, industry

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38 Section 16 of the Broadcasting Ordinance.

39 ‘Market-based approach’ for spectrum management means ‘methods relying on market forces to ensure the efficient use of spectrum as a public resource’. (From Radio Spectrum Policy Framework (April 2007) published by the Communications and Technology Branch of the Commerce, Industry and Technology Bureau of Hong Kong).

participants can bid for spectrum use rights through an open bidding or tendering process. To ensure industry participants are kept aware of the availability of spectrum, the release plan is updated every year. Unsurprisingly, spectrum availability determines the number of market players in the industry. Currently, spectrum is auctioned and allocated by the CA through the spectrum release plans. Where a spectrum has been previously allocated under an earlier release plan, it will be clearly stated in the current release plan.

For the three-year period from 2012/13 to 2014/15, the spectrum release plan was announced on 19 December 2011 by the former TA for the industry participants' and the public's information. The former TA clearly stipulated that the release plan is non-binding, and it (and now the CA) is not bound to allocate or assign any spectrum to any industry player. All allocation of spectrum, as and when such allocation is made, is subject to the former TA's (and now the CA's) discretion.

As part of the spectrum management policy, Hong Kong is also considering spectrum trading so as to create a market for secondary trading of spectrum use. We understand that<sup>40</sup> the government has commissioned feasibility studies but has yet to release any conclusions from such studies. One of OFCA's major tasks for 2012/2013 is to consider whether a spectrum-trading scheme should be implemented based on the feasibility report. Until the government announces the results of the feasibility report, the telecommunications industry in Hong Kong will not know what potential changes there may be (and the extent of such changes) in relation to spectrum. If spectrum trading is adopted, relevant competition measures may be required, and there may be allocation of spectrum bands that are permitted for secondary trading and a new licence category for spectrum use may need to be created.

## ii Spectrum auction and fees

The government imposes fees on the use of spectrum since it is a limited resource, but demand is high. Such fees are referred to as the spectrum utilisation fee ('SUF') and are applicable to all use of spectrum save for those reserved for government use. As an example, in January 2009, the 2.3GHz and the 2.5/2.6GHz bands were made available for auction. In the end, a total of 90MHz in the 2.5GHz band sold for approximately HK\$1.5 billion to three bidders.<sup>41</sup>

The results of the latest auction of spectrum (the 2.3GHz band) for the provision of broadband wireless services was announced by the former OFTA on 6 February 2012. The three winners to the auction each paid the SUF (amounting to a total of HK\$470 million) and provided the TA with a performance bond in return for a total of 90MHz of radio spectrum. The three winners will be assigned the acquired spectrum under a 15-year unified carrier licence and are required to provide a minimum coverage of 50 per cent of population of Hong Kong as regards its mobile services, or a minimum coverage of 200 commercial and/or residential buildings as to its fixed services within five years from the grant of the licences.

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40 OFTA's 2008/2009 Trading Fund Report.

41 Please refer to Section VII, *infra*, for details regarding the latest spectrum auction, which was completed in June 2010.

## **IV MEDIA**

### **i Digital switchover**

Digital television was first introduced in 2000 by a pay-TV service provider, and then followed by other pay-TV service providers. Broadcasting of digital television by pay-TV service providers are through cable, satellite and broadband. It was not until December 2007 that Hong Kong's only two domestic free-to-air television service providers commenced simulcast, that is, provided both analogue and digital terrestrial broadcasting services. These service providers broadcast digital television via radio communications. With television services becoming digital, consumers will have access to HDTV, interactive TV, electronic programme guides and datacasting services.

It is the intention that digital television will solve technical issues, such as bad reception, while at the same time expanding consumers' choice of programming. Further, spectrum will become available once analogue broadcasting is switched off since analogue broadcasting requires more spectrum than digital broadcasting even if the same amount of information is carried, and the released spectrum can then be used for other telecommunications services, including more television channels. The two domestic free-to-air television service providers have, as a result of the introduction of digital broadcasting, introduced more television channels originating from Hong Kong, mainland China and also Taiwan.

The results of a survey conducted in March 2011 showed that only approximately 63 per cent of the households in Hong Kong are receiving DTTV services, which is far from the target of 89 per cent by end of 2010 that was originally anticipated by the CEDB.<sup>42</sup> As a result, the Hong Kong government has deferred the plan to switch off analogue television services from the end of 2012 to 2015 to bring it in line with the actual implementation and market situation of DTTV development in Hong Kong, even though as of January 2012, the coverage of DTTV is over 96 per cent of the population.

## **V THE YEAR IN REVIEW**

### **i The Competition Ordinance<sup>43</sup>**

A very important piece of legislation, the Competition Ordinance, was passed by the Hong Kong Legislative Council on 14 June 2012. Although not solely related to broadcasting or telecommunications, the Competition Ordinance spans various sectors and business. The Competition Ordinance has not yet come into operation, and the government intends to implement the legislation in phases so that the public and the business section can familiarise themselves with the new legal requirements during the transition period. When it comes into operation, relevant competition provisions that are currently embedded in the Telecommunications Ordinance and the Broadcasting Ordinance (and any subsidiary regulations) will be amended or repealed (as applicable). Amendments and changes to the Telecommunications Ordinance and the Broadcasting

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42 Press release of the CEDB dated 22 June 2011.

43 No. 14 of 2012 of the Government of the Hong Kong SAR Gazette.

Ordinance are set out in Schedule 8, Parts 4 and 9 of the Competition Ordinance. Some more important changes are described below.

Pursuant to Part 11 of the Competition Ordinance,<sup>44</sup> the CA will have concurrent jurisdiction with the Competition Commission ('the Commission') with regards to telecommunications and broadcasting related competition matters. The CA will have jurisdiction over (1) entities licensed under the Telecommunications Ordinance or the Broadcasting Ordinance; (2) unlicensed entities whose activities require them to be licensed under the Telecommunications Ordinance or the Broadcasting Ordinance; and (3) entities exempted pursuant to Section 39 of the Telecommunications Ordinance. There is a very specific 'merger rule' set out in Schedule 7 of the Competition Ordinance, which only applies to the telecommunications sector. Save as otherwise exempted, undertakings that are subject to this merger rule are prohibited from 'directly or indirectly, carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong'. Factors that can be taken into account in determining whether there is substantial lessening of competition are set out in Schedule 7 of the Competition Ordinance.

Further, there is a mechanism in the Competition Ordinance whereby competition matters can be transferred between regulators with concurrent jurisdictions.

Sections 7K (anti-competitive practices), 7L (abuse of position), 7N (non-discrimination) and 7P (Authority may regulate changes in relation to carrier licensees) in the Telecommunications Ordinance and Section 13 to 16 in the Broadcasting Ordinance are to be repealed. They will be replaced by the conduct rules set out in Part 2 of the Competition Ordinance. A new Section 7Q (exploitative conduct) will be added to the Telecommunications Ordinance. One other potential area of change that may take place as a result of the coming into operation of the Competition Ordinance will be in relation to the codes and guidelines that are currently in issue. The CA has issued its own guidelines on competition-related matters, such as in relation to its approach to analysis, handling of competition complaints and enforcement of competition procedures under the Telecommunications Ordinance and the Broadcasting Ordinance respectively. Section 35 of the Competition Ordinance states that the Commission must, *inter alia*, 'issue guidelines (a) indicating the manner in which it expects to interpret and give effect to the conduct rules [...] after having consulted the Legislative Council and any persons it considers appropriate. Pursuant to section 161 of and Schedule 6 to the Competition Ordinance, upon coming into operation of the said section, the CA and the Commission are required to sign a Memorandum of Understanding which must provide for, *inter alia*, the joint authorship of educational materials or guidelines on competition matters. In the circumstances, it is not clear whether the Commission will waive its right under Section 35 of the Competition Ordinance and allow the CA to issue new guidelines on broadcasting and telecommunications-related competition matters pursuant to the concurrent jurisdiction provision.

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44 Part 11, Sections 159 to 161 of the Competition Ordinance.

**ii Commencement of the Communications Authority Ordinance**

As explained above, the Communications Authority Ordinance came into operation on 1 April 2012. On the same day, the CA was set up as a unified regulator to service the broadcasting and telecommunications industries. The CA took over all powers and functions of the BA and the TA, which were dissolved on 1 April 2012.

**iii Charging scheme in respect of administratively assigned spectrum**

Currently, radio spectrum without congestion that are assigned administratively (not through auctions) are not subject to any form of SUF (SUF is implemented on spectrum assigned through auction). In November 2010, the government issued a public consultation paper relating to the proposed implementation of a charging scheme in respect of SUF for such spectrum, including relevant guiding principles, the proposed SUF and its calculation methodology and the implementation details. The stated purpose of the charging scheme is to encourage spectrum users to use the spectrum wisely and effectively. The government envisaged the return of any surplus spectrum for subsequent reassignment to other users. To encourage the return of surplus spectrum, a one-off grant capped at 10 per cent of the annual SUF applicable to the spectrum is proposed. This grant is also available where users migrate to other means of providing their services.

It is proposed that SUF be imposed on spectrum in frequency bands that are currently congested (that is, 75 per cent occupied) and are anticipated to be more congested in the future. As a result, eight frequency bands used as fixed links, electronic news gathering or outside broadcast links and selected satellite links will be subject to SUF. SUF will be determined based on the estimated opportunity cost of the spectrum. The proposed SUF will be payable annually and there will be a transition period of five years before the charging scheme is fully in force. SUF bands are also proposed to be reviewed every five years.

Having considered the views on the consultation paper of ten market participants, the Secretary for Commerce and Economic Development and the former TA issued a consultation conclusion on 23 September 2011 and decided to proceed with the implementation of the SUF charging scheme for spectrum assigned administratively based on the lists of frequency bands, SUF levels and implementation arrangements. Subject to the legislative process, it is anticipated that the SUF charging scheme for spectrum assigned administratively will commence in early 2012 with a grace period of two years after which the first SUF charging cycle will take effect by a three-year phase-in approach.

## Appendix 1

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# ABOUT THE AUTHORS

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Simon Berry is a partner in the Hong Kong office of Latham & Watkins and a member of the corporate department.

Mr Berry has extensive experience in regulatory law. His practice also focuses on a broad range of mergers and acquisitions, reorganisations, post-acquisition integration and corporate finance transactions involving regulated entities such as banks, insurance companies and financial institutions.

His experience in regulatory matters includes licensing and advisory work covering a wide range of regulated activities including securities, commodities, futures and other derivatives, asset management and proprietary trading including offerings of investment products, outsourcing, e-commerce-related issues, data privacy, Internet securities trading and e-banking matters. He has advised on the acquisition and disposal of a number of licensed entities as well as members of stock exchanges, futures exchanges, clearing companies and other regulated entities.

His experience in mergers and acquisitions includes takeover offers, sales and purchases of businesses and companies, direct investments, private equity, joint ventures, mergers by legislation, schemes of arrangement and other commercial agreements. He has also advised on transactions involving television companies and radio broadcasting companies. He is the chairman of the Competition Law Committee of the Law Society of Hong Kong.

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Viola Jing is an associate in the Hong Kong office of Latham & Watkins and a member of the litigation department.

Her practice focuses on civil and commercial litigation and financial regulatory compliance and investigations. She has acted for high net-worth individuals, private and public companies in monetary claims and other civil matters.

Ms Jing's experience in litigation includes advising clients on shareholders or directors disputes, debt recovery actions, defamation, general commercial, employment, corporate insolvency and bankruptcy matters and attending companies winding-up and bankruptcy proceedings.

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