

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

EIGHTH EDITION

Editor
John P Janka

THE LAWREVIEWS

THE

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MEDIA AND
TELECOMMUNICATIONS
REVIEW

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CONTENTS

PREFACE.....	vii
<i>John P Janka</i>	
LIST OF ABBREVIATIONS.....	ix
Chapter 1 AUSTRALIA.....	1
<i>Angus Henderson, Richard Dampney and Stephen Coudounaris</i>	
Chapter 2 BRAZIL.....	16
<i>Raphael de Cunto and Beatriz Landi Laterza Figueiredo</i>	
Chapter 3 BULGARIA.....	28
<i>Anna Rizova and Oleg Temnikov</i>	
Chapter 4 CHINA.....	42
<i>Jihong Chen</i>	
Chapter 5 EU OVERVIEW.....	54
<i>Marco D'Ostuni, Gianluca Faella and Manuela Becchimanzi</i>	
Chapter 6 FRANCE.....	73
<i>Myria Saarinen and Jean-Luc Juban</i>	
Chapter 7 GERMANY.....	90
<i>Christian Engelhardt</i>	
Chapter 8 HONG KONG.....	107
<i>Simon Powell and Chi Ho Kwan</i>	
Chapter 9 INDIA.....	123
<i>Atul Dua and Anuradha</i>	

Contents

Chapter 10	INDONESIA.....	136
	<i>Aston Goad, Indra Dwisatria and Randy Riflaan</i>	
Chapter 11	ITALY.....	148
	<i>Marco D'Ostuni, Marco Zotta and Manuela Becchimanzi</i>	
Chapter 12	JAPAN.....	167
	<i>Hiroki Kobayashi and David Lai</i>	
Chapter 13	KENYA.....	185
	<i>Brian Tororei</i>	
Chapter 14	LEBANON.....	197
	<i>Simon El Kai, Souraya Machnouk, Hachem El Housseini and Ziad Maatouk</i>	
Chapter 15	LUXEMBOURG.....	210
	<i>Linda Funck</i>	
Chapter 16	MEXICO.....	232
	<i>Federico Hernández Arroyo</i>	
Chapter 17	NIGERIA.....	243
	<i>Olajumoke Lambo and Godson Oghenechuko</i>	
Chapter 18	PORTUGAL.....	252
	<i>Jaime Medeiros, Mónica Oliveira Costa and Ana Ramos Logrado</i>	
Chapter 19	RUSSIA.....	271
	<i>Maxim Boulba and Elena Andrianova</i>	
Chapter 20	SINGAPORE.....	281
	<i>Ken Chia and Daryl Seetoh</i>	
Chapter 21	SPAIN.....	307
	<i>Pablo González-Espejo</i>	
Chapter 22	SWITZERLAND.....	321
	<i>Andrés Gurovits and Clara-Ann Gordon</i>	
Chapter 23	TAIWAN.....	338
	<i>Patrick Marros Chu, Vick Chien and Sam Huang</i>	

Contents

Chapter 24	TURKEY.....	349
	<i>Burçak Ünsal and Okan Gündüz</i>	
Chapter 25	UNITED KINGDOM.....	367
	<i>John D Colahan, Gail Crawford and Lisbeth Savill</i>	
Chapter 26	UNITED STATES.....	413
	<i>John P Janka and Jarrett S Taubman</i>	
Appendix 1	ABOUT THE AUTHORS.....	435
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	455

PREFACE

This fully updated eighth edition of *The Technology, Media and Telecommunications Review* provides an overview of evolving legal constructs in 26 jurisdictions around the world. It is intended as a business-focused framework for both start-ups and established companies, as well as an overview for those interested in examining evolving law and policy in the rapidly changing TMT sector.

Broadband connectivity and wireless services continue to drive law and policy in this sector. The disruptive effect of new technologies and new ways of communicating creates challenges around the world as regulators seek to facilitate the deployment of state-of-the-art communications infrastructure to all citizens and also to use the limited radio spectrum more efficiently than before. At the same time, technological innovation makes it commercially practical to use large segments of ‘higher’ parts of the radio spectrum for the first time. Moreover, the global nature of TMT companies compels them to address these issues in different ways than before.

A host of new demands, such as the developing internet of things, the need for broadband service to aeroplanes, vessels, motor vehicles and trains, and the general desire for faster and better mobile broadband service no matter where we go, create pressures on the existing spectrum environment. Regulators are being forced to both ‘reform’ existing spectrum bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs; and facilitate spectrum sharing between different services in ways previously not contemplated. Many important issues are being studied as part of the preparation for the next World Radio-communication Conference to be held in 2019. No doubt, this Conference will lead to changes in long-standing radio spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Legacy terrestrial telecommunications networks designed primarily for voice are being upgraded to support the broadband applications of tomorrow that will extend economic benefits, educational opportunities and medical services throughout the world. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Many governments are re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation also lead to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector. Similarly,

many global companies now are able to focus their regulatory activities outside their traditional home, and in jurisdictions that provide the most accommodating terms and conditions.

Changes in the TMT ecosystem, including increased opportunities to distribute video content over broadband networks, have led to policy focuses on issues such as ‘network neutrality’ – the goal of providing some type of stability for the provision of the important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented has profound effects on the balance of power in the sector, and also raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers and to facilitate their new businesses.

The following chapters describe these types of developments around the world, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication, and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2017

HONG KONG

*Simon Powell and Chi Ho Kwan*¹

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 four mobile network operators,² 26 local fixed network operators³ and 260 external fixed telecommunications service providers⁴ serving Hong Kong's population of slightly over 7.38 million in a land area of approximately 1,000 square kilometres.⁵ The residential fixed line penetration rate is 92.06 per cent⁶ and the mobile subscriber penetration rate is 237 per cent.⁷ The competition for internet services is intense, with a total of 224 ISPs.⁸ The number of registered customer accounts with broadband access amounts to approximately 2.63 million and the household broadband penetration rate is 93 per cent.⁹ According to OFCA, there are approximately 2.16 million subscribers to licensed domestic pay-TV services in Hong Kong¹⁰ out of around 2.53 million households in Hong Kong.¹¹ There are more than 46,100 public Wi-Fi access points in the city,¹² and the numbers continue to grow. As these figures demonstrate, the use of telecommunications services is advanced and widespread in Hong Kong.

In terms of television broadcasting, despite the fact that there is no limit to the number of licences that can be granted, until 2015 there had only ever been two domestic free-to-air television programme service providers in Hong Kong for the past 30 years. Recently

1 Simon Powell is a partner and Chi Ho Kwan is an associate at Latham & Watkins.

2 As of August 2017, provided by the Office of the Communications Authority (OFCA).

3 i.e., licensees authorised to provide facility-based local fixed telecommunications services under an FTNS licence, an FCL or a UCL using wireline or wireless technology (as of August 2017, provided by OFCA).

4 i.e., licensees authorised to provide facility-based external telecommunications services (ETS) under an FTNS licence, an FCL or a UCL, and those authorised to provide service-based ETS under SBO licences (as of August 2017, provided by OFCA).

5 As of mid-2017, provided by the Census and Statistics Department (CSD).

6 The residential fixed line penetration rate is calculated by dividing the number of residential fixed lines by the number of households in Hong Kong (as of June 2017, provided by OFCA).

7 As of June 2017, provided by OFCA.

8 i.e., licensees authorised to provide internet access services under an FTNS licence, an FCL, a UCL or an SBO licence (as of August 2017, provided by OFCA).

9 As of June 2017, provided by OFCA.

10 As of December 2016, provided by OFCA.

11 According to statistics from May 2017 to July 2017, provided by the CSD.

12 As of August 2017, provided by OFCA.

there have been some major changes in this respect. On 1 April 2015, the Chief Executive in Council granted a third domestic free-to-air television programme service licence to HK Television Entertainment Company (HKTVE), enabling HKTVE to provide free television services in Hong Kong using a fixed network as its transmission mode for 12 years. HKTVE commenced its service on 6 April 2016 with a Cantonese language general entertainment television channel, ViuTV. PCCW, HKTVE's parent company, also operates an IPTV platform, Now TV, and a media streaming service, Viu. Further, Asia Television Limited, one of the two original domestic free-to-air television service providers, ceased to be a domestic free-to-air television programme service licensee on 1 April 2016 following the expiry of its licence. On 31 May 2016, the government announced that the Chief Executive in Council had decided to grant a domestic free-to-air television programme service licence to Fantastic Television Limited (Fantastic TV), a subsidiary of listed communications company i-CABLE Communications Limited. The licence is valid from 31 May 2016 for 12 years until 30 May 2028, subject to a mid-term review around 2022. Fantastic TV launched its integrated Cantonese channel on 14 May 2017, and its integrated English channel is due to be aired by May 2018. Therefore, there are currently three domestic free-to-air television licensees in Hong Kong. As for domestic pay-TV service, there are currently two licensees (Hong Kong Cable Television Limited and PCCW Media Limited).

In addition to domestic free-to-air and domestic pay-TV service providers, there are two other main categories of television broadcasting licences: non-domestic television programme service licences (mainly satellite television services) and other licensable television programme service licences (mainly hotel room television services).

Domestic television licences (both free-to-air and pay) are granted and renewed by the Chief Executive in Council (with recommendations from the Communications Authority (CA)), while the CA issues and renews licences in the other two categories. Post-licensing, the responsibility for regulating compliance with the relevant rules and regulations and monitoring compliance and non-compliance rests mainly on the CA.

The Chief Executive in Council is responsible for issuing sound broadcasting licences. There are two licensees of analogue sound broadcasting services.¹³ This does not include Radio Television Hong Kong (RTHK), which is funded by the government (and does not hold a sound broadcasting licence). Hong Kong's close proximity to Mainland China means it is not uncommon for radio signals from radio stations on Mainland China to be picked up in Hong Kong.

The development of DAB services in Hong Kong has not been satisfactory. In March 2011, the government granted 12-year sound broadcasting licences to three providers for the provision of DAB services in Hong Kong. They were required under their 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. Between September 2015 and September 2016 (three to four years after service launch), all three commercial DAB licensees sought approval from the Chief Executive in Council to surrender their respective licences before expiry. According to the Review of the Development of Digital Audio Broadcasting in Hong Kong published by the Communications and Creative Industries Branch of the Commerce and Economic Development Bureau (CEDB), the DAB operators cited the lack of a critical audience mass for DAB services and of any prospect of making the business model

13 As of August 2017, provided by OFCA.

commercially viable as the grounds for early termination.¹⁴ On 28 March 2017, the Chief Executive in Council decided that DAB services should be discontinued in Hong Kong, and that the DAB services provided by the public broadcaster, RTHK, would be terminated. RTHK's DAB services were terminated at midnight on 3 September 2017 (its analogue radio service remains).

II REGULATION

i The regulators

The Telecommunications Authority (TA) and the Office of the Telecommunications Authority (OFTA)

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

The Broadcasting Authority (BA) and the Television and Entertainment Licensing Authority (TELA)

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 Ordinance¹⁵ 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 TELA to discharge its 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 and complaints regarding anticompetitive behaviour, and for processing applications (new and renewals) for television programme service licences.

Further, as 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 the registration of newspapers.

14 Review of the Development of Digital Audio Broadcasting in Hong Kong published by the Communications and Creative Industries Branch of the CEDB, December 2016.

15 Chapter 391 of the Laws of Hong Kong.

The CA and OFCA

In light of the continued blurring of the roles of the BA and the TA, on 1 April 2012, the Communications Authority Ordinance¹⁶ came into operation, and the CA was created as a unified regulator to service the broadcasting and telecommunications (including internet) industries. The functions of the BA and the TA were transferred to the CA. Like the TA before it, the CA operates through an executive arm, OFCA. OFCA is a combination of the broadcasting arm of TELA (other TELA functions were transferred to other government departments) and OFTA. The Office for Film, Newspaper and Article Administration under OFCA took over TELA's previous functions in relation to film classification, control of obscene and indecent articles, and newspaper registration, but the issuance of entertainment licences was transferred to the Home Affairs Department. The CA took over all powers and functions of the TA and the BA, and the TA and the BA were both dissolved on 1 April 2012.¹⁷

The major pieces of legislation administered by OFCA are:

- a* the Communications Authority Ordinance;
- b* the Telecommunications Ordinance;¹⁸
- c* the Unsolicited Electronic Messages Ordinance (UEMO);¹⁹
- d* the Broadcasting Ordinance;
- e* the Competition Ordinance;²⁰
- f* the Broadcasting (Miscellaneous Provisions) Ordinance;²¹ and
- g* the Trade Descriptions Ordinance (TDO).²²

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'. For this purpose, the Telecommunications Ordinance contains provisions regulating, *inter alia*, licensing, preventing some anticompetitive practices and imposing some restrictions on ownership.

The Legislative Council enacted the Competition Ordinance in June 2012, giving the CA concurrent jurisdiction with the newly established Competition Commission with regard to the investigation and bringing of enforcement proceedings in respect of competition cases in the communications sector before the Competition Tribunal (the tribunal established within the judiciary to hear and adjudicate competition cases). The Competition Ordinance fully came into force on 14 December 2015, and the competition provisions in the Broadcasting and Telecommunications Ordinances were repealed simultaneously.

The UEMO 'provide[s] for the regulation of the sending of unsolicited electronic messages and for connected purposes' 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 message and pre-recorded message do-not-

16 Chapter 616 of the Laws of Hong Kong.

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

18 Chapter 106 of the Laws of Hong Kong.

19 Chapter 593 of the Laws of Hong Kong.

20 Chapter 619 of the Laws of Hong Kong.

21 Chapter 391 of the Laws of Hong Kong.

22 Chapter 362 of the Laws of Hong Kong.

call registers. As of August 2017,²³ more than 2.9 million numbers have been registered. However, the effectiveness of this legislation is sometimes queried, as service providers in various industries still appear able to circumvent the regulations and restrictions, and continue to make or send unsolicited marketing calls, facsimiles and text messages.

The purpose of the TDO is:

[to] prohibit false trade descriptions, false, misleading or incomplete information, false marks and misstatements in respect of goods provided in the course of trade or suppliers of such goods; to confer power to require information or instruction relating to goods to be marked on or to accompany the goods or to be included in advertisements; to restate the law relating to forgery of trade marks; to prohibit certain unfair trade practices; to prohibit false trade descriptions in respect of services supplied by traders; to confer power to require any services to be accompanied by information or instruction relating to the services or an advertisement of any services to contain or refer to information relating to the services; and for purposes connected therewith.

On 19 July 2013, amendments to the TDO came into effect to ‘provide greater protection for consumers by extending its coverage from goods to services and specified unfair trade practices’²⁴ by prohibiting false trade descriptions of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepted payments. The CA has concurrent jurisdiction with the Customs and Excise Department to enforce these provisions in the broadcasting service sector. The CA does not preview or pre-censor any material before its broadcast. Editorial responsibility lies with the licensees themselves. The CA has promulgated a set of codes of practice for television and sound broadcasting services to provide guidance on these issues to the service providers.

The Office of the Privacy Commissioner for Personal Data (Privacy Commissioner)

Hong Kong was the first territory in Asia to legislate and establish an independent privacy commissioner for personal data, covering both the private and public sectors. Hong Kong’s 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 (PDPO),²⁵ 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, the fourth of which 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 incidents in Hong Kong regarding the 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. The Hong Kong police force’s 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 the personal data of more than 2 million individuals

23 Based on the Registration Statistics on Do-not-call Registers published by OFCA.

24 Press release of OFCA dated 15 July 2013.

25 Chapter 486 of the Laws of Hong Kong.

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).²⁶ The leak of the personal data of Octopus users was so significant that the Privacy Commissioner issued its first-ever interim report on its investigation into the matter at the end of July 2010. The final report was published in October 2010.

In response to increasing concerns over the alleged misuse of personal data, the PDPO was amended in 2012 to:

- a* address the unauthorised disclosure of personal data by a person who obtained such personal data from a data user;
- b* extend the enforcement power of the Privacy Commissioner;
- c* clarify the requirements when using personal data for direct marketing and when providing personal data to another for use in direct marketing; and
- d* provide legal assistance to an aggrieved individual seeking compensation from a data user for damages suffered as a result of the data user's contravention of any requirement imposed by the PDPO in relation to their personal data.

The Privacy Commissioner has published codes and guidelines on personal data privacy protection regarding the internet for information technology practitioners, biometric data users, CCTV and drone operators as well as mobile service operators.

The Hong Kong Computer Emergency Response Team Coordination Centre (HKCERT)

The HKCERT, managed by the Hong Kong Productivity Council, is the centre for coordination of computer security incident responses for local enterprises and internet users. It facilitates information dissemination, provides advice on preventive measures against security threats and promotes information security awareness, as well as issuing security alerts to warn about vulnerable computer systems.²⁷

Sources of law

Hong Kong's laws governing broadcasting, communications, media and the publication of books and newspapers are scattered across multiple pieces of legislation, including:

- a* the Communications Authority Ordinance;
- b* the Broadcasting Ordinance;
- c* the Competition Ordinance;
- d* the Film Censorship Ordinance;²⁸
- e* the Interception of Communications and Surveillance Ordinance;²⁹
- f* the Telecommunications Ordinance;

26 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 are provided to Octopus. In the summer of 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. In July 2010, Octopus disclosed that it had made HK\$44 million since early 2006 by selling personal data.

27 See, for example, HKCERT's Security Bulletin entitled 'Foxit Reader Multiple Vulnerabilities', released on 18 August 2017.

28 Chapter 392 of the Laws of Hong Kong.

29 Chapter 589 of the Laws of Hong Kong.

- g* the UEMO;
- b* the Books Registration Ordinance;³⁰
- i* the Registration of Local Newspapers Ordinance;³¹
- j* the TDO; and
- k* the PDPO.

The Communications and Creative Industries Branch of Hong Kong's CEDB is the policy bureau responsible for broadcasting and telecommunications policy. However, the responsibility for supervision of licensees rests with the CA.

ii Ownership restrictions

The Telecommunications Ordinance

The CA has power to impose conditions, including the period of validity, in respect of the licences issued under the Telecommunications Ordinance. In addition, the CA has authority to require a licensee to comply with the terms of its licence and any applicable legislation, regulations and codes of practice, and to suspend or revoke licences in accordance with the Telecommunications Ordinance or other rules or regulations to protect the public interest.

The Telecommunications Ordinance disqualifies two categories of person from controlling an entity with a sound broadcasting licence: 'disqualified persons' and 'unqualified persons'. Subject to exemptions, disqualified persons are restricted from exercising control (or increasing control) over a sound broadcasting licence holder.³² 'Disqualified persons' include:

- a* advertising agents;
- b* suppliers of broadcasting materials to licensees;
- c* a sound broadcasting licence holder;
- d* any person who (as its business) transmits sound or television material, whether in Hong Kong or outside Hong Kong;
- e* a domestic free-to-air or a domestic pay-TV licensee; or
- f* an associate of any of such persons, or any person who exercises control of a corporation that is a person referred to above.³³

'Unqualified persons' refers to persons who are not for the time being ordinarily resident in Hong Kong³⁴ and who have not at any time been resident 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

30 Chapter 142 of the Laws of Hong Kong.

31 Chapter 268 of the Laws of Hong Kong.

32 Section 13G of the Telecommunications Ordinance.

33 Section 13A of the Telecommunications Ordinance.

34 '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 total in any two consecutive calendar years; and

b in the case of a company, means a company:

(iii) that is formed and registered in Hong Kong under the Companies Ordinance (Cap 622);

(iv) in which case: 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, if more than two of

Hong Kong.³⁵ 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 after the grant of a sound broadcasting licence.³⁶ 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 a three-year period after the grant date. Any agreement or similar arrangement or understanding that breaches this requirement is void.

The regulation and classification of internet and IP-based services fall under the purview of the Telecommunications Ordinance. There is no separate regime insofar as internet services are concerned. All sectors of Hong Kong’s telecommunications market have been liberalised with no foreign ownership restrictions.³⁷

The Broadcasting Ordinance

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.³⁸

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

- a* the exercise of the control and management of the licence holder must be *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 a residency requirement.³⁹ The residency requirement is equally applicable to those directors who actively participate in management and operations, and to the principal officers (being those in charge of the selection, production or scheduling of television programmes) of the licence holder; and
- b* no disqualified person or their controlling entities or persons or associates (unless otherwise disclosed in the licence application) can exercise control over (or remain in control of) 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 satisfying the residency requirement.

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 have at any time been resident for a continuous period of not less than seven years; and

(v) the control and management of which is bona fide exercised in Hong Kong.

35 Section 13I of the Telecommunications Ordinance.

36 Section 13J of the Telecommunications Ordinance.

37 Telecommunications Overview published by OFCA, June 2016.

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

39 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 for a total of 300 days in any two consecutive years 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

The Broadcasting Ordinance sets out detailed restrictions regarding the holding, acquisition or exercise of voting control of licence holders who are not qualified voting controllers (except for domestic pay-TV licence holders). A qualified voting controller is someone 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 ‘unqualified voting controller’ is anyone who is not a qualified voting controller. Unqualified voting controllers cannot exercise voting control in excess of 49 per cent of the total voting control at any 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 to 6 per cent or 6 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.

Further, a domestic free-to-air television programme service licence will not be granted to a company that is a subsidiary of a corporation.⁴⁰

iii Competition measures

The Competition Ordinance

On 14 June 2012, the Competition Ordinance was passed as a general and cross-sector competition law curbing anticompetitive conduct across all industry sectors. The Competition Ordinance came into full force on 14 December 2015. Under the Competition Ordinance, the CA has concurrent jurisdiction with the Competition Commission to enforce the Competition Ordinance in respect of the conduct of telecommunications and broadcasting licensees, including merger and acquisition activities involving carrier licensees.⁴¹ A memorandum of understanding was entered into between the CA and the Competition Commission in December 2015 to affirm their commitment to exercising their functions with a consistent interpretation and application of the provisions of the Competition Ordinance.⁴² The CA will ordinarily take the role of lead authority on matters that fall within the concurrent jurisdiction.

The Competition Ordinance provides for a cross-sectoral competition law prohibiting anticompetitive conduct through three competition rules:

- a* The First Conduct Rule:⁴³ an undertaking⁴⁴ must not make or give effect to an agreement, engage in a concerted practice or, as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong;

40 Section 8(3) of the Broadcasting Ordinance.

41 Section 159 of the Competition Ordinance.

42 Press release of the Competition Commission and Memorandum of Understanding between the Competition Commission and the CA dated 14 December 2015.

43 Section 6(1) of the Competition Ordinance.

44 ‘Undertaking’ means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity.

- b* The Second Conduct Rule:⁴⁵ an undertaking that has a substantial degree of market power must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong; and
- c* The Merger Rule:⁴⁶ an undertaking must not, directly or indirectly, carry out a merger involving telecommunications carrier licensees that has, or is likely to have, the effect of substantially lessening competition in Hong Kong. When determining whether a merger has, or is likely to have, the effect of substantially lessening competition, the CA may take into account:
- the extent of competition from competitors outside Hong Kong;
 - whether the acquired undertaking, or part of the acquired undertaking, has failed or is likely to fail in the near future;
 - the extent to which substitutes are available or are likely to be available in the market;
 - the existence and height of any barriers to entry into the market;
 - whether the merger would result in the removal of an effective and vigorous competitor;
 - the degree of countervailing power in the market; and
 - the nature and extent of change and innovation in the market.⁴⁷

Between December 2015 and December 2016, the CA reviewed three transactions under the Merger Rule and considered that no further action was necessary.⁴⁸

For the telecommunications industry, in addition to the provisions of the Competition Ordinance, the Telecommunications Ordinance also contains a further provision relating to dominant licensees – Section 7Q (exploitative conduct). Under this section, a licensee in a dominant position in a telecommunications market must not engage in conduct that, in the opinion of the CA, is exploitative. In determining whether a licensee is dominant, the CA must take into account, *inter alia*:

- a* the market share of the licensee;
- b* the licensee's power to make pricing and other decisions;
- c* any barriers to entry to competitors in the relevant market;
- d* the degree of product differentiation and sales promotion; and
- e* any other matters stipulated in guidelines issued for the purposes of Section 7Q.

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 government has adopted a market-based

45 Section 21(1) of the Competition Ordinance.

46 Section 3, Schedule 7 of the Competition Ordinance.

47 Section 6, Schedule 7 of the Competition Ordinance.

48 PowerPoint presentation 'Overview of the Development of Broadcasting & Telecommunications Sectors in 2016/17' dated 9 February 2017 published by the CA.

approach to spectrum management,⁴⁹ 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 a spectrum release plan governing a three-year period going forward was released pursuant to the Radio Spectrum Policy Framework that was announced in April 2007. Under the spectrum release plan, industry 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 spectrum release plan is updated annually on a rolling basis or as required taking into account the latest developments. Spectrum availability determines the number of market players in the industry. Currently, spectrum is auctioned and allocated by the CA through the latest spectrum release plan. Where spectrum has been previously allocated under an earlier release plan, it will be clearly stated in the current release plan.

The CA announced the spectrum release plan for 2017 to 2019 on 21 February 2017. According to the plan, no spectrum will be available for release during this period.⁵⁰ Nonetheless, the CA has clearly stipulated that the release plan is non-binding, and it 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 CA's discretion.

As part of the spectrum management policy, Hong Kong is also considering spectrum trading to create a market for secondary trading of spectrum use. The government is understood to have commissioned feasibility studies, but it has yet to make the consultant's report publicly available.⁵¹ However, the consultant's conclusions can be inferred from the reports of the Subcommittee on Telecommunications. These suggest that, in jurisdictions where it is permitted, spectrum trading does not occur frequently. Further, while demand for spectrum remains incessant, few holders of spectrum rights are willing to transfer their rights to other operators. The administration did not therefore consider spectrum trading a matter of priority, even though it is viewed as desirable under the Radio Spectrum Policy Framework.⁵²

In November 2013, two Hong Kong TV stations were fined by OFCA for renting transmission capacity without the prior consent of the CA, per the licence requirement, constituting illegal spectrum trading under the current legislation.

In February 2016, the CA and the Secretary for Commerce and Economic Development (SCED) jointly published a consultation paper in relation to the arrangement for reassignment of the frequency spectrum in the 900MHz and 1800MHz bands upon expiry of the existing assignments between November 2020 and September 2021.⁵³ The 900–1800MHz spectrum consists of 50MHz of spectrum in the 900MHz band and 150MHz of spectrum in the 1800MHz band. It accounts for 36 per cent of the 552MHz of spectrum already assigned

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

50 Spectrum Release Plan for 2017–2019 dated 21 February 2017 published by OFCA.

51 OFTA's 2008/2009 Trading Fund Report.

52 Report of the Subcommittee on Telecommunications, LC Paper No. CB (4) 170/12-13; LC Paper No. CB (4) 364/12-13(05).

53 Arrangements for the Frequency Spectrum in the 900MHz and 1,800MHz Bands upon Expiry of the Existing Assignments for Public Mobile Telecommunications Services and the Spectrum Utilization Fee – Consultant Paper dated 3 February 2016.

to the industry for the provision of public mobile telecommunications services.⁵⁴ According to HKT, Hong Kong's largest operator of fixed-line and mobile networks, it is the largest amount of spectrum ever assigned in one lot, and the frequency bands are critical blocks for the provision of 3G, 4G and future 5G services. In essence, there are three proposals put forward by the government:

- a* a full-fledged administratively assigned approach that assigns all the spectrum to the incumbent mobile network operators through the offer of a right of first refusal;
- b* a full-fledged market-based approach that reassigns all the spectrum by way of auction; and
- c* a hybrid approach that reassigns 40MHz or one-fifth of the 900–1800MHz spectrum to the incumbent mobile network operators through the offer of the right of first refusal and the rest by way of auction.

In February 2017, the CA and the SCED launched the second round of public consultation in relation to the arrangement for reassignment of 200MHz of frequency spectrum in the 900MHz and 1800MHz bands. Having considered the submissions received in response to the February 2016 consultation paper, and the findings of a consultancy study on the impact on service quality arising from the various spectrum reassignment options set out in that consultation paper, in the second consultation paper, the CA proposed for further consultation the hybrid option of the administratively assigned cum market-based approach for the reassignment of the frequency spectrum in the 900MHz and 1800MHz bands. That approach would reassign part of the spectrum to the incumbent spectrum assignees through the offer of a right of first refusal, with the remaining spectrum to be reassigned by auction. Under the hybrid approach proposed by the CA:

- a* 2 x 10MHz of spectrum in the 1800MHz band would be reassigned to each of the four incumbent spectrum assignees through the offer of a right of first refusal (RFR spectrum): i.e., a total of 80MHz or 40 per cent of the 900/1800MHz spectrum would be offered as RFR spectrum;
- b* the remaining 70MHz of spectrum in the 1800MHz band and all the 50MHz of spectrum in the 900MHz band would be assigned by way of auction: i.e., at least a total of 120 or 60 per cent of the 900/1800MHz spectrum would be auctioned; and
- c* any spectrum that may become available arising from the decision of any incumbent spectrum assignee to not take up the RFR spectrum (as mentioned in (a) above) will be pooled together with the 120MHz of spectrum (as mentioned in (b) above) to form the 'auctioned spectrum'.⁵⁵

The recent consultations have renewed calls to allow spectrum trading among Hong Kong's telecommunications network operators. However, the CA's view is that spectrum is a scarce resource, and it is unlikely that mobile network operators would be willing or able to release any spectrum to make trading viable. The CA considers the implementation of spectrum trading in Hong Kong a policy matter on which the government has commissioned a consultancy study. The CA noted that this issue will be addressed further once the findings of that consultancy study are available.⁵⁶

54 Press release of the CA dated 3 February 2016.

55 Press release of the CA dated 14 February 2017.

56 Annex to the second consultation paper, Paragraph 22.

The CA and the SCED have indicated that they will endeavour to announce their respective decisions on the arrangements for the reassignment of the 900/1800MHz spectrum and the related spectrum utilisation fee (on which, see below) by around the end of 2017, giving incumbent spectrum assignees three-year advance notice of any possible changes to their existing spectrum assignments.

ii Broadband and next-generation mobile spectrum use

With over 46,100 registered Wi-Fi access points,⁵⁷ Hong Kong has extensive public Wi-Fi service coverage. Wi-Fi operates on unlicensed spectrum in the 2.4GHz and 5GHz bands. Small cells are installed in payphone kiosks, bus stops, shops and on lampposts to boost mobile network capacity and improve signal reception. OFCA facilitates the extension of mobile broadband coverage by use of microwave backhaul links for the connection of small cells to the core network.

The CA adopts a light-handed licensing and regulatory approach for public Wi-Fi services.⁵⁸ As of August 2017, eight unified carrier licensees are authorised to provide public Wi-Fi services.⁵⁹ The CA aims to release available spectrum blocks as soon as they are made available to the public so that the public can enjoy the benefits of advanced wireless technologies as early as possible.

It is expected that there will be greater demand for radio spectrum for the development and commercial application of 5G mobile technologies, which is expected to launch in the market around 2020. The SCED indicated in his written reply to a question raised in the Legislative Council that, since it is expected that 5G services will use radio spectrum above the 6GHz band, the CA will closely monitor the latest developments in the allocation of the concerned spectrum for the provision of 5G services in the international arena, and plan for the necessary supply of spectrum having regard to the actual situation in Hong Kong.⁶⁰

In this regard, on 27 July 2017, the CA launched a public consultation on the proposed reallocation of the 3.4–3.7GHz frequency band of radio spectrum from fixed satellite service to mobile service in 2020 to support the commercial deployment of 5G services. The CA aims to make a decision on reallocation of the 3.4–3.7GHz frequency band of radio spectrum in early 2018.⁶¹

iii Spectrum auction and fees

Since it is a limited resource, and demand is high, the government imposes a fee on the use of spectrum. This fee (the spectrum utilisation fee (SUF)) is applicable to all use of spectrum save that reserved for government use. As an example, in March 2013, a total of 50MHz of radio spectrum in the 2.5–2.6GHz band was sold for HK\$1.54 billion to four bidders.⁶²

The results of the auction of spectrum in the 1.9–2.2GHz band were announced by OFCA on 10 March 2015. A total of 49.2MHz of spectrum was reassigned after the

57 As of August 2017, provided by OFCA.

58 OFCA Presentation 'Facilitating the Wireless Broadband Connection of Hong Kong' by Sanda Cheuk, Assistant Director (Regulatory) dated 9 March 2016.

59 Provided by OFCA.

60 Commerce of Economic Development Bureau, Legislative Council Question 22: Efficiency of radio spectrum utilization dated 29 June 2016.

61 Press release of CA dated 27 July 2017.

62 Press release of OFCA dated 19 March 2013.

incumbent spectrum assignees exercised their right of first refusal. Following the decision of the CA on the arrangements for reassignment of the spectrum, and its decision to give conditional consent to the acquisition by HKT Limited of CSL New World Mobility Limited, the other three incumbent spectrum assignees accepted the right of first refusal for the reassignment of 68.2MHz of the 118.4MHz of paired spectrum that was assigned in 2001. The remaining 49.2MHz was reassigned through auction, where a non-incumbent spectrum assignee was assigned a total of 19.6MHz of spectrum, with the rest being assigned to the incumbent spectrum assignees. Together, the winners of the auction paid SUFs of HK\$2.42 billion for their 15-year licences, which commenced on 22 October 2016.⁶³

The SECD considers that determining the SUF for the auctioned spectrum and the RFR spectrum in the 900/1800MHz spectrum is a policy matter and, in accordance with the government's Radio Spectrum Policy Framework, a market-based approach in spectrum management will be used wherever the CA considers that there are likely to be competing demands from providers of non-government services for the spectrum. An SUF that reflects the full market value of the spectrum, as determined by the market through a competitive bidding process, seeks to ensure that spectrum, being a scarce public resource, is put into the hands of those who value it the most and who will consequently put it to the most efficient use. Having regard to this principle, the views received in the first public consultation, and the CA's proposal to adopt the hybrid approach, the SECD proposes that, for the auctioned spectrum, the SUF should be determined by auction, subject to an auction reserve price, and, for the RFR spectrum, the SUF should be set at the average SUF of the auctioned spectrum, subject to a minimum price and a cap.⁶⁴

IV MEDIA

i Mobile services

To facilitate the development of broadcast-type mobile TV services, the government announced the Framework for Development of Broadcast-type Mobile TV Services in Hong Kong in February 2010. In the Framework, the government announced that the radio spectrum of 678–686MHz would be released for the introduction of broadcast-type mobile TV services in Hong Kong with at least 75 per cent of the transmission capacity to be used to provide mobile TV services, with the operator entitled to harness the remaining capacity of the UHF allocated for delivery of other services such as datacasting.⁶⁵

Pursuant to the Telecommunications Ordinance, an operator of the network used to transmit mobile TV services via the assigned spectrum is required to obtain a UCL. The government has also indicated that the content of mobile TV, either local broadcast-type or streaming-type, should be subject to regulation by general laws rather than under the Broadcasting Ordinance. To enable self-regulation, the industry will be required to develop

63 Press release of OFCA dated 8 December 2014 and the Successful Bidder Notice published by the CA dated 10 March 2015.

64 Press release of the CA dated 14 February 2017.

65 Framework for Development of Broadcast-type Mobile TV Services in Hong Kong (February 2010) published by the then Communications and Technology Branch of the CEDB.

codes of practice on the provision of mobile TV services prior to service commencement. The codes should include, *inter alia*, the requirement of conditional access with a view to protecting public morals and children.⁶⁶

The radio spectrum of 678–686MHz was auctioned off in June 2010, with China Mobile Hong Kong Corporation Limited successfully bidding for the spectrum at an SUF of HK\$175 million. OFTA announced that, after payment of the SUF and submission of the performance bond, China Mobile Hong Kong Corporation Limited will be assigned the spectrum under a 15-year UCL. The licensee would be obliged to provide service coverage to at least 50 per cent of Hong Kong's population within 18 months from licence grant.⁶⁷

V THE YEAR IN REVIEW

i The CA to examine the licence conditions of Television Broadcasts Limited (TVB)

In May 2017, the CA indicated that it had engaged a Queen's Counsel to examine the licence conditions of, and statutory declarations and deeds of undertakings submitted by, TVB,⁶⁸ Hong Kong's largest free-to-air television broadcaster, and to review its compliance with the Broadcasting Ordinance's provisions regarding ownership and control. The investigation arose following a concern highlighted by the Takeovers and Mergers Panel of the Securities and Futures Commission (Panel) in its ruling dated 10 May 2017 on an application for a waiver of the obligation to make a mandatory general offer for TVB shares under the Takeovers Code (ruling). Specifically, the Panel was of the view that China Media Capital, an indirect shareholder of TVB controlled by Chinese media tycoon Mr Li Ruigang, had great influence over the appointment of directors at TVB,⁶⁹ which appears contrary to the stipulation in the Broadcasting Ordinance that only a permanent resident of Hong Kong can be a 'qualified voting controller' of a domestic TV licensee such as TVB.

In the ruling, the Panel referred to various provisions under Schedule 1 to the Broadcasting Ordinance that place restrictions on the ownership and control of domestic free-to-air television licensees, including but not limited to Section 20(1), which provides that an unqualified voting controller is required to obtain prior written approval from the CA if its holding crosses 2, 6 or 10 per cent of the licensee's issued shares; Section 3, which provides that a 'disqualified person' is restricted from holding more than 15 per cent of the licensee's shares; and Section 19, which restricts the voting control that can be exercised by unqualified voting controllers at the licensee's general meetings,⁷⁰ and the Panel recommended that the Securities and Futures Commission provide certain relevant documents, and a copy of the ruling, to the CA so that the CA may discharge its duties.⁷¹

66 Ibid.

67 Press release of the OFTA dated 29 June 2010.

68 South China Morning Post, 'Hong Kong's telecoms regulator to examine TVB's shareholding structure', published on 18 May 2017.

69 Takeovers and Mergers Panel's ruling on an application for a waiver of the obligation to make a mandatory general offer for the shares of Television Broadcasts Limited under the Takeovers Code arising from an offer under the Share Buy-backs Code and related matters dated 10 May 2017, Paragraphs 59 and 65.

70 Ibid., Paragraph 7.

71 Ibid., Paragraph 75.

ii Recent enforcement trends

On 10 January 2017, a commercial facsimile sender (sender) was convicted of three offences of contravention of an enforcement notice served on him for sending commercial electronic messages in contravention of UEMO. The Magistrates Court imposed a fine of HK\$7,500 and ordered the sender to pay the CA's costs and expenses of the investigation, totalling HK\$60,000.

OFCA had received reports from members of the public alleging that the sender had sent commercial facsimile messages promoting design and decoration services that did not contain his name or address. OFCA also received reports alleging that the sender continued to send facsimile messages to the recipients who had sent unsubscribe requests to him, or that the sender's unsubscribe facility had been disconnected and the recipients of the sender's messages could not send unsubscribe requests to him. After investigation, OFCA served an enforcement notice on the sender in October 2015 pursuant to Section 38 of the UEMO, requiring him to stop sending further facsimile messages in contravention of the UEMO. However, OFCA continued to receive reports that the sender was still sending commercial facsimile messages, suggesting that he had failed to comply with the enforcement notice, leading to OFCA initiating a prosecution against the sender for contravening Section 39 of UEMO.

OFCA indicated that it would continue to investigate suspected cases of contravention and stressed that it is committed to undertaking prompt enforcement actions against any senders contravening the UEMO.⁷²

iii Creation of class licences for the use of and trade in 60GHz devices and 79GHz automotive radars

Pursuant to Section 7B(2) of the Telecommunications Ordinance, following consultation, the CA has decided created two class licences to cover the use and sale of 60GHz radio devices (enabling fast data transfer over short distances, such as wireless connection for audiovisual equipment and wireless broadband internet access similar to existing Wi-Fi) and 79GHz automotive radars (automotive radars operating in this band are being developed by the industry with a view to further improving vehicles and road safety) in order to benefit the public and the industry. These class licences were published in January 2017, and permit a person to use and sell this radio equipment in accordance with the licence conditions without the need to apply for an individual licence. No licence fee is involved.⁷³

72 Press release of OFCA dated 10 January 2017.

73 PowerPoint presentation 'Overview of the Development of Broadcasting & Telecommunications Sectors in 2016/17' dated 9 February 2017 published by the CA.

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