The Law and Policy for Implementing a Unified Communications Regulator in the United Kingdom and Lessons for Hong Kong

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In March 2006, the Hong Kong government issued a Consultation Paper proposing the merger of the existing Telecommunications and Broadcasting Authorities into a unified communications regulator called the Communications Authority, which should be similar to the Office of Communications (OFCOM) established by the United Kingdom (UK) in 2003. In this article, the authors first study the proposals of the Hong Kong government on the establishment of a unified Communications Authority. They then examine the background for the establishment of OFCOM by studying the telecommunications law and policy development in both the European Union (EU) and United Kingdom. The authors then evaluate the implementation experience of OFCOM from both legal and policy perspectives, and analyse the Office of Communications Act 2002, the Communications Act 2003 and the Regulatory Framework for Electronic Communications Services 2002 adopted by the EU, as well as the regulatory and personnel policies of OFCOM. Finally, the authors argue that Hong Kong can learn eight lessons from the UK in its future implementation of a unified communications regulator. These include strong political support, systematic planning, the appointment of credible and competent staff, adequate supporting legislation, a "light-hand" regulatory approach, openness and transparency, the guarantee and promotion of media and cultural diversity and finally, adequate legal control of the powers of the regulator together with legal remedies for members of the public aggrieved by the policies or decisions of the regulator.

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Introduction

Since the 1990s, many countries and jurisdictions have adopted a unified communications regulator to cope with the phenomenon of technological convergence, which breaks down the traditional barriers between the telecommunications and broadcasting sectors. For example, Malaysia established the Malaysian Communications and Multi-Media Commission (MCMC) in 1999, while the United Kingdom adopted the Office of Communications (OFCOM) in 2003. The Hong Kong government followed this international trend and issued a Consultation Paper in April 2006 to propose the establishment of a unified communications regulator called the Communications Authority (CA).[1] It was obvious from the Consultation Paper that the Hong Kong government considered OFCOM as one possible model of unified regulator that Hong Kong can follow in establishing the CA in future.

This article attempts to study the legal and policy implications of implementing OFCOM in the UK and evaluates what lessons Hong Kong can learn in its future adoption of the CA. OFCOM is highly relevant to Hong Kong for two reasons: to begin with, it is one of the best models of a unified communications regulator available in the world, which serves as a good reference for Hong Kong. Moreover, the existing "sector-specific" regulatory framework for Hong Kong communications sectors, namely, the Telecommunications Authority regulating the telecommunications sector and the Broadcasting Authority which supervises the broadcasting sector, was inherited from the UK when Hong Kong was a British colony. The current regulatory regime in Hong Kong is therefore similar to its British counterpart prior to the establishment of OFCOM. As a result, the experience of OFCOM is significant to Hong Kong in planning its future transition from the current "sector-specific" regime to a unified regulatory regime.

This article is divided into four parts. Part One analyses the government proposals on the establishment of a unified regulator called the Communications Authority. Part Two gives an overview of the telecommunications law and policy development in both the EU and the UK, which helps us to understand the background for the establishment of OFCOM. Part Three considers the implementation experience of OFCOM from both legal and policy perspectives. Part Four evaluates what lessons Hong Kong can learn from the implementation experience of OFCOM in its future establishment of a unified CA.

[1] The Consultation Paper is available at http://www.citb.gov.hk/ctb/eng/paper/pdf/CA_consultation_paper.pdf.

Part One: The Hong Kong Government Proposals on the Establishment of the Communications Authority

In the Consultation Paper on the Establishment of the CA released in March 2006, the government explained why Hong Kong needs a unified regulator. To begin with, it was necessary because of technological and market developments in the communications sectors.[2] Second, the need for fair competition in a converging market also called for a unified regulator. At present, competition in the local communications sector is regulated by "sector-specific" laws and such a framework will become increasingly ineffective as the broadcasting and telecommunications markets intertwine with each other. For example, anti-competitive practices may arise, the impact of which can only be assessed if the entire communications sector is treated as a single market. Equally, new opportunities for business synergies will arise in the era of convergence, so that, in order to avoid inhibiting progress, the regulator must understand the new converging markets; a unified regulator can also better cope with "cross-sectoral" competition in this new environment.[3] Third, a unified regulator will benefit both regulator and operator. It can provide "one-stop-shopping" and better consistency in regulatory approach and practice to the industry players, thereby reducing their administrative burden and enhancing their efficiency. The regulator can also pool together expertise to deal with issues arising from a converging environment.[4] Fourth, because regulation of the broadcasting and telecommunications sectors calls for similar expertise, operational synergy and efficiency can be accomplished by merging the broadcasting and telecommunications regulators into one unified regulator.[5] Fifth, this can promote efficient utilisation of public resources, bring about innovations and increase competition in the communications sectors. All these benefit consumers in Hong Kong.[6]

In the Consultation Paper, the Hong Kong government also discussed different approaches for the establishment of the CA. The document conceded that the "ideal" approach would be, first, to adopt a comprehensive communications legislation for regulation of the entire communications sector thereby empowering the proposed CA to enforce such a statute. However, this approach will require a major review of existing

[2] *Ibid.*, paras 16–19.
[3] *Ibid.*, paras 20–23.
[4] *Ibid.*, para 24.
[5] *Ibid.*, paras 25–26.
[6] *Ibid.*, para 27.

communications laws before they can be consolidated into a single piece of legislation, which is inconsistent with the government's plan to establish a unified CA expeditiously.[7]

As a result, the government proposed a "staged approach". In the first stage, the government will adopt a new piece of legislation called the Communications Authority Ordinance to merge the existing telecommunications and broadcasting regulators into a CA. The new unified regulator will be empowered to enforce the existing telecommunications and broadcasting regulations. In the second stage, the new CA will review the existing "sector-specific" laws and consolidate them into a unified Communications Ordinance. Such a staged approach, the government has argued, will enable a speedy establishment of the unified regulator.[8]

The Consultation Paper also defines the public mission of the new CA: promotion of consumer interests, fair competition, innovation and investment in the communications industry. The ultimate objective is to "maintain a vibrant communications sector to enhance Hong Kong's competitive advantage as a communications hub in the region".[9] Another key mission of the Authority will be to uphold the freedom of speech. The core values of CA are also defined as: "open and transparent, fair and consistent, engaging and supportive".[10]

The Consultation Paper also outlines the regulatory approach of the new regulator. It should be relaxed, with emphasis on fair competition, rather than on active regulation by detailed rules. Second, it should avoid stifling innovation and investment by regulatory intervention, and extending its regulatory ambit continuously. Third, it should adopt regulatory tolerance, rather than regulatory intervention, as its guiding principle.[11]

What is more, the Consultation Paper lays down the structure of the unified regulator. It proposes a governing body that makes major decisions, promulgates plans, approves procedures on the basis of transparency and accountability, oversees staff performance and ensures that the Authority serves its public purposes. A board of seven members is also proposed to ensure a plurality of views, as well as high efficiency in decision-making and approval processes.[12] It also proposed that the executive support for the future CA, which is called the Office of the

[7] *Ibid.*, paras 28–29.
[8] *Ibid.*, paras 30–32.
[9] *Ibid.*, para 37.
[10] *Ibid.*, para 39.
[11] *Ibid.*, paras 40–43.
[12] *Ibid.*, paras 44–48.

Communications Authority (OFCA), will be staffed by civil servants and headed by a public officer.[13]

Finally, the Paper also sets out the timetable for the implementation of the CA. The legislation for its establishment should be introduced by around November 2006. The members of the Authority would then be appointed within one month of the passage of the law, while the CA should commence operations within four months from the passage of the law.[14] It is noteworthy, however, that the relevant legislation for the establishment of the CA has hitherto not been passed after a lapse of over four years since the publication of the Consultation Paper.

In the Consultation Paper, the government referred to the international trend of adoption of unified communications regulators in many developed countries, of which the UK was one. At the end of 2002, the UK government merged the existing five regulators into OFCOM.[15] In the second part of this article, we analyse, therefore, these UK legal and policy reforms. Also, because of the binding nature of EU telecommunications law and policy on the UK, we will consider their relevance to the establishment of OFCOM.

Part Two: Overview of Legal and Policy Reforms in the UK and EU Telecommunications Sectors: Background for the Establishment of OFCOM

In retrospect, the establishment of OFCOM was influenced by changes in telecommunications law and policy in *both* the EU and the UK.[16] At the EU level, it was in the late 1980s that legal and policy reforms in the telecommunications sector took place. In 1987, the European Commission (EC) issued a Green Paper on "the Development of a Common Market for Telecommunications Services and Equipment",[17] which advocated the opening of European telecommunications markets to create a single market by 1992,[18] by way of "liberalisation" and "harmonisation". Such

[13] *Ibid.*, paras 49–57.
[14] *Ibid.*, paras 60–62.
[15] *Ibid.*, paras 13–14.
[16] For a discussion of the EU law in the telecommunications sector, *see* Braun J.-D. and Capito R. "The Emergence of EC Telecommunications Law as a Self-Standing Field within Community Law", in Koenig C., Bartosch, A., Braun J.-D. and Marion R., *EC Competition Law and Telecommunications Law* (Wolters & Kluwer, 2009), pp 41–52.
[17] COM (87) 290 final, 30 June 1987. Actually, the Commission's *Action Plan in relation to the Telecommunications Sector*, COM (84) 277 preceded this.
[18] *See* Sherer J. and Bartsch T., "Telecommunications Law and Policy of the European Union", in Scherer J. (ed), *Telecommunications Laws in Europe* (5th edn, Haywards Heath, 2005).

an approach was described by Koenig and Roder as the "basic dualism" of EC telecommunications law.[19]

In the late 1990s, the EU found it necessary to review its telecommunications law and policy due to the rapid development of the convergence phenomenon, which was breaking down the traditional barriers between the telecommunications, broadcasting and internet sectors. On 3 December 1997, the EC promulgated a Green Paper on "Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation owards an Information Society Approach" (1997 Green Paper).[20] This was followed, on 10 November 1999, by the publication of a Communication titled "Towards a New Framework for Electronic Communications Infrastructure and Associate Services" (The 1999 Communications Review). This consultation document marked the beginning of a new era for the EU in which a new regulatory framework for all communication services was developed.[21]

On 26 April 2000, the EC announced the results of its public consultation on the 1999 Communications Review, which eventually led to an overhaul of the entire regulatory regime for the European communications sector. By 12 December 2001, the European Parliament had adopted the new European communication regulatory package,[22] which has been commonly known as the Regulatory Framework for Electronic Communications Services (the EU Regulatory Framework).[23]

The EU Framework consisted of six directives, *first*, a Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (OJ L 108/33, 24 April 2002) (the Framework Directive); *second*, a Directive 2002/20/EC on the authorisation of electronic communications networks and services (OJ L108/21, 24 April 2002) (the Authorization Directive); *third*, a Directive 2002/19/EC on access to, and interconnection of, electronic communications

[19] Koenig C. and Roder E. "The Regulation of Telecommunications in the European Union: A Challenge for the Countries Acceding to the European Community" [1999] *European Business Law Review* 333 (334).

[20] COM (97) 623.

[21] For more discussion of the Communication "Towards a New Framework for Electronic Communications Infrastructure and Associate Services" ("The 1999 Communications Review"), COM (1999) 539; *see* Brodey M. "Telecommunications: Towards a New Regulatory Framework for Electronic Communications", *Computer and Telecommunications Law Review*, 2000, Vol 6(7), pp 180–186.

[22] See Commission Press Release IP/01/1801 dated 12 Dec 2001 http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt+gt&doc=IP/01/18010RAPID&lg=EN&display=.

[23] For a discussion of the EU Regulatory Framework, *see* Walden I. "European Union Communications Law", Chapter Five, *Telecommunications Law and Regulation* (3rd edn, Oxford University Press, 2009), Ch 5, pp 167–210.

networks and associate facilities (OJ L108/7, 24 April 2002) (the Access Directive); *fourth*, a Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (OJ L 108/7, 24 April 2002) (the Universal Services Directive); *fifth*, a Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L201/37, 24 April 2002)(the Data Protection Directive); and *sixth*, a Regulation 2887/2000/EC on unbundled access to the local loop (OJ L336/4, 18 December 2000) (the Local Loop Regulation). The Local Loop Regulation had actually been adopted prior to the other five directives but took effect in 2002. As Sinclair indicated, the EC had considered its implementation a matter of priority.[24]

Of the above six directives, the most important one was the Framework Directive,[25] which developed a "harmonised" regulatory framework for the EU electronic communications services. This was in fact the "core" legal document for the EU Regulatory Framework. In contrast, the Authorisation Directive attempted to remedy the problems resulting from the diverse licensing regimes adopted by different EU member states by creating a "general authorisation regime" to remove the entry barriers existing between them.[26] Likewise, the Access Directive tried to build up a "harmonised" regulatory framework for suppliers of electronic communications services which would promote competition, service interoperability and consumer rights.[27] Similarly, the Directive on Universal Service dealt with promoting and monitoring the service obligations[28] and, finally, the Data Protection Directive attempted to "harmonise" data protection across the EU member states.[29]

As one of its member states, the UK's telecommunications law and policy is inevitably shaped by the aforesaid developments in the EU.

[24] Sinclair M. "A New European Communications Services Regulatory Package: An Overview", *Computer and Telecommunications Law Review*, 2001, Vol 7(6), pp 156–165, at 157.

[25] For a detailed discussion of the Framework Directive, *see* Braun J.-D. and Capito R., "The Framework Directive", in Koenig C., Bartosch A., Braun J.-D. and Marion R., *EC Competition Law and Telecommunications Law* (Wolters & Kluwer, 2009), pp 343–380.

[26] For a detailed discussion of the Authorisation Directive, *see* Brandenberg, A. "Authorization", in Koenig C., Bartosch A., Braun J.-D. and Marion R., *EC Competition Law and Telecommunications Law* (Wolters & Kluwer, 2009), Ch 10, pp 471–508.

[27] For a detailed discussion of the Access Directive, *see* Winkler K.E. and Baumgarten, "The Framework for Network Access and Interconnection", in Koenig C., Bartosch A., Braun J.-D. and Marion R., *EC Competition Law and Telecommunications Law* (Wolters & Kluwer, 2009) Ch 9, pp 421–470.

[28] For a detailed discussion of the Universal Service Directive, *see* Nikolinakos N.Th., *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, "Universal Service Provisions – End User Rights" (Kluwer Law International, 2006), Ch 9, pp 295–332.

[29] For a detailed discussion of the Data Protection Directive Schnabel C., "Privacy and Data Protection in EC Telecommunications Law", Koenig C., Bartosch, A., Braun J.-D. and Marion R., *EC Competition Law and Telecommunications Law* (Wolters & Kluwer, 2009) Ch 11, pp 520–522.

In 1981, adoption of the Telecommunications Act of 1981 marked the beginning of reforms of the British telecommunications sector by creating British Telecommunications (BT), which took over the telecommunications function of the Post Office. Under the 1981 Act, a second licence of fixed telecommunications network was also issued to Mercury Communications Limited (Mercury). However, the 1981 Act did not envisage full competition in the telecommunications sector. On the contrary, the Conservative government clearly stated its policy in a 1983 Duopoly Statement that it had no intention to issue licences to operators other than BT and Mercury.

Three years later, the UK government passed the Telecommunications Act 1984, which brought about the privatisation of BT. The Act established the Director General of Telecommunications (DGT) as the independent telecommunications regulator, which was supported by the Office of Telecommunications (OFTEL). The Act also set out the legal framework for a competitive telecommunications market. However, while the law could potentially lead to the opening of the telecommunications sector through the issue of more licences, the British government maintained the "duopoly" policy throughout the 1980s by granting licences only to BT and Mercury.

The Telecommunications Act 1984, therefore, created a regime which regulated the telecommunications operators by way of licensing.[30] However, the procedure to amend the licences issued was very complicated. As Brisby pointed out, the inflexible procedure did not cater for market changes.[31]

Eventually, in the early 1990s, the UK government undertook the duopoly review, which resulted in the release of a white paper titled "Competition and Choice: Telecommunications Policy for the 1990s" in March 1991.[32] This significantly ended the duopoly of BT and Mercury and marked the beginning of a more open and competitive telecommunications policy in the UK. Liberalisation and competition in the British telecommunications sector continued throughout the 1990s, which was intensified by the emergence of the convergence phenomenon that we discuss in more detail below.

At this juncture, it is interesting to note the parallel legal and policy reforms taking place in the UK and the EU during the late 1990s and

[30] For example, s 5(1) of Telecommunications Act 1984 stipulated that "a person who runs the telecommunications system with the United Kingdom shall be guilty of an offence unless he is authorized to run the system by licence … "

[31] Brisby P. "The Regulation of Telecommunications Networks and Services in the United Kingdom", *Computer and Telecommunications Review*, 2006, Vol 12(4), pp 114–139.

[32] CM 1303.

early 2000s. When the EU promulgated the 1997 Green Paper, the UK government also published its own Green Paper on "Regulating Communications: Approaching Convergence in the Information Age".[33] After extensive public consultations, the UK government then published a paper called "Regulating Communications: The Way Ahead" on 12 December 2000, which set out for the first time the intention of the UK government to establish a unified communications regulator called OFCOM.[34] Finally, when the EU implemented the 2002 Regulatory Framework, the UK similarly adopted the Office of Communications Act 2002, which paved the way for the adoption of OFCOM. It is therefore clear that OFCOM was adopted in UK government both as a response to the 2002 Regulatory Framework as well as the convergence phenomenon.

It is also noteworthy that similar regulatory reforms took place in other EU member states like Austria and Italy, which actually reformed their regulatory structures before the UK. For example, Austria implemented the Austrian Telecommunications Act 1997 to establish the Austrian Regulatory Authority for Broadcasting and Telecommunications which was a convergent regulatory authority.[35] Likewise, Italy established the Autorita per le garanzie nelle comunicazioni (AGCOM) in 1997, which was created to regulate both the telecommunications and audiovisual sectors. According to Verdier-Bonchut, the UK actually imitated the Italian experience of AGCOM in establishing OFCOM.[36]

In contrast, Smith[37] explained that the adoption of OFCOM was driven by the interests of commercial media operators in UK as they attempted to use convergence to justify further deregulation of the communication sectors. The OFCOM also reflected the commitment of the New Labour government to free market principles and policy innovation. The regulatory bickering between the Independent Television

[33] CM 4022.

[34] CM 5010. For a discussion of the White Paper, *see* Calleja R. and Crane T., "White Paper, White Wash ? A New – But Uncertain – Future for Communications", *Entertainment Law Review*, 2001, Vol 12(4), pp 123–129.

[35] For an analysis of the development of communications regulation in Austria, *see* Michael Latzer M., Just N., Saurwein F. and Slominski P., (2006), "Institutional variety in communications regulation. Classification scheme and empirical evidence from Austria", *Telecommunications Policy* 30(3–4) April–May 2006, pp 152–170.

[36] For an analysis of the establishment and implementation problems of AGCOM in Italy, *see* Verdier-Bobchut V., "Regulation of the Audiovisual and Telecommunications Sector in Italy: From Community Challenge to National Issue", *International Review of Administrative Sciences*, 69(2003), pp 271–283.

[37] Smith P., "The politics of UK television policy: the making of Ofcom", *Media, Culture, & Society,* 2006, Vol 28(6): pp 929–940.

Commission and OFTEL, as well as the struggle between rival departments within the New Labour government also hastened the adoption of OFCOM. As a result, different stakeholders for various reasons, supported a unified regulatory regime for the communications sector.

The OFCOM, the "super-regulator", was eventually formed by "merging" five regulators by virtue of the Communications Act 2003. With powers and duties defined by the Act, OFCOM was established to regulate both content and carriage, products and services, commercial and public service broadcasting. In this way, it has developed a common regulatory approach to the telecommunication and broadcasting sectors, with a view to pushing for both convergence and diversification.[38]

Part Three: Implementation Experience of OFCOM: Legal and Policy Perspectives

After the publication of the White Paper, it took less than three years for the UK government to establish OFCOM. The milestones in its establishment can be summarised by Table 1 below:

Table 1: Milestones in creating OFCOM[39]

Date	Milestone
2000 Dec	White Paper "A New Future for Communications" was published
2001 Sep	Presentation of OFCOM Scoping Report to ministers
2002 Mar	Royal Assent to the OFCOM Act
May	Publication of the draft Communications Bill
July	Appointment of David Currie as first Chairman of OFCOM
Sep	Appointment of non-executives to the Main Board
Nov	Submission of Report "Creation of OFCOM" by the Management Consortium
2003 Jan	Appointment of Stephen Carter as the first Chief Executive of OFCOM
Jan	Riverside House confirmed to be the site in London for OFCOM Headquarters
July	Royal Assent to the Communications Act

[38] Livingstone S., Lunt P. and Miller L., "Citizens and consumers: discursive debates during and after the Communications Act 2003", *Media, Culture, & Society*, 2007, Vol 29(4): pp 613–638.

[39] This table was adapted from National Audit Office, "The creation of Ofcom: Wider lessons for public sector mergers of regulatory agencies", LONDON: The Stationery Office, 3 July 2006, available at http://www.nao.org.uk/publications/0506/the_creation_of_ofcom_wider_l.aspx.

The implementation experience of OFCOM can be analysed from both legal and policy dimensions. For the legal dimension, it was shaped by two important pieces of UK legislation, namely, the Office of Communications Act 2002 and the Communications Act 2003, and the EU Regulatory Framework.

Office of Communications Act 2002

On 19 March 2002, the Act was adopted, which provide the legal basis for the UK government to establish OFCOM before the Communications Act came into existence one year later. As a consequence, OFCOM started to prepare for the takeover of regulatory functions from the then existing regulators, namely, the Director General of Telecommunications, the Independent Television Commission, the Broadcasting Standard Commission, and the Radio Authority. Under the Office of Communications Act, a Board was established to become responsible for the appointment of a Chief Executive as well as the necessary staff when OFCOM came into full operation. However, the 2002 Act also prohibited the Board from any interference with the works of then existing regulators.[40] As explained by Romer and Maguire, such provision prevented "regulatory uncertainty" and permitted the existing regulators to carry on their works until the implementation of the Communications Act 2003.[41] Moreover, the Act required the existing regulators to assist by carrying out their functions in a matter that promoted the interest of OFCOM.[42]

Communications Act 2003 and EU Regulatory Framework

The Communications Act was passed on 17 July 2003,[43] while the four Directives contained in the EU Regulatory Framework commenced on 25 July 2003. It therefore reflected the close relationship between the two. By virtue of the Communications Act 2003, OFCOM formally took over the functions of the abovementioned five "sector-specific" communications regulators, including the Independent Television Commission, Radio Authority, the Office of Telecommunications, the Broadcasting Standards Commission and the Radio communications Agency on 29 December 2003. Such regulatory development could be interpreted as "a fairly straightforward response by UK policymakers to the convergence of television, telecommunications and computing

[40] s 2, Communications Act 2002.
[41] Romer J. and Maguire G., "An Overview of the Draft United Kingdom Communications Bill", *Computer and Telecommunications Law Review*, 2002, Vol 8(6), pp 136–140, at 139.
[42] s 4, Office of Communications Act 2002.
[43] Ch 21, Laws of UK 2003.

technologies facilitated by digitalisation".[44] It could also be taken as a significant shift in the UK approach of communications regulation from one of allocating a relatively scarce spectrum to one of market power control for facilitating competition.[45]

The 2003 Communications Act was thus a substantial piece of legislation with 411 sections and 19 schedules. It not only implemented the communications policy of the New Labour government set out in the 1999 White Paper but also the four Directives contained in the EU Regulatory Framework, namely, the Framework Directive, the Authorisation Directive, the Access Directive and the Universal Services Directive.

As a result, the Act incorporated many EU law principles which resulted in its unique legislative pattern. For example, the principal duties of OFCOM are set out in s 3 of the Communications Act 2003 as: first, "to further interests of citizens in relation to communications matters"; and second, "to further consumer interests in relevant markets, where appropriate by promoting competition".[46] Such provision demonstrated the need of OFCOM to recognise both social and economic goals in formulating its regulatory policies.

However, those duties are "overridden" by s 3 of the Act, which required OFCOM to act in accordance with the six EC requirements.[47] These included requirements to: first, promote competition; second, to contribute to the development of the EU internal market; third, to promote the interests of EU citizens; fourth, to carry out their functions in a manner which does not favour any form of network or service; fifth, to encourage the provision of network access; and sixth, to encourage compliance with international standards to enhance service interoperability and consumer choice. As Brisby argued, the regime of duties and principles of OFCOM created by the Communications Act 2003 was complicated and "messy", which made it difficult for the regulator to consider all of them in an effective manner.[48]

Significantly, new developments took place in both the EU and the UK after the adoption of the Regulatory Framework and the Communications Act 2003. On 13 November 2007, the European

[44] Smith P. (2006), "The politics of UK television policy: the making of Ofcom", *Media, Culture, & Society*, Vol 28(6): pp 929–940, at 929.

[45] Collins R. (1997), "Back to the Future: Digital Television and Convergence in the United Kingdom", *Telecommunications Policy*, Vol 22(4/5): pp 383–96, at 395.

[46] s 3(1).

[47] s 4.

[48] Brisby P., "The Regulation of Telecommunications Networks and Services in the United Kingdom", *Computer and Telecommunications Law Review*, 2006, Vol 12(4), pp 114–139 at 135.

Commission published a set of legislative proposals for further reform of the electronic communications sector.[49] These proposals attempt to build on the Regulatory Framework for Electronic Communications by promoting regulatory harmonisation, enhancing independence of national regulators and strengthening consumer protection.[50]

In the UK, meanwhile, the conflicts and tensions of OFCOM in furthering the consumer and citizen interests as articulated in the aforesaid s 3 of the Communications Act has remained a topical issue among academics and policymakers after its adoption in 2003. For example, Livingstone, Lunt and Miller advocated a new definition of citizen interest that is distinct from consumer interest.[51] Likewise, OFCOM issued a Discussion Paper titled "Citizens, Communications and Convergence"[52] to further public deliberations on the issue.

We now turn to look at OFCOM experience from a policy perspective, which can be divided into two issues: regulatory policy and personnel policy.

Regulatory Policy

The Board of OFCOM is responsible for formulating regulatory policies.[53] In practice, it follows certain guiding principles. It operates "with a bias against intervention", and only intervenes if there is a legal duty to accomplish a public goal that cannot be achieved by the markets. The OFCOM also undertakes to employ the "least intrusive" regulatory tools and ensure their actions are "evidence-based, proportionate, consistent, accountable and transparent". They also carry out consultations with operators and assess the regulatory impact before

[49] Proposal of the Commission of 13 November 2007 for a Directive amending Directives 2002/21/EC (framework), 2002/19/EC (access and interconnection), and 2002/20/EC (authorisation), COM(2007) 697; Proposal of the Commission of 13 November 2007 for a Directive amending Directive 2002/22/EC (universal service and users' rights), Directive 2002/58/EC (protection of privacy in the electronic communications sector) and Regulation 2006/2004 on consumer protection cooperation, COM(2007) 698; Proposal of the Commission of 13 November 2007 for a Regulation establishing the European Electronic Communications Market Authority, COM(2007) 699, available at http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm.

[50] For an analysis of the 2007 legislative proposals, *see* de Streel, A., "Current and future European Regulation of Current and Future European Regulation of Electronic Communications: A Critical Assessment", *Telecommunications Policy,* Vol 32 (2008) 11, pp 722–734.

[51] *See* Livingstone S., Lunt P. and Miller L., "Citizens, Consumers and the Citizen-Consumer: Articulating the Citizen Interest in Media and Communications Regulation", *Discourse and Communication,* 2007, Vol 1(1), pp 85–111.

[52] For an analysis of the Discussion Paper, *see* Livingstone S., "What is the citizen's interest in communication regulation? Ofcom's agenda for 'Citizens, Communications and Convergence'", unpublished paper presented at Media@lse Fifth Anniversary Conference, 21–23 Sep 2008, LSW London. Available at http:eprints.lse.ac.uk/21561.

[53] Doyle G. and Vick D.W., "The Communications Act 2003: A New Regulatory Framework in the UK", *Convergence*, 2005, Vol 11, p 75.

intervening in the market.[54] This was different from traditional UK regulators, which were usually staffed by civil servants. However, it is noteworthy that OFCOM has recently been criticised by a consumer group for its slow intervention and reluctance to act without external pressure.[55]

Personnel Policy

In fact, the personnel policy of OFCOM was very innovative by UK standards. For example, the first chairman of OFCOM Board, David Currie, or Lord Currie of Marylebone, was not a civil servant but was "a highly respected academic and economist with substantial regulatory experience". Moreover, many of OFCOM staffs were recruited from the private sector, including "a significant number of genuine high-flyers".[56]

Part Four: Lessons from UK for Hong Kong in the Future Adoption of Communications Authority

Based on the above analysis of the implementation experience of OFCOM, and taking into account the Hong Kong government proposals at the beginning of this article, we consider that Hong Kong has the following eight lessons to learn from UK with regard to future establishment of the Communications Authority.

Lesson 1: Implementation of a Unified Regulator Needs Strong Political Support

The success of a regulator depends heavily on the political support of the ruling government. In the UK, although the idea of a unified communications regulator was supported by different stakeholders, one important factor contributing to its success was that OFCOM was part of the New Labour government's commitment to free market principles and policy innovation. As far as the Hong Kong government is concerned, therefore, it is vital that they give strong political support to the future success of the CA. However, judging from the delay in the implementation of the Authority, it is uncertain at this stage whether that support will be forthcoming, unlike its UK counterpart.

[54] OFCOM Annual Report 2008–09, p 33.

[55] Brooker S. and Taylor A., *Rating Regulators-Ofcom, Consumer Focus,* paras 2–12 , 2009 available at http://www.consumerfocus.org.uk/assets/1/files/2009/06/10708_CF_Ofcom_web.pdf.

[56] Brisby P., "The Regulation of Telecommunications Networks and Services in the United Kingdom", *Computer and Telecommunications Law Review*, 2006, Vol 12(4), pp 114–139.

Lesson 2: Implementation of a Unified Regulator Needs Systematic Planning
We have already seen that the passage of the UK Office of Communications Act 2002 enabled the establishment of OFCOM and the recruitment of the necessary staff before its formal takeover of the regulatory functions of the five regulators at the end of 2003. This provided a new set of duties and principles to follow in regulating the converging communications sector and demonstrated that systematic planning is vital to successful implementation.

From the HK government proposal stated at the beginning of this article, however, the government will depart from the UK practice in that the CA will continue to rely on existing "sector-specific" telecommunications and broadcasting regulations. Only after its establishment, the Authority will undertake a review of the existing regulations and consolidate them into a unified Communications Ordinance. It means therefore that the unified communications regulator in Hong Kong will not have the benefit and guidance of a unified piece of legislation with which to regulate the converging communications sector. Whether such planning is effective in future implementation remains to be seen.

Lesson 3: Appointment of Credible and Competent Persons is Crucial to the Success of a Unified Regulator
Those in charge of a unified communications regulator will directly affect the market environment and it is imperative to have staff familiar with the communication industries. The implementation experience of OFCOM demonstrated this point well as many of its staff came from the communications sector and as indicated earlier, some were "high-flyers". However, as stated at the beginning of this article, the Hong Kong government proposes that the executive support for the Communications Authority (called the OFCA in the proposal) will be staffed by civil servants and headed by a public officer. Again, whether such support structure and leadership will be conducive to the future implementation of the CA in Hong Kong is questionable.

Lesson 4: Adequate Legislation and Regulation is Necessary for the Adoption of a Unified Regulator
It is necessary to have the proper legislation in place before the adoption of a unified communications regulator. The UK Office of Communications Act of 2002 was adopted to pave the way for the establishment of OFCOM. Then the Communications Act came into operation in 2003, which not only vested all powers of the five regulators into OFCOM but also set out detailed duties and principles for the regulator to follow. This

has demonstrated the importance of developing a sufficient legal and regulatory framework.

As we have already seen from the government proposal, the existing "sector-specific" telecommunications and broadcasting regulations will remain and a unified Communications Ordinance akin to the Communications Act 2003 will not come into existence until the CA completes a review of the existing communications regulations. One can only hope that an adequate legal and regulatory framework will be put into place for the future implementation of a unified communications regulator in Hong Kong.

Lesson 5: A Unified Regulator should Adopt a Light-hand Approach in Regulating the Communications Sectors

The OFCOM has consistently adopted a "light-hand" approach in its regulation, which avoids unnecessary interference to the communications market and has contributed to its successful implementation in the UK. Similarly, the Hong Kong CA will adopt regulatory tolerance as its guiding principle. Moreover, it will avoid stifling innovation and investment by regulatory intervention, and refrain from extending its regulatory ambit continuously. These principles are consistent with the "light-hand" approach adopted by OFCOM and should contribute to the implementation of the unified communications regulator.

Lesson 6: The Unified Regulator should be Open and Transparent to Remove Any Public Concern Over its Legitimacy Deficit

When OFCOM was first proposed in the UK, its legitimacy was questioned for fears of its "undemocratic" nature and its potential development into a "super regulator" overseeing the entire communications sector with little public accountability.[57] Yet in the past few years, the implementation experience removed such concerns of "legitimacy deficit" as OFCOM demonstrated a high degree of openness and transparency. In fact, as a regulator, it undertook wide consultations before implementing regulatory actions, and gave reasons for the policies it implemented as well as the individual cases it adjudicated.[58] In Hong Kong, the government stated that the core values of the CA were also to be defined as open and transparent. The future CA must, therefore,

[57] *See*, for example, Crane T., "OFCOM – a new order for communications regulation or a bureaucratic nightmare?", *Computer and Telecommunications Law Review*, 2003, Vol 9(2), pp 37–40.

[58] Feintuck M. and Varney M., *Media Regulation, Public Interest and the Law*, 2006, pp 170–176.

attain a similar degree of transparency as OFCOM in the UK in order to alleviate any public fears over its legitimacy deficit.

Lesson 7: The Unified Regulator should Guarantee and Promote Media and Cultural Diversity

In the UK, OFCOM was required by the 2003 Communications Act to establish a Content Board to regulate media content,[59] the members of which would come from different parts of the country.[60] The law therefore demonstrated the policymakers' desire to broaden the geographical representation of the board, thereby ensuring a diversity and plurality of views in the regulation of media content. However, Feintuck and Varney pointed out the failure to ensure a balance of cultural or ethnic backgrounds in the appointment of board members which still contributed to statutory deficiency.[61] In the case of the Hong Kong government proposals, there appears to be no similar establishment like the Content Board in OFCOM. However it is essential for the future CA to put mechanisms in place to guarantee and promote cultural and media diversity so as to ensure the policy objective of maintaining a vibrant communications sector to enhance Hong Kong's competitive advantage as a communications hub in the region.

Lesson 8: The Functions, Duties and Powers of the Unified Regulator should be Subject to Adequate Legal Control and Legal Remedies should be Available to the Aggrieved Members of the Public

In UK, the functions, duties and powers of OFCOM are set out in, and regulated by, the Communications Act 2003. Moreover, the regulatory actions of OFCOM are subject to the Human Rights Act 1998. What is more, common law remedies like judicial reviews are available to members of the pubic who feel aggrieved by the policies and decisions of OFCOM. This has ensured that OFCOM is legally accountable for any policy adopted or decision it made in individual cases considered to be wrong.

According to the government proposals, the Hong Kong Communications Ordinance will not come into place before the establishment of the Communications Authority. Therefore adequate legal provisions must be put in place to regulate the functions, powers and duties of the

[59] s 12 Communications Act 2003.

[60] s 12(5) of the Communications Act 2003 read "In appointing persons to be members of the Content Board, OFCOM must secure that, for each of the following parts of the United Kingdom, (a) England, (b) Scotland, (c) Wales, and (d) Northern Ireland, there is a different member of the Board capable of representing the interests and opinions of persons living in that part of the United Kingdom".

[61] Feintuck M. and Varney M., *Media Regulation, Public Interest and the Law*, 2006, p 186.

CA. Moreover, the Bills of Rights Ordinance and common law remedies of judicial review will be applicable to provide adequate legal remedies for local citizens who feel aggrieved by any policies or decisions adopted by the CA.

In conclusion, the implementation experience of OFCOM has clearly demonstrated the merits of a unified regulator for the communications sector. While Hong Kong need not necessarily adopt the UK model completely, the lessons drawn from the OFCOM experience should provide much useful reference if the government proceeds to establish the CA in the near future.