

# MEDIA POLICY AND REGULATION IN THE AGE OF CONVERGENCE — THE HONG KONG EXPERIENCE



Richard Wu Wai Sang\* and Grace Leung Lai Kuen\*\*

*The advent of digital technology and its ability to deliver content from a variety of traditional media forms has blurred the boundaries between the computer, telecommunications and television sectors, and has led to the emergence of a 'convergence' phenomenon, thereby posing new problems and challenges for the regulators of media industries worldwide. In this article the authors trace the emergence and development of the convergence phenomenon, set out various theories put forward by communications scholars to account for its emergence, and examine the regulatory issues and concerns for media regulators that arise from the convergence phenomenon. The authors then examine the approach adopted by Hong Kong in dealing with the convergence phenomenon, and discuss briefly the recently enacted Telecommunications (Amendment) and Broadcasting Ordinances. The authors conclude that Hong Kong should shift from a 'gradualist' to a 'radical' approach in its media policy and regulation, if it is to deal adequately with the convergence phenomenon in the 21st century.*

## **Introduction: changing rules of the game**

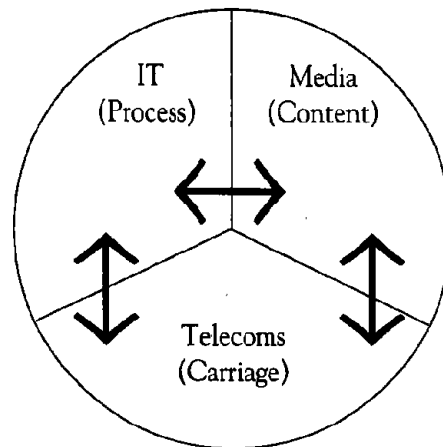
The convergence phenomenon is creating a new global media environment as we begin the 21st century. The emergence of the convergence phenomenon is largely attributed to the invention of digital technology in the 1990s, which makes possible the delivery of media content in different technological forms. The boundaries between computers, telecommunications and television are becoming blurred, if not disappearing altogether. Heretofore, computers were used mainly for storing information and making arithmetic calculations; telecommunications were mainly concerned with telephone networks used for voice conversation; and television was primarily a medium providing sight and sound entertainment as well as information for a mass audience. These were traditionally treated as separate media industries regulated under different regulatory regimes. However, digitalisation is now creating an era of convergence and new rules of the game are gradually emerging in the media industries, both

\* Assistant Professor, Faculty of Law, University of Hong Kong.

\*\* Part-time Lecturer, Department of Journalism and Communications, Chinese University of Hong Kong. The authors wish to express their gratitude to Charles Booth and Rick Glofcheski of the Faculty of Law, University of Hong Kong, and to an anonymous referee, for their invaluable comments on an earlier draft of this article.

at the global and national levels. The historic and ongoing merger of America Online and Time Warner and other similar merger activities that followed, were but a natural response to the phenomenon of convergence. In fact, in 1996 alone more than 15% of the total value of worldwide mergers and acquisitions (US\$1 trillion) was generated by activities in media industries.<sup>1</sup> It is certain that the convergence phenomenon will continue to reshape the landscape of the media industries in the years to come.

Figure 1  
Convergence of different industries<sup>2</sup>



Many Western countries are becoming increasingly aware of the impact of convergence on the media industries, and there is a growing body of literature on the subject. This article explains the convergence phenomenon, traces its development, and reviews the implications of the convergence phenomenon for media regulation under four headings: the role of government; sector-specific regulations; multiple regulators; and competition law and policy. It then identifies three approaches adopted in different jurisdictions to deal with the convergence phenomenon: 'do-nothing', 'gradualist' and 'radical'. The Hong Kong experience is then analysed, concentrating on the role of government, multiple regulatory regimes and regulators, and competition law. Drawing on the recent experiences of other jurisdictions, such as the European Union and the United Kingdom, an attempt is made to evaluate whether and if so, to what extent Hong Kong responds to the phenomenon of convergence in its media policies and regulation.

<sup>1</sup> European Commission, *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation towards an Information Society Approach* (hereafter, *Green Paper on Convergence*) (Brussels: European Commission, 1997), p 14. Available at <<http://www.ispo.cec.be/convergencecp/97623.html>>.

<sup>2</sup> This is adapted from Trevor Barr, *newmedia.com.au: the changing face of Australia's media and communication* (St Leonard: Allen & Unwin, 2000), pp 23-24.

## The phenomenon of convergence

### *Technological and media convergence*

In previous decades the technological characteristics of media were dominated by 'analogue' technology. 'Analogue' refers to a system whereby information is stored or delivered through the direct and continuing creation or reproduction of natural signals. Vinyl records, which use air vibrations to record variations of sound levels in the grooves, are a clear example of analogue technology. At present, their digital counterparts, the compact discs, are far more popular. The latter uses digital technology to transform and record sound into binary digits. Digitalization can apply to images, texts and video materials, as well as to sound. Digitalization also makes integration and conversion of different media content possible. Therefore, the emergence of digital technology has not only caused a technological revolution in the record industry, but has also resulted in the 'convergence' of different media products.

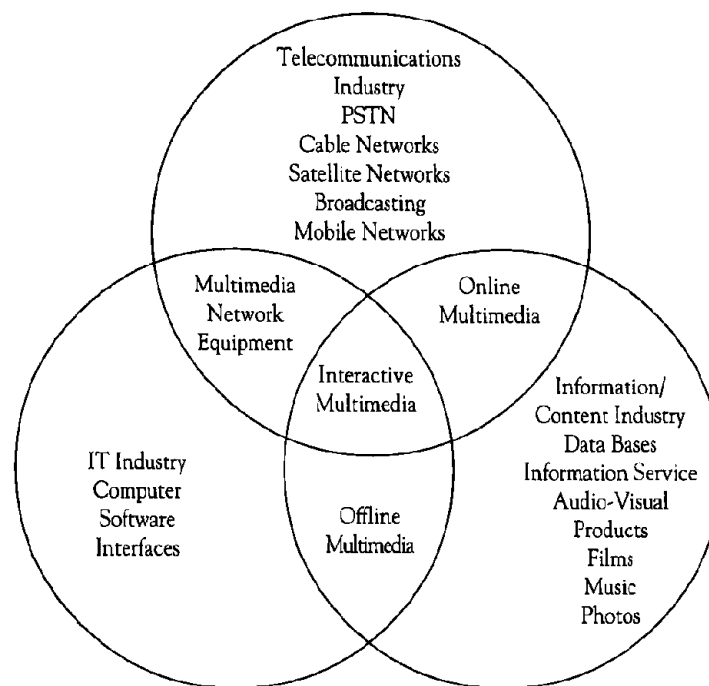
What is the exact meaning of 'convergence'? There is no standard definition and different people have their own interpretations. On the technological level, convergence simply means 'technological convergence', that is, the integration or coming together of different media technologies or industries at different levels. In a consultation report commissioned by the European Commission, the term 'convergence' was defined as follows:

Convergence is an on-going process, which entails the coming together of the following:

- content from the audiovisual and publishing industries;
- potentially separate physical infrastructures (such as all those supporting broadcast television or telecommunications services) able to carry similar sorts of information at increasingly lower costs;
- the interactive information storage and processing capabilities of the computer world;
- the ubiquity, improving functionality and ease of use of consumer electronics.<sup>3</sup>

<sup>3</sup> KPMG, *Public Policy Issues Arising from Telecommunication and Audiovisual Convergence, Summary Report* (Brussels: European Commission, 1997) (KPMG Report), pp 2-3, available at <<http://www.ispo.cec.be/infosoc/promo/pubs/exesum.html>>.

Figure 2  
The Converging Information Society<sup>4</sup>



The social significance of convergence, however, lies more with another meaning or interpretation, namely, 'media convergence'. Put simply, media convergence means that all forms of communication are converted into a single multi-media technology. Media convergence becomes a real possibility with the advent of new technologies. For example, Roger Noll and Monroe Price note that the arrival of the internet in the 1990's was a turning point that 'holds the promise of completing the convergence of all communication media.'<sup>5</sup>

#### *Media convergence — the ongoing academic debates*

While many people, like Noll and Price, predict that following the emergence of the internet, media convergence will occur, an increasing number of academic scholars and media industry experts believe that the internet is not necessarily the terminal or final destination for all communication media. In their opinion, satellite or fibre-optic transmission, and even television or mobile telephones are also capable of performing the functions of the internet in attaining media convergence.

<sup>4</sup> This is adapted from Committee for Information, Computers and Communication Policy, OECD, *Global Information Infrastructure — Global Information Society (GII-GIS) Policy Requirements* (Paris: Organisation for Economic Development, 1997), p 15.

<sup>5</sup> Roger Noll & Monroe Price, 'Communication Policy' in R Noll & M Price (eds), *A Communications Cornucopia* (Washington DC: Brookings Institution Press, 1998), p 12.

What contributes to the emergence of media convergence? There is no simple explanation. Most people believe that technology is important in bringing about media convergence. However, some academics argue that it is not the *only* factor accounting for the emergence of media convergence. For example, Jan van Dijk points out that media convergence is a result of structural changes produced by current communications. He asserts that complete digitalization of transmittable information, together with the popularity of broadband transmission through fibre-optic cables, will speed up the process of media convergence.<sup>6</sup>

Dwayne Winseck, on the other hand, highlights the historical and political-economic factors contributing to the emergence of media convergence. He points out that media convergence began long before the arrival of digitalization. He argues that media convergence has always been a historical possibility but that the intentions of private industry and/or governments have prevented a cross-media combination.<sup>7</sup> In Winseck's view, the current push both by governments and industry to bring about information highways in the West promotes media convergence.<sup>8</sup> One good example is the 1996 Telecommunications Act adopted in the United States, which removed all major legal barriers to the convergence phenomenon.<sup>9</sup>

Some scholars believe that media convergence will bring about a fundamental and revolutionary change in the media industries. For example, van Dijk predicts that it will cause important structural changes in the media industries and that media convergence will take place at five levels: infrastructure, transportation, management, services and types of data. The recent takeover of the Cable and Wireless (Hong Kong Telecom) Limited, a company providing telecommunications services, by Pacific Cyberworks Limited, a company providing internet services, provides a typical example of such media convergence in Hong Kong.<sup>10</sup>

#### *The reality of media convergence*

Differences in opinion over the pace and scale of the convergence process notwithstanding, it is clear that convergence is no longer an abstract concept discussed merely in the realm of academic circles. Rather, convergence is a fact of life and its importance is already manifest in the media industries of many jurisdictions, including Hong Kong. In fact, Noll and Price predict that

<sup>6</sup> Jan van Dijk, *The Network Society: Social Aspects of New Media* (London: Sage, 1999) p 9.

<sup>7</sup> For example, the media regulations of Hong Kong still impose many restrictions on cross-media ownership.

<sup>8</sup> Dwayne Winseck, 'Pursuing the Holy Grail: Information Highways and Media Reconvergence in Britain and Canada' (1998) 13(3) *European Journal of Communication* 337, at 343.

<sup>9</sup> M Cimattoribus, A De Tommaso & P Neri, 'Impacts of the 1996 Telecommunications Act on the US Models of Telecommunication Policy' (1998) 22(6) *Telecommunications Policy* 493, at 501.

<sup>10</sup> See 'Pacific Century Cyberworks Wins Control of C&W Unit — Internet Upstart May Pay Up to \$38.1 Billion', *Asian Wall Street Journal*, 29 February 2000, p 1.

worldwide we will witness a complete convergence of communication media by the end of the first decade of this century.<sup>11</sup>

In recent years, there have been many examples of media convergence in our daily lives, both in Hong Kong and elsewhere. Most of these examples are related to the internet. In the past, different media, like television, radio and telephone, performed different roles and functions. These boundaries are now breaking down with the emergence of the internet. The internet may be used to perform the function of the telephone by using internet telephony. They may also use it to perform the role of radio, by broadcasting radio programmes over the internet. Similarly, television programmes have been broadcast over the internet, and Hollywood has even webcast a special movie, 'Quantum Project', on the internet.<sup>12</sup>

#### *The global concern for convergence*

In the media industry and within regulatory bodies in Western countries, there is growing concern about the impact of convergence. The European Commission, for example, has published several policy papers and conducted a public consultation on this topic.<sup>13</sup> Since enormous economic benefits, international competitiveness and job creation opportunities arise from the convergence phenomenon, the European Commission is keen to adjust its regulatory framework to facilitate the ongoing process of convergence.<sup>14</sup> Though its policy papers highlight the negative impact of the convergence phenomenon, the Commission's deep-rooted faith in the salvation of technology and in 'utopian' expectations for the information society is manifestly reflected in its discourse on the convergence phenomenon.<sup>15</sup>

It is now widely accepted in many developed countries that media convergence occurs at various levels, including infrastructure, transportation, management, services, and types of data. These countries are divided, however, in their perceptions and assessments as to the extent and the speed at which media convergence will take place. They also hold different views on the impact of the convergence phenomenon on their economies and societies. Some countries, like the United Kingdom and the United States, are apparently convinced of the economic promise of media convergence. Thus, they actively adopt new regulatory policies and frameworks that are compatible with the convergence phenomenon.<sup>16</sup>

<sup>11</sup> See Noll and Price (note 5 above), p 13.

<sup>12</sup> 'First Hollywood movie is going to be released on the Internet', Ming Pao, 7 May 2000, p A11.

<sup>13</sup> The European Commission published the *Green Paper on Convergence* (note 1 above) in December 1997 and subsequently carried out a 5-month consultation and public hearing process. A summary of the comments on the *Green Paper on Convergence* is available at <<http://www.ispo.cec.be/convergencegp/gpworkdo.html>>.

<sup>14</sup> See *Green Paper on Convergence* (note 1 above), p 2.

<sup>15</sup> See van Dijk (note 6 above).

<sup>16</sup> Legal Advisory Board, *Position paper on the Green Paper on the convergence of the telecommunication, media and information technology sectors* (Brussels: European Commission, 1999), p 1.

### Convergence: new issues and concerns for media regulators

With the onset of convergence, many new issues and concerns arise for media regulators. Although the responses in different jurisdictions may not be the same, the issues involved are broadly similar. Here, we concentrate on the following four issues: (1) the role of government, (2) sector-specific regulations, (3) multiple regulators, and (4) competition policy and law.

#### *The role of government*

Many scholars argue that the government has a significant role to play in directing the development of the media industries in the era of convergence. For example, Noll and Price stress the importance in the United States of the government adoption of sensible policies to regulate the main delivery system, ie the electronic network, to optimise the development of the mass media.<sup>17</sup> Hong Kong policymakers apparently share this view. Their emphasis on the role of government to regulate the network or infrastructure was reflected in a speech by a government official in 1998 as follows:

A fresh approach to regulation at both the facility and service provisions levels is called for to ensure that new enterprises and established players will be allowed the freedom to harness the converging technologies in an environment where applications and infrastructures can develop and flourish. An open, common interface information infrastructure, accessible throughout the SAR, needs to be established and obstacles to interconnections between networks removed.<sup>18</sup>

#### *Sector-specific regulations*

Convergence poses a fundamental challenge to the regulatory paradigm in many jurisdictions. At present, media regulations of many countries (like the United Kingdom) and cities or territories (like Hong Kong) are based on a sector-specific paradigm. Such a regulatory paradigm is feasible so long as clear technological boundaries exist for different media industries. The technological classifications, however, were all created in the era of analogue technology. With the onset of the convergence phenomenon, traditional technological boundaries that once existed between different media industries have become obsolete. Thus, the paradigm of sector-specific regulations is no longer adequate in the era of convergence, and a new regulatory paradigm is necessary to replace the sector-specific regulatory paradigm. Some scholars, such as van Dijk,

<sup>17</sup> See Noll and Price (note 5 above), p 33.

<sup>18</sup> See speech of Rita Lau, 'Convergence in Info-communications: Challenges and Opportunities', presented at the Hong Kong Economic Forum, Hong Kong, 29 June 1998. Available at <<http://www.info.gov.hk/itbb/speech/pr290698htm>>.

propose the adoption of a general framework of communication and information legislation for this era of convergence.<sup>19</sup>

### *Multiple regulators*

The convergence phenomenon also poses new problems for countries or cities that adopt a multiple regulatory model. As some academics pointed out, multiple regulatory agencies can potentially lead to 'suboptimal, uncoordinated and potentially inconsistent decisions.'<sup>20</sup> For example, in Hong Kong, the regulator for the telecommunications sector is the Telecommunications Authority while the regulator for the broadcasting sector is the Broadcasting Authority. Under the multiple regulatory model, different media regulators develop their own regulatory principles and practices. However, new media services created in the era of convergence may straddle different traditional sectors and may need to be licensed and regulated by different regulators.<sup>21</sup> Thus, instead of fostering the development of new media services, the existence of multiple regulators may lead to their 'over-regulation'. Moreover, the licensing of new media services by different regulators may result in discriminatory treatment of the new media services and thereby distort the media markets. There is also the danger of an existing regulatory regime being applied inappropriately to the new media services.

As a result, many academics believe that media convergence will inevitably lead to the convergence of multiple regulatory regimes into a single regulator.<sup>22</sup> The obvious advantage of having a single regulator is that both the policy and the law are formulated and applied by the same regulator and the regulatory standards applied to different media sectors can be 'harmonised.' As the convergence phenomenon continues to occur, this harmonisation of regulatory principles for different media sectors will become ever more important. For example, in the European Union, there are calls for radical reforms of regulatory frameworks and the establishment of a single regulator to replace the existing regulatory framework.<sup>23</sup>

### *Competition law and policy*

The convergence phenomenon also brings about broader regulatory issues of competition policy and law. As the convergence phenomenon continues, cross-media acquisitions will increase, leading to both a growing level of horizontal integration amongst the bigger players and an intensified concentration in the market. The merger between America Online and Time

<sup>19</sup> See van Dijk (note 6 above), p 115.

<sup>20</sup> William H Melody, 'Telecom reform: progress and prospects' (1999) 23(1) Telecommunications Policy 7 at 29.

<sup>21</sup> *Green Paper on the Regulatory Implications* (note 1 above), 3 December 1997, p 26.

<sup>22</sup> Richard Collins & Cristina Murrioni, *New Media, New Policy*, (Cambridge: Polity Press, 1996), p 186.

<sup>23</sup> See, for example, *Green Paper on Convergence* (note 1 above).



Warner, as well as the subsequent merger between EMI and Warner Records in January 2000, are landmark examples of such cross-media acquisitions in the United States.<sup>24</sup> In Hong Kong, the classic example of such cross-media acquisitions is provided by the takeover in August 2000 of Cable and Wireless (HKT) Limited, the largest player in the telecommunications sector, by Pacific Century Cyberworks Limited, a new internet company set up only one year earlier by Richard Li, the son of Hong Kong tycoon Li Ka Shing.<sup>25</sup> These cross-media acquisitions clearly exemplify the integration and transformation of the media industries brought about by the convergence phenomenon.

While the accumulation and concentration of capital is a natural tendency in a capitalistic society, some scholars have pointed out that the convergence phenomenon leads to even greater concentrations of power in the media industries.<sup>26</sup> Other scholars have also predicted a shift in the nature of media concentration from one based on horizontal mergers to one involving increased vertical integration. Their prediction is based on the view that media operators are now seeking alliances that will enable them to acquire the broad set of skills needed to address the media markets.<sup>27</sup> Regardless of whether these predictions prove true or not, it is clear that the emergence of cross-media mega-mergers forces media regulators to formulate new competition policies and laws. These mergers also force regulators to deal with such issues as determining the appropriate levels of concentration of media ownership and domination by certain media players in regional and/or global markets. For example, following the takeover of Cable and Wireless (HKT) Limited by Pacific Cyberworks Limited, issues of monopoly and unfair competition have inevitably arisen in the Hong Kong telecommunications market.<sup>28</sup> These issues led a recent report of the European parliament to call for the adoption of a competition law in Hong Kong.<sup>29</sup>

### Convergence: approaches of regulation

Undoubtedly, different theories and perceptions about the convergence phenomenon have different implications for media regulators when designing

<sup>24</sup> Stephen Seawright, 'AOL record-breaking Time Warner acquisition highlights demand for web content net snares media sector' South China Morning Post, 12 January 2000, p 1.

<sup>25</sup> See note 10 above.

<sup>26</sup> Herbert Schiller 'United States' in Vicki MacLeod (ed), *Media Ownership and Control in the Age of Convergence* (London: International Institute of Communication, 1996), p 261.

<sup>27</sup> Bernard Clements, 'The Impact of Convergence on Regulatory Policy' (1998) 22(3) *Telecommunications Policy* 197, at 199.

<sup>28</sup> After the takeover of Cable and Wireless (HKT) Limited, Li Ka Shing and his family now control the two largest players in the Hong Kong telecommunications market. Li, through Cheung Kong Holdings, controls Hutchison Whampoa while his son, Richard Li, controls Pacific Century Cyberworks Limited.

<sup>29</sup> Audrey Snee, 'Li family firms have undue influence, says MP report.' South China Morning Post, 26 October 2000, p 2.

desirable regulatory models and strategies. Broadly speaking, such regulatory models and strategies can be categorized into three approaches.<sup>30</sup> The first approach, the 'do nothing approach,' is a favored option for those who either believe that the future development of convergence is uncertain or that the convergence phenomenon is a natural historical development. Thus, it is not necessary to formulate a new regulatory model or strategy under this approach. Most developing countries in the world adopt this approach.<sup>31</sup> In fact, the issue of convergence does not even appear in the reform agenda of these countries.

The second approach, the 'gradualist approach,' favors the development of new regulatory models for media services and industries that may evolve as a result of the convergence phenomenon, eg, internet services. This approach is a logical choice for those who recognize that as a result of the convergence phenomenon, traditional forms of media regulations cannot adequately deal with the emergence of new media services and industries. However, these people do not agree that convergence brings a fundamental change to media industries. Thus, traditional forms of media regulations are retained and continue to serve their original objectives under this approach. For example, 'old' forms of telecommunications and broadcasting regulations are retained in many jurisdictions, while 'new' forms of media regulations are adopted for new media services like video-on-demand services. In other words, 'old' and 'new' forms of media regulations co-exist in these jurisdictions. Jurisdictions like Hong Kong fall within this category.

The do nothing and gradualist approaches have their supporters in academic circles. In fact, many scholars believe that governments and the law do not need to play a proactive role in media regulation. For example, van Dijk points out that law and justice have lagged behind new technology in almost every historical period. He argues that new technology must become established in society before legislation can be applied to it. 'Legislation-in-advance', in his opinion, is akin to state planning and does not mesh with the principle of free initiative in technological development in capitalist societies.<sup>32</sup>

The third approach, the 'radical approach,' calls for the revamping of the existing regime of media regulations and the adoption of a completely new model to regulate the media industries and services. This approach is favoured by those who believe that convergence will bring fundamental changes to media industries. Under this approach, traditional models and strategies of regulation are inappropriate and irrelevant and new regulatory models and strategies must be formulated for the evolved media industries. This radical approach has been adopted by the United States and is reflected in its media regulations. In the groundbreaking Telecommunications Act 1996, the United

<sup>30</sup> These three models are adapted from the *Green Paper on Convergence* (note 1 above), pp 40-41.

<sup>31</sup> In our opinion, countries such as North Korea, Vietnam, and the Philippines fall within this category.

<sup>32</sup> See van Dijk (note 6 above), p 115.

States removed all legal barriers hindering the convergence of telecommunications and television, mobile and fixed, and local and distance telephone services.<sup>33</sup> Pursuant to this law, most business restrictions were removed and telecommunications operators and cable television companies were permitted to enter each other's markets.

The European Union, which used to be more conservative than the United States, now also advocates a radical approach. In recent years, the European Commission has become increasingly convinced that existing regulatory frameworks based on the technical characteristics of media and their channels of delivery are no longer adequate. The Commission advocates a single regulatory framework for a single communications market. In 1998, the European Commissioner, Martin Bangemann, proposed the development of an International Charter for Global Communications because he believed that it was no longer possible to distinguish between telecommunications, broadcasting and other IT-related media.<sup>34</sup> Moreover, the European Commission presented a Communication proposal in February 1998 to call for an international discussion on the creation of a framework for international policy coordination in the broader field of communications.<sup>35</sup>

From an economic point of view, the European Commission's stance is wholly justified. In its policy papers on convergence, the Commission stressed that governments' failure to address the regulatory implications of convergence at an early stage would maintain the existing regulatory barriers, introduce market distortions and inhibit the growth of new media markets. This failure, in turn, would threaten the European countries' competitiveness in an increasingly global marketplace and lead to the loss of opportunities for economic growth and the creation of jobs. In fact, it was estimated by some consultants that revenues in some media industries of Europe could drop by 40% by 2005 if Europe does not take full account of the convergence phenomenon.<sup>36</sup>

It is obvious that the European Commission believes that an appropriate regulatory framework will facilitate growth of the media industries, ensure a competitive market and provide necessary protection for the public. In fact, the European Commission provided mounting evidence in their policy paper to demonstrate the emergence of new multi-media services and the increasing

<sup>33</sup> See Cimattoribus, De Tommaso & Neri (note 9 above), p 501.

<sup>34</sup> See the speech of Martin Bangemann, European Commissioner, delivered at the ITU Conference Telecom Inter@active 1997, 'A New World Order for Global Communications: the Need for an International Charter', 8 September 1997, Geneva, Switzerland. Available at <<http://www.ispo.cec.be/infosec/promo/speech/geneva.html>>.

<sup>35</sup> Communication from the European Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 'The need for strengthened international coordination.' Available at <<http://www.ispo.cec.be/eif/policy/com9850en.html>>.

<sup>36</sup> See KPMG Report (note 3 above), p 7.

capability of modern networks.<sup>37</sup> The Commission also argued that regulatory uncertainty would impede the development of new products and services and hold back investment, thereby damaging prospects for the implementation of the 'Information Society'.<sup>38</sup> In other words, European countries would suffer in both economically and socially if the issue of convergence is not dealt with properly. It is noteworthy that the stance of the European Commission is supported by some academics, such as Bernard Clements, who argues that Europe can afford to neither adopt a do nothing approach nor put the matter on the back burner, because timing is crucial to the effective regulation of convergence.<sup>39</sup>

### *The Hong Kong experience*

In recent years, the Hong Kong government has attempted to deal with the convergence phenomenon in different ways. As can be seen from an examination of how media policy and regulation has responded to the convergence phenomenon, our analysis focuses on the same four issues discussed above: (1) the role of government, (2) sector-specific regulations, (3) multiple regulators, and (4) competition policy and law.

### *The role of government*

Up to 1990 the Hong Kong government basically adopted a do nothing approach in media policy. In fact, it was not until the late 1980s that the Hong Kong government established two policy branches to formulate policies for the telecommunications and broadcasting sectors, namely, the Economic Services Branch for the telecommunications sector and the Culture and Recreation Branch for the broadcasting sector. The media policy of Hong Kong at that time, as summarized by Paul Lee,<sup>40</sup> exhibited four characteristics: 'act after problems arise',<sup>41</sup> 'look for reference from abroad',<sup>42</sup> 'wait for suggestions from private sectors'<sup>43</sup> and 'trust the work to ad-hoc working parties'.<sup>44</sup> This policy reflected the prevailing 'positive non-interventionist' philosophy of the Hong Kong government at that time.<sup>45</sup>

<sup>37</sup> See *Green Paper on Convergence* (note 1 above), p 1.

<sup>38</sup> *Ibid*, p 2.

<sup>39</sup> See Clements (note 27 above), p 199.

<sup>40</sup> See Paul Lee, 'Regulatory Issues in the Communication Policy of Hong Kong: setting new rules of the game for broadcasting and telecommunications,' Pacific Telecommunications Council Fourteenth Annual Conference Proceedings Papers (1992), held at Honolulu, Hawaii, pp 696-704.

<sup>41</sup> By this phrase, Lee meant that the Hong Kong government was highly reactive. See *ibid*, pp 696-97.

<sup>42</sup> By this phrase, Lee meant that the Hong Kong government relied heavily on the experience of foreign countries, particularly the United Kingdom, in formulating any new telecommunications policy for Hong Kong. See *ibid*, pp 697-98.

<sup>43</sup> By this phrase, Lee meant that the Hong Kong government did not take the initiative. See *ibid*, p 698.

<sup>44</sup> These ad-hoc working parties might or might not be composed of people with expertise in the issues concerned. See *ibid*, pp 698-99.

<sup>45</sup> 'Positive non-interventionism' was a term coined by Sir Haddon-Cave, the former Financial Secretary of Hong Kong. For a more detailed description of the term, see David G Lethbridge, *The Business Environment of Hong Kong* (Hong Kong: Oxford University Press, 1984), p 36.

With the emergence of the convergence phenomenon in the 1990s, the Hong Kong government started to adopt a gradualist approach in its role. This change of approach can be demonstrated by the change in the government's handling of the exclusive licence granted to Hong Kong Telecom International Limited ('HKTI' and the 'HKTI Licence'). The Hong Kong government granted the HKTI an exclusive licence in the early 1980s. From that time onwards, the development of new media services in Hong Kong was severely restricted. As many new media technologies and services emerged as a result of the convergence phenomenon in the 1990s, the Hong Kong government found it increasingly difficult to allow new media services to enter the Hong Kong market without breaching the exclusivity of the HKTI Licence. In the early 1990s, the Hong Kong government tried to work within the constraints of the HKTI Licence, culminating in an official statement issued by the Telecommunications Authority known as 'The Interpretation of the Exclusivities of the Hong Kong Telecom International'.<sup>46</sup> In that statement, the Telecommunications Authority made it clear that the interpretation of language in the HKTI Licence would *not* be expanded to embrace new technologies and service concepts. Rather, exclusivity would be applied only when proposed activities clearly violated the meaning of the HKTI Licence in its original sense.<sup>47</sup>

Nevertheless, as time went on, the HKTI Licence proved to be highly restrictive in accommodating the development of new media services in Hong Kong. Partly for this reason, the Hong Kong government entered into negotiations with Hong Kong Telecom, the parent company of HKTI, for an early termination of the HKTI Licence before its legal expiration in 2006. In the end, Hong Kong Telecom agreed to terminate the HKTI Licence in March 1998 in exchange for the payment of HK\$6.7 billion to HKTI as compensation for this early termination.<sup>48</sup> It is no exaggeration to say that the Hong Kong government paid a high price, in monetary terms, for the convergence phenomenon indeed.<sup>49</sup>

The HKTI Licence was undoubtedly an important issue tackled by the Hong Kong government in dealing with the convergence phenomenon. Apart from this, the Hong Kong government has also developed many new policy initiatives to cope with the convergence phenomenon in recent years. For example, the government is attempting to remove all artificial constraints that limit networks

<sup>46</sup> Available at <<http://www.ofta.gov.hk/tas/ftn/exclusi.html>>.

<sup>47</sup> For a full account of the HKTI Licence episode, see Milton Mueller, *Telecom Policy and Digital Convergence* (Hong Kong: City University of Hong Kong Press, 1998), pp 85-8.

<sup>48</sup> 'Telecom franchise Termination of IDD franchise will benefit company as it can receive HK\$6.7 bil cash compensation and pay no loyalty fee', *Sing Tao Daily*, 25 January 1998, p 1.

<sup>49</sup> For details and criticisms of the agreement terminating the HKTI Licence, see Gabriela Kennedy, 'A step in the right direction: the liberalisation of Hong Kong's international telecommunications market' (1998) 4 (4) *Computer and Telecommunications Law Review* 150, at 151.

in their capability to carry broadcasting, telecommunications or multimedia services. If the Hong Kong government is successful, fixed telecommunications networks will soon be able to carry television programme services, and cable television networks to carry telecommunications services. Similarly, satellite television broadcasters will be able to offer telecommunications services. The Hong Kong government is also liberalising the external facilities market and developing the broadband infrastructure so that the networks can inter-operate and inter-connect with each other to achieve maximum effectiveness and efficiency.<sup>50</sup>

It is obvious that the Hong Kong government has shifted from a do nothing approach to a gradualist approach in recent years. While such a change of approach is laudable, we believe that the gradualist approach is increasingly incompatible with the pace of development of the convergence phenomenon. As the HKTL Licence incident demonstrates, many new media services may not be able to develop in Hong Kong if the government fails to act promptly and adopt a radical approach.

#### *Sector-specific media regulations*

As mentioned above, Hong Kong has followed the British model of media regulation and adopts a sector-specific regulatory system. Thus, the telecommunications and broadcasting regulations remain separate and distinct from each other. The principal legislation for telecommunications regulation is the Telecommunication Ordinance ('TO'),<sup>51</sup> which was substantially amended by the Telecommunications (Amendment) Ordinance ('TAO')<sup>52</sup> enacted in June 2000. The principal legislation for the broadcasting sector used to be the Television Ordinance ('TVO'),<sup>53</sup> but was largely repealed by the new Broadcasting Ordinance ('BO')<sup>54</sup> enacted in July 2000.<sup>55</sup>

It is clear from the existing legal arrangements that the regulatory regime of Hong Kong is premised on distinct telecommunications and broadcasting sectors regulated by different sets of media regulations. However, this distinction is gradually blurring, if not being removed altogether, in this era of convergence. The inadequacies of a sector-specific regulatory regime were highlighted in the video-on-demand ('VOD') case that occurred in 1990s.<sup>56</sup>

<sup>50</sup> For a full account of the policy initiatives of the Hong Kong government in recent years, see the speech of KC Kwong, 'The Convergence of Telecommunications and Broadcasting', delivered at the Hong Kong Institute of Directors, 11 January 2000. Available at <[www.info.gov.hk/itbb/english/speech/pr11012000a.ht](http://www.info.gov.hk/itbb/english/speech/pr11012000a.ht)>.

<sup>51</sup> Cap 106, Laws of Hong Kong.

<sup>52</sup> Ord No 36 of 2000.

<sup>53</sup> Cap 52, Laws of Hong Kong.

<sup>54</sup> Ord 48 of 2000, s 44.

<sup>55</sup> Ord 48 of 2000.

<sup>56</sup> For a full account of the video-on-demand case, see Peter Waters, 'Convergence or collision: the regulatory treatment of video-on demand in Hong Kong' (1996) 2 (4) Computer and Telecommunications Law Review 160, at 160.

In the early 1990s, the Hong Kong Telephone Company Limited ('HKT'), the incumbent operator in Hong Kong's telecommunications sector, started to develop a VOD service, the first of its kind in the world.<sup>57</sup> At about the same time, the Hong Kong government granted a cable television licence to Wharf Cable Limited ('Wharf'), another Hong Kong company. Wharf regarded the VOD service as a potential threat to its cable television business. Thus, when the Hong Kong government granted its approval to HKT to conduct a commercial trial of the VOD service,<sup>58</sup> Wharf took the matter to court and the case of *Wharf Cable Limited v The Attorney General and Hong Kong Telephone Company Limited* ('Wharf')<sup>59</sup> became a landmark decision in the media regulation of Hong Kong.

In the *Wharf* case, Wharf argued that VOD service was within the ambit of the definition of 'broadcasting' under the TVO and therefore needed a licence under the TVO. Wharf also argued in the *Wharf* case that VOD service was *not* a transmission of television programmes 'that is made available only to persons making a request for the programmes on a point-to-point basis',<sup>60</sup> which was exempt from licensing as a subscription television broadcasting service under the TVO. Sears J rejected both arguments.

On the first issue, Sears J held that the fundamental difference between television (whether free or subscribed) and VOD service was that in the former, television programmes were transmitted simultaneously. As VOD service was not transmitted 'simultaneously to the general public', Sears J held that it did not fall within the definition of 'broadcasting' in the TVO.<sup>61</sup> On the second issue, Sears J rejected the argument by Wharf that the words 'point-to-point basis' that appeared in the TVO meant an 'unswitched' transmission. Rather, Sears J held that the words simply meant 'from one point to another, in contrast to one point to multi-point', and therefore the exemption regarding subscription television broadcasting licence in the TVO was applicable to VOD service.<sup>62</sup>

The *Wharf* decision, however, did not stand for long. In an effort to salvage the sector-specific regime, the Hong Kong government amended the TVO. Under the new amendments, a new category of broadcasting called 'programme service' was created, which covered 'point-to-point transmission made on request'.<sup>63</sup> In other words, while the *Wharf* decision held that VOD service was

<sup>57</sup> For details of the development of VOD services in Hong Kong, see Pun Lee Lam, 'The development of information infrastructure in Hong Kong' (1998) 22(8) Telecommunications Policy 713, at 717.

<sup>58</sup> For more details of the approval, see 'Statement by the Telecommunications Authority on the Approval of a Video-on-demand Trial by Hong Kong Telephone Company Limited' issued by the Telecommunications Authority, 3 March 1995. Available at <<http://www.ofta.gov.hk/tas/others/rac031-content.html>>.

<sup>59</sup> HCMP No 1493 of 1995.

<sup>60</sup> TVO, schedule 1.

<sup>61</sup> Note 59 above, p 52.

<sup>62</sup> *Ibid.*

<sup>63</sup> TVO, s 2.

not regulated by the TVO, the government stepped in to bring the VOD service within the ambit of the TVO by way of legislative amendments.

The VOD case therefore exposes the problems of Hong Kong's sector-specific regulatory regime. In fact, many new media services, such as VOD service, may not fit well within traditional service classifications. They straddle the telecommunications and broadcasting sectors and the sector-specific regimes simply cannot regulate them effectively. Moreover, the sector-specific regulatory regime may create unintended market distortions by failing to treat a new media service on the same footing as existing media services of a similar nature.

In recent years, the Hong Kong government has attempted to improve its sector-specific media regulations. For example, in the TAO, a new category of licences called 'class licences' is introduced. When a class licence is granted, there is no need for a person intending to supply specific media services to apply for an individual licence, as long as he complies with the conditions of the class licence.<sup>64</sup> This undoubtedly represents an improvement over the old regime, under which individual licences were required for different media services. Class licences are generally preferable to individual licences because they lessen the administrative burden for the new media players.<sup>65</sup> The concept of class licence, however, is not new. It exists as a category of licences under the UK Telecommunications Act of 1984.<sup>66</sup> In fact, Milton Mueller called for the introduction of class licences in Hong Kong a few years ago.<sup>67</sup>

It is clear that the Hong Kong government will maintain a sector-specific regulatory system for the telecommunications and broadcasting sectors. This reflects the gradualist approach that it consistently adopts. We feel, however, that so long as such a sector-specific regime is maintained in Hong Kong, it is necessary to determine the specific regime under which a new media service should be regulated. Thus, artificial legal barriers will continue to exist between the telecommunications and broadcasting sectors. In the long run, this will curtail the development of new media services that may emerge in the age of convergence.

### *Multiple regulators*

As mentioned above, Hong Kong adopts a multiple regulator model for its media industries. The regulator in the telecommunications sector is the Telecommunications Authority and in the broadcasting sector is the Broadcasting Authority. In recent years, there have been calls in Hong Kong

<sup>64</sup> Legislative Council Brief to Telecommunications (Amendment) Bill 1999, 30 April 1999, p 4.

<sup>65</sup> John Worthy and Rohan Kariyawasam, 'A pan-European telecommunications regulator?' (1998) 22 (1) Telecommunications Policy 3, at 3.

<sup>66</sup> For a full discussion of 'class licences' under the Telecommunications Act 1984 of the UK, see Colin Long, *Telecommunications Law and Practice*, (London: Sweet and Maxwell, 1996), ch 6.

<sup>67</sup> See Mueller (note 47 above), p 133.



by the Consumer Council<sup>68</sup> and academics<sup>69</sup> for reforming the multiple regulator structure for media industries. In response, the Hong Kong government reformed the regulatory framework. As a result of the reforms, a new regulatory framework was established, and a new policy bureau for communications, namely, the Information Technology and Broadcasting Bureau, was created in 1998. This new bureau oversees and co-ordinates the activities of the two existing media regulators, the Broadcasting Authority and the Telecommunications Authority (Figures 3 and 4 below). However, the two media regulators remain separate regulators under the new structure (Figure 4 below). They do not merge into one single regulator.

Elsewhere in the world, the single regulator model is increasingly favoured. For example, the Federal Communications Commission in the United States provides the classic example of such a single regulator model. In the United Kingdom, there have also been calls to merge different media regulators into a single Office of Communications.<sup>70</sup> In retaining the multiple regulator model, the Hong Kong government is again demonstrating its adherence to the gradualist approach.

We believe that in the long run, the single regulator model is preferable for coping with the convergence phenomenon in Hong Kong. However, in our view, before such a merger might become a reality, the two media regulators, ie, the Telecommunications Authority and Broadcasting Authority, should strengthen their cooperation and negotiate common regulatory policies and goals. This would improve their regulatory consistency in dealing with the convergence phenomenon. Moreover, a periodic review and restructuring of the existing regulatory structure would be indispensable for coping with the rapid development of the convergence phenomenon.

#### *Competition policy and law*

It is obvious that in this age of convergence, the Hong Kong government appreciates the importance of maintaining fair competition. As the Secretary for Information Technology and Broadcasting has said, competition is a key policy issue for the Hong Kong government in dealing with the challenges of the convergence phenomenon.<sup>71</sup> In fact, the Hong Kong government has recently taken new initiatives to open up the media markets progressively and to create a fair and level-playing field for all media players.<sup>72</sup>

<sup>68</sup> Consumer Council, *Achieving Competition in the liberalised telecommunications markets* (1996), ch 9, paras 50-54.

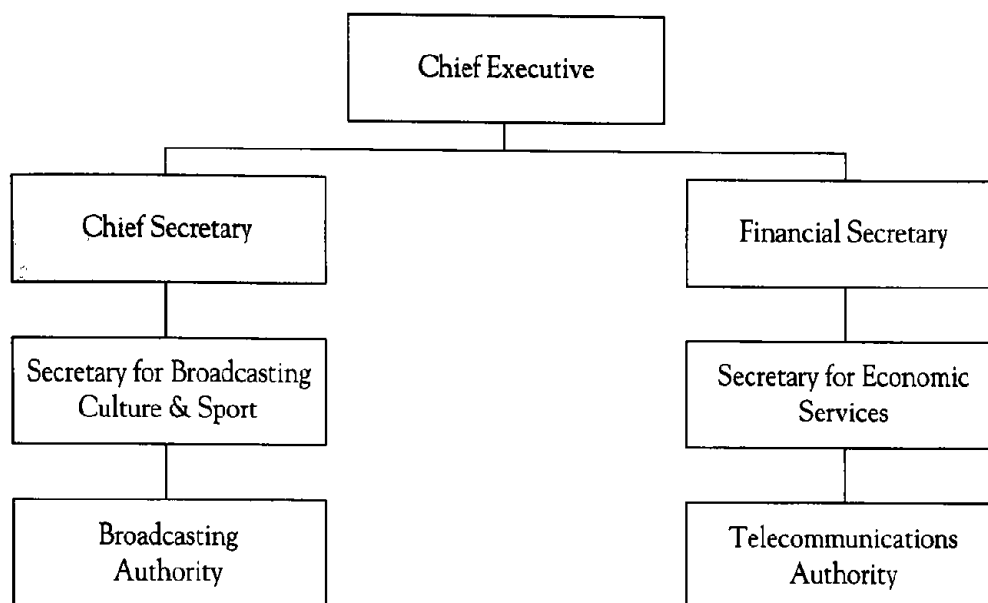
<sup>69</sup> Mueller (note 47 above), p 127.

<sup>70</sup> See Jeremy Landau, 'The future regulation of broadcasting and telecommunications in the United Kingdom', 1997 3(4) *Computer and Telecommunications Law Review* 145, at 147.

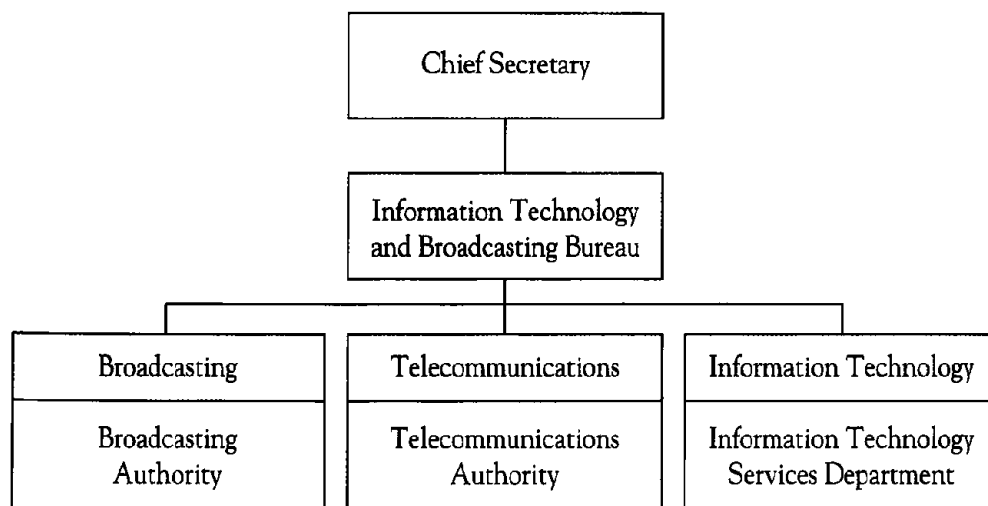
<sup>71</sup> See speech of KC Kwong, 'The Convergence of Telecommunications and Broadcasting', available at <[www.info.gov.hk/itbb/english/speech/pr11012000a.htm](http://www.info.gov.hk/itbb/english/speech/pr11012000a.htm)>.

<sup>72</sup> Ibid.

*Figure 3*  
Original regulatory framework of the telecommunications and  
broadcasting industry in Hong Kong



*Figure 4*  
'Restructured' regulatory framework



In the past, there have been many restrictions on cross-media ownership under the TVO. For example, once a company fell within the list of 'disqualified persons' mentioned in the TVO,<sup>73</sup> that company was not permitted to 'exercise control' of a company that holds a broadcasting licence.<sup>74</sup> As a result, a company that 'transmit[ted] sound outside Hong Kong or television material whether within or without Hong Kong', or 'supply[ed] materials for broadcasting by a licensee' or '[wa]s the sole or dominant supplier of a public switched telephone service by wire to residential premises in Hong Kong'<sup>75</sup> was classified as a 'disqualified person' under the TVO. Thus, such a company could not exercise control of a company that holds a television broadcasting licence.

The scope of disqualified person is substantially reduced in the new BO.<sup>76</sup> Thus, the abovementioned three categories of companies are now excluded from the list of disqualified person[s]. In other words, they can now exercise control in companies that hold television programme licenses, subject to other limitations in the new law.

The above amendments notwithstanding, the new BO retains the definition of disqualified person. Thus, holders of sound broadcasting licences and the proprietors of local newspapers are still classified as disqualified persons under the new law, meaning that they are prohibited from exercising control in a company that holds television programme service licences.<sup>77</sup> On the other hand, the definition of disqualified person, which was originally in the main body of the TVO,<sup>78</sup> is now provided in a schedule to the new BO.<sup>79</sup> As a result, the definition of disqualified person can be amended more easily in the future by way of a Gazette notice issued by the Chief Executive in Council, subject to the approval of the Legislative Council.<sup>80</sup> Such a change in the format of the legislation enables the Hong Kong government to respond more quickly to issues involving media ownership.

Furthermore, under the TVO, companies holding television broadcasting licences were subject to many restrictions on their investments. For example, they could not hold interests, directly or indirectly, in certain categories of broadcasting companies. They were also restricted in holding investments up to 15% in aggregate of the issued shares in other categories of broadcasting companies.<sup>81</sup> All these restrictions are now removed in the BO, giving these companies much more freedom and flexibility to invest in other broadcasting companies.

<sup>73</sup> For a definition of 'disqualified person' under the TVO, see s 2 (1) of the Ordinance.

<sup>74</sup> For a definition of 'exercise control of a company' under the TVO, see *ibid*.

<sup>75</sup> Note 73 above.

<sup>76</sup> For definition of 'disqualified person' under BO, see s 2(1) of the Ordinance.

<sup>77</sup> BO, part 2, schedule 1.

<sup>78</sup> TVO, s 2(1).

<sup>79</sup> BO, part 2, schedule 1.

<sup>80</sup> *Ibid*, s 43(1).

<sup>81</sup> TVO, s 17B.

It can be discerned from these changes in the new BO that the Hong Kong government is trying to reduce the restrictions on cross-media ownership. However, the government is still reluctant to remove all restrictions on cross-media ownership. While such an ambivalent attitude towards cross-media ownership is consistent with the gradualist approach, it is not conducive to the long-term development of the convergence phenomenon in Hong Kong.

However, the issue of adopting a competition law remains a thorny issue for Hong Kong. In the past, regulation of competition was achieved partly through the scheme of disqualified person. In addition, it was also done through the incorporation of fair competition conditions in the licences. For example, in the case of Fixed Telecommunication Network Services (FTNS) Licences issued under the TO, there are conditions prohibiting 'anti-competition'<sup>82</sup> and 'abuse of dominant positions',<sup>83</sup> which are mandatory standard licence conditions imposed by the TO.<sup>84</sup>

In the new TAO and BO, provisions promoting competition are incorporated into the principal legislation for telecommunications and broadcasting regulations respectively. For example, in the new BO, there are provisions prohibiting 'anti-competitive conduct'<sup>85</sup> and 'abuse of dominance'.<sup>86</sup> Similarly, in the new TAO, there are provisions prohibiting 'anti-competitive practices',<sup>87</sup> 'abuse of position',<sup>88</sup> 'misleading or deceptive conduct'<sup>89</sup> and 'discrimination'.<sup>90</sup>

As both the TAO and BO have only been in operation for a few months, it remains uncertain whether the new pro-competitive provisions can achieve their intended objective of promoting competition in the media industries. It is clear, however, that the Hong Kong government is reluctant to adopt a general competition law. Such a stance, while consistent with its gradualist approach, is incompatible with emerging international trends. For example, the United Kingdom enacted a new Competition Act in 1998, which is applicable to the telecommunications sector.<sup>91</sup> Moreover, both the PRC and Taiwan have enacted competition laws in recent years.<sup>92</sup> A recent European Union report also renewed calls for adoption of a general competition law in

<sup>82</sup> See Condition 15(1)(a) of Standard Conditions of Fixed Telecommunication Network Services (FTNS) Licences in Schedule 3, Telecommunications Regulations, TO ('the Standard Conditions').

<sup>83</sup> Condition 16(1) of the Standard Conditions.

<sup>84</sup> Ibid.

<sup>85</sup> BO, s 13.

<sup>86</sup> Ibid, s14.

<sup>87</sup> TAO, s 7K.

<sup>88</sup> Ibid, s 7L.

<sup>89</sup> Ibid, s 7M.

<sup>90</sup> Ibid, s 7N.

<sup>91</sup> 'The Application of the Competition Act in the Telecommunications Act', statement of Office of Telecommunications, UK, January 2000, available at <<http://www.oftel.gov.uk/competition/cact0100.htm>>.

<sup>92</sup> For a discussion of the adoption of a competition law in Hong Kong, see Albert Chen 'Competition Law and Hong Kong' (1993) 23 HKLJ 412, at 417.

Hong Kong,<sup>93</sup> echoing similar pleas made early by local bodies like the Consumer Council.<sup>94</sup>

In our opinion, a general competition law should be introduced in Hong Kong for two reasons. First, as the process of convergence continues, cross-media acquisitions and mergers will intensify the development of media conglomerates in Hong Kong. The problem of fair competition will continue to arise as it will be increasingly difficult for small players in the media industry to compete and survive. At present, the big players, with their cross-media networks and huge financial resources, are able to use many 'anti-competitive' practices to squeeze out small players from the media markets. For example, there was a heated debate recently on whether the Hong Kong government should grant a domestic pay television programme service licence to Galaxy Satellite, a subsidiary of Television Broadcast Limited. Hong Kong Cable Television, the current market leader in the pay-TV market, protested that it was unfair for one media organization to hold two television programme service licences, even though they fall under different categories licences in the BO.<sup>95</sup> The government eventually decided to grant a domestic pay television programme licence to Galaxy Satellite, subject to stringent conditions imposed.<sup>96</sup> However, despite the imposition of restrictions, Hong Kong Cable Television still feared that such granting of two licences to one single media organization would stifle market innovations and reduce consumer choices in the long run.<sup>97</sup> Such problems of unfair competition can, in our view, be best dealt with by the adoption of a general competition law.

Second, as the convergence phenomenon continues, regulation of media industries with a *mere* sector-specific regime will become increasingly ineffective. In contrast, if Hong Kong adopts a general competition law, sector-specific laws and regulations would be gradually reduced. In other words, media industries would be regulated less by 'sector-specific' regulations and more by general competition laws. Moreover, existing and new players in media industries would be able to compete under general competition laws and principles, which would be applied equally on a non-sector-specific basis. In the long run, this would create a more effective and efficient regulatory environment for local media industries in this age of convergence.

<sup>93</sup> See Snee (note 29 above).

<sup>94</sup> The Consumer Council had prepared a series of special reports on competition at the request of government between the years 1993-96. For example, one of those special reports was 'Ensuring Competition in the Dynamic Television Broadcasting Market'.

<sup>95</sup> 'Cable protests against granting of second license to Television Broadcast Limited', Hong Kong Economic Journal, 23 June 2000, p 2.

<sup>96</sup> Wan Wai Kwan & Ben Kwok, 'Pay-TV boom switches on TVB unit among five new operators providing 149 extra channels in \$700 million fight for market', South China Morning Post, 5 July 2000, p 1.

<sup>97</sup> Hung Wai Man, 'Cable claims there will be no price cut', Sing Tao Daily, 7 July 2000, Finance Section, p 3.

## Conclusion

The rules of the game for media industries will inevitably change in this new era of convergence. The primary questions have to do with the pace and the scale of the change. It is also certain that the convergence phenomenon will continue to shape future media policy and regulation and exert new pressures on Hong Kong policy makers and media regulators alike. To date, the Hong Kong government has consistently adopted a gradualist approach, as is evident from the four areas highlighted in this article, ie, the role of government, sector-specific regulations, multiple regulators, and competition law and policy. As the development of media convergence intensifies, however, we believe that the Hong Kong government should shift from a gradualist approach to a more radical approach in its media policy and regulation. If it fails to do so, Hong Kong may not be able to take full advantage of the challenges posed by media convergence in the 21st century.