

LEGISLATIVE COUNCIL BRIEF

Telecommunications Ordinance
(Chapter 106)

TELECOMMUNICATIONS (AMENDMENT) BILL 2001

INTRODUCTION

At the meeting of the Executive Council on 6 February 2001, the Council ADVISED and the Chief Executive ORDERED that the Telecommunications (Amendment) Bill 2001 (the Bill), at Annex A, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

General Background

2. Under the policy objectives to promote the development of the telecommunications industry, protect the interests of consumers, and maximise benefits to the economy as a whole, the Telecommunications Authority (TA) proposed, in the second consultation in October 2000, to select the successful third generation mobile services (3G) applicants through a hybrid allocation method. It would involve a two-stage process of pre-qualification, followed by spectrum auctioning. The pre-qualification exercise will weed out unqualified applicants and ensure that 3G networks to be built by eligible applicants will reach an acceptable quality within a certain period of time. Spectrum auctioning is an efficient and fair method of allocating licences to applicants with the best business case. The TA also invited comments on various auctioning methods either by way of a cash (upfront lump sum or deferred) or royalties with a minimum guaranteed payment. The aim is to find the best approach that encourages the participation of more companies while minimising the risk for the Government.

3. The second consultation ended on 13 November. We are now finalizing our proposals on the licensing and regulatory framework with a view to issuing licences by mid-2001 as publicly pledged.

Need for Amendments to the Telecommunications Ordinance

4. Under the existing Telecommunications Ordinance (Cap 106) (the Ordinance), the TA is empowered to issue various telecommunications licences under section 7, including the carrier licences for 3G mobile services, and allocate frequencies of the radio spectrum under section 32H. Section 32I provides that the Secretary for Information Technology and Broadcasting (SITB) may by regulation prescribe the level of, or the method for determining, the spectrum utilization fee (which is above the simple recovery of cost of government service). There is however no express provision to empower the TA to consider the payment of spectrum utilization fees in issuing telecommunications licences and in allocating spectrum, as would be required in a licensing exercise where spectrum auctioning is involved.

5. Given the novelty of the proposed hybrid licensing method in the second consultation paper, and taking into account the recent experience of European auctions, some amendments to the primary legislation are necessary to provide the firm legal basis to conduct the licensing exercise. With the advice of the Department of Justice, we propose to introduce the Bill to achieve, inter alia, the following :

- (i) remove any uncertainty on whether the TA has the power, in issuing licences and allocating spectrum, to take into account considerations such as the spectrum utilization fees of qualified bidders in a spectrum auction, which are previously matters that fall outside the purview of the TA under the Ordinance; and
- (ii) establish clearly the respective roles of SITB and the TA under the Ordinance – SITB to prescribe the level of, or the method for determining, the spectrum utilization fee (e.g. by cash or royalty auction) and the TA to set the terms and conditions of the auction and tender apart from issuing licences and allocating spectrum as described in (i) above.

The Proposal

6. We propose to add **enabling provisions** in the Ordinance to provide the firm legal basis for the TA to conduct the 3G licensing exercise. We also propose that the amendments should cater for future licensing exercises whereby spectrum utilization fees will be levied under section 32I of the Ordinance. The Bill should have an express provision for SITB to empower the TA to specify the terms and conditions for auction or tender. Breach of these terms and conditions may allow the TA to disqualify the bids, or tenders, forfeit or enforce all or part of the security lodged, and where the applicant has already obtained the licence, cancel, withdraw or suspend the licence. To prevent and deter collusive, anti-competitive and other malpractices in a spectrum auction or tender, some restrictions and sanctions empowered by law (vis-à-vis by contract) would give the TA firm backing in such regulatory decisions. Other consequential and incidental changes are also proposed to tie in with the proposals.

THE BILL

7. The main provisions of the Bill are set out as follows:
- (a) **Clauses 2 and 3** - These clauses amend sections 7 and 32H of the Ordinance to expressly provide that in issuing licences or assigning spectrum frequency, the TA is empowered to regard the fees arising from the auction or tender or other methods under section 32I(2)(b) as a determining factor. This aims to remove any uncertainty that TA may have taken into account irrelevant considerations in exercising his power.
 - (b) **Clause 4** - This clause amends section 32I of the Ordinance to clarify that SITB will prescribe by regulation the level of spectrum utilization fees, or the methods for determining the spectrum utilization fees, including auction, tender or any other method she thinks fit. The regulation

may also empower SITB to specify the minimum amount of the fees. In case of an auction or tender, the regulation may empower the TA to specify the terms and conditions of the auction or tender (including the terms and conditions relating to the payment of the fees).

Such terms and conditions include those in relation to bidders' right to participate or to withdraw, and those relating to penalties for breach of the terms and conditions set by the TA. Penalties may include disqualification, forfeiture or enforcement of all or part of the security lodged, and where the applicant has already obtained the licence, cancellation, withdrawal or suspension of the licence. The power for the TA to cancel, withdraw or suspend the licence is intended to provide an effective deterrent, after the licences have been granted, against collusion or other malpractices prior to or during the bidding process which are detrimental to public interest. To prevent the abuse of this avenue for delaying or challenging the grant of licence by a dissatisfied bidder, the newly added section 32I(6) provides that such power could only be exercised by the TA if the complaint is made by the bidder within three months after the date on which the outcome of the exercise has been publicly declared.

- (c) **Clause 5** - This clause amends section 34 of the Ordinance to expressly exclude from consideration by the TA and the Chief Executive in Council the payment of spectrum utilization fees under section 32I of the Ordinance or other licence fees a licensee may have already made when they exercise their power to cancel, withdraw or suspend any licence so as not to undermine the effectiveness of the deterrent power under section 34. Moreover, the clause also provides that like other licence fees, no spectrum utilization fees would be refunded.

8. An extract of the provisions of the Ordinance which are
— being amended is attached at Annex B.

LEGISLATIVE TIMETABLE

9. The legislative timetable will be –

Publication in the Gazette	9 February 2001
First Reading and commencement of Second Reading debate	14 February 2001
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

10. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

11. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

12. The current binding effect of the provision of section 3 of the Ordinance applies to the Bill.

FINANCIAL AND STAFFING IMPLICATIONS

13. The spectrum utilization fees to be generated in the 3G spectrum auction will be set by the market. In view of the changing market sentiment on investment in 3G services, it is difficult to estimate

the spectrum utilization fees that may be brought to the General Revenue. The Finance Committee has already approved the creation of a commitment of \$55 million for engaging consultancy services for design and implementation of the forthcoming 3G licensing exercise. The Office of the Telecommunications Authority will undertake this exercise within its existing staffing resources.

ECONOMIC IMPLICATIONS

14. The Bill will provide a firm legal basis for the TA to grant 3G licences by a hybrid allocation method. The timely issue of 3G licences will allow Hong Kong to enjoy 3G services at the same time as other advanced economies. This will benefit network providers as well as content and application providers. Consumers and businesses will also stand to benefit from quality and competitive 3G services.

ENVIRONMENTAL IMPLICATIONS

15. The Bill does not have any environmental implications.

PUBLIC CONSULTATION

16. The TA has conducted two rounds of consultation in March and October 2000 on the licensing and regulatory framework of 3G.

PUBLICITY

17. A press release will be issued to tie in with gazettal of the Bill. The Information Technology and Broadcasting Panel of the Legislative Council will be briefed on 12 February 2001. A spokesman will be made available to answer media enquiry.

ENQUIRIES

18. For any enquiries relating to this Brief, please contact :-

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7 February 2001
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TELECOMMUNICATIONS (AMENDMENT) BILL 2001

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A BILL

To

Amend the Telecommunications Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Telecommunications (Amendment) Ordinance 2001.

2. Issue of licences

Section 7 of the Telecommunications Ordinance (Cap. 106), as amended by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000), is amended by adding -

"(12) Where a licence which may be issued under subsection (5) relates to the use of spectrum which under section 32I is subject to the payment of spectrum utilization fee -

- (a) by the user of the spectrum; and
- (b) the method for determining which is prescribed under section 32I (2) (b),

then the Authority may, in determining applications for the licence, regard the fees, if any, arising or resulting from that method as a determining factor in relation to those applications."

3. Power to allocate frequency

Section 32H is amended by adding -

"(6) Where an assignment which may be made under subsection (1) relates to the use of spectrum which under section 32I is subject to the payment of spectrum utilization fee -

- (a) by the user of the spectrum; and
- (b) the method for determining which is prescribed under section 32I (2) (b),

then the Authority may, in determining applications for the assignment, regard the fees, if any, arising or resulting from that method as a determining factor in relation to those applications."

4. Spectrum utilization fee

Section 32I is amended -

- (a) by repealing subsection (2) and substituting -

"(2) The Secretary may by regulation prescribe -

- (a) the level of spectrum utilization fees; or
- (b) the method for determining the spectrum utilization fees, which may be by -
 - (i) auction or tender or a combination of auction or tender; or
 - (ii) such method as the Secretary thinks fit,

including any method combined with a method mentioned in subparagraph (i).";

(b) by adding -

"(4) Without prejudice to the generality of subsections (2) and (3), the power of the Secretary under subsection (2) (b) to make a regulation prescribing a method for determining spectrum utilization fee shall also include the power to make a regulation to provide for all or any of the following -

- (a) empowering the Secretary to specify the minimum amount of the fee, whether by notice published in the Gazette or otherwise;
- (b) empowering the Authority to -
 - (i) promote, hold, conduct, suspend, cancel or conclude an auction or tender to which the method relates;
 - (ii) specify the terms and conditions of an auction or tender to which the method relates by notice

published in the Gazette (including terms and conditions relating to the payment of the fee).

(5) Without prejudice to the generality of subsection (4) (b) (ii), the terms and conditions of an auction or tender which may be specified in a notice under that subsection may include terms and conditions relating to all or any of the following -

- (a) subject to paragraph (c), the criteria by which the Authority shall determine whether a person is qualified to participate in the auction or tender;
- (b) subject to paragraph (c), the criteria by which the Authority shall determine whether 2 or more persons who are qualified by the criteria mentioned in paragraph (a) to participate in the auction or tender are connected, in whatever manner specified in the first-mentioned criteria, for the purposes of the auction or tender;
- (c) the criteria by which, or the

procedure to be followed by which, the Authority shall determine which of the persons connected as mentioned in paragraph (b) is qualified to participate in the auction or tender;

- (d) a bidder or tenderer (including a prospective bidder or tenderer, or a person acting on behalf of a bidder or tenderer or prospective bidder or tenderer) shall lodge with, or otherwise provide to, the Authority security of such type and value as the Authority specifies, whether by notice published in the Gazette or otherwise (which value may be calculated by reference to a percentage of the minimum amount mentioned in subsection (4) (a));
- (e) that a bid or tender may not be withdrawn by the bidder or tenderer except with the consent in writing of the Authority and for a reason specified in the notice;

- (f) that the Authority may disqualify a bid or tender, or a bidder or tenderer, for a reason specified in the notice;
- (g) that the Authority -
 - (i) may forfeit to the Government, or otherwise enforce, a security mentioned in paragraph (d) (including any interest earned thereon), whether in whole or in part, for a reason specified in the notice;
 - (ii) subject to subsection (6), may cancel, withdraw or suspend a licence -
 - (A) where section 7(12) applied to the issue of the licence or section 32H(6) applied to the assignment under section 32H(1) of the

spectrum to which the licence relates; and

(B) for a reason specified in the notice;

(iii) may specify requirements which have the purpose or effect of promoting or ensuring that the auction or tender is conducted in a fair, efficient and orderly manner.

(6) Without prejudice to the generality of any other ground on which the Authority may exercise the power mentioned in subsection (5) (g) (ii), the Authority shall not exercise that power pursuant to a complaint alleging that there is a ground for the exercise of the power except such a complaint made -

(a) by a bidder or tenderer at the auction or tender to which the complaint relates; and

(b) to the Authority not later than 3 months after the date on which

the outcome of that auction or tender was publicly declared.

(7) Notwithstanding any other provision of this Ordinance, the Authority shall have all necessary powers to enforce the terms and conditions of an auction or tender which may be specified in a notice under subsection (4) (b) (ii).

(8) Any spectrum utilization fee paid pursuant to this section shall be paid into the general revenue.

(9) It is declared that -

- (a) a spectrum utilization fee payable pursuant to this section is a fee payable in addition to any fee prescribed under section 7(2) or 37(1) (g);
- (b) a complaint which would fall within subsection (6) but for the fact that it is made before the issue of the licence concerned, or before the assignment of the spectrum concerned, shall not of itself prevent the Authority from issuing the licence under section 7(5), or assigning the spectrum under section 32H(1), to the

bidder or tenderer against which the complaint is made;

- (c) a notice mentioned in subsection (4) (a) or (b) (ii) or (5) (d) is not subsidiary legislation.

(10) In this section (including subsection (3)) -

"spectrum utilization fee" (頻譜使用費) includes a fixed fee, a fee calculated by a formula or a fee ascertained by another method, or any combination thereof."

5. General provisions as to licences, etc.

Section 34 is amended -

- (a) by adding -

"(4D) Where Chief Executive in Council or the Authority proposes to exercise a power under subsection (4), he shall not consider -

- (a) any fee (including any spectrum utilization fee under section 32I) or other sum paid in respect of or under or in relation to any licence, permit, permission or consent granted under this Ordinance;
- (b) any representations mentioned in

subsection (4B) to the extent to which they fall within paragraph (a);

(c) the operation of subsection (5) if that power is exercised,

and subsection (4A) shall be construed accordingly.";

(b) in subsection (5), by adding ", including any spectrum utilization fee paid pursuant to section 32I" after "refunded".

Explanatory Memorandum

The object of this Bill is to amend the Telecommunications Ordinance (Cap. 106), as amended by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000), to -

- (a) empower the Telecommunications Authority to regard the fees arising from a method prescribed under section 32I(2) (b) to determine a spectrum utilization fee as a determining factor in determining applications for a licence under section 7(5) which relates to the use of spectrum which is subject to the payment of that spectrum utilization fee (clause 2);
- (b) empower the Telecommunications Authority to regard the fees arising from a method prescribed under section 32I(2) (b) to determine a spectrum utilization fee as a determining factor in determining

applications for the assignment under section 32H(1) of the use of spectrum which is subject to the payment of that spectrum utilization fee (clause 3);

- (c) make it clear that the method of calculating a spectrum utilization fee may be by auction or tender or such other method as the Secretary (within the meaning of section 2(1)) thinks fit (clause 4(a));
- (d) enable the Secretary to make a regulation empowering the Telecommunications Authority to specify the terms and conditions of an auction or tender mentioned in new section 32I(2) at clause 4(a) (clause 4(b));
- (e) make it clear the ambit of the Telecommunications Authority's power to specify and enforce such terms and conditions (new section 32I(5), (6) and (7) at clause 4(b));
- (f) make it clear that the Telecommunications Authority shall, inter alia, not take into consideration any fee or other sum paid when deciding whether or not to exercise his power under section 34(4) to cancel, withdraw or suspend a licence, permit, permission or consent granted under the Ordinance (new section 34(4D) at clause 5(a)); and
- (g) provide that a spectrum utilization fee paid to the Government is not refundable if the licence to which the fee relates is cancelled, withdrawn or suspended (clause 5(b)).

- (e) the fees payable including for the grant and renewal of licences and by way of annual fees.
- (7) Without limiting the general nature of the conditions that may be prescribed for or attached to a licence, the conditions may relate to-
- (a) the manner of service provision;
 - (b) interconnection;
 - (c) interference;
 - (d) adherence to technical standards;
 - (e) compliance with directions, guidelines, codes of practice, regulations, this Ordinance and international obligations;
 - (f) universal service obligations;
 - (g) accounting practices;
 - (h) the provision of information;
 - (i) tariffs;
 - (j) network coordination;
 - (k) protecting customer information;
 - (l) prohibiting unfair market practice;
 - (m) the regulation of a dominant licensee;
 - (n) the provision of performance bonds.
- (8) The Authority shall publish in the Gazette the form of a licence he issues together with the general conditions to be imposed under the licence.
- (9) The Authority shall maintain a register of licences and general conditions he publishes in the Gazette.
- (10) The Authority may authorize the provision of ancillary and associated services under a licence and, where such services are so authorized, the licence shall be deemed to be granted in respect of those services.
- (11) Where the Authority refuses to issues a licence to a person, he shall provide to the person his reasons in writing for the refusal.

(Replaced 36 of 2000 s. 4)

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Section of Enactment

Chapter:	106	Title:	TELECOMMUNICATIONS ORDINANCE	Gazette Number:	36 of 2000
Section:	32H	Heading:	Power to allocate frequency	Version Date:	16/06/2000

- ▼
- (1) The Authority may assign-
- (a) frequencies and bands of frequencies in all parts of the radio spectrum used in Hong Kong or on board a ship, aircraft or space object that is registered or licensed in Hong Kong; and
- (b) satellite orbital positions and parameters for satellites registered or licensed in Hong Kong, and shall keep a central register of the frequencies, bands of frequencies and satellite orbital positions and parameters assigned.
- (2) The Authority may-
- (a) subject to the consultation requirement under section 32G(2), divide any part of the radio spectrum into the number of bands of frequencies he thinks appropriate and specify the general purpose for which each band may be used;
- (b) subject to the consultation requirement under section 32G(2), divide a frequency band into the channels he considers appropriate and specify the general purpose for which each channel may be used;
- (c) assign the frequencies or bands of frequencies to users of radiocommunications apparatus and specify the purpose for which and the conditions under which the frequencies or bands of frequencies are to be used.
- (3) Subject to subsection (4), the Authority may vary or withdraw frequencies, bands of frequencies or satellite orbital positions or parameters assigned, or vary the purposes for which and the conditions under which the frequencies, bands of frequencies or satellite orbital positions or parameters are to be used.
- (4) The Authority may only exercise its authority under subsection (3) if the Authority has given reasonable notice of the intended variation or withdrawal to the licensee which has been assigned the relevant frequency, band of frequency or satellite orbital position or parameter.
- (5) A person shall not, in Hong Kong or on board any ship, aircraft or space object that is registered or licensed in Hong Kong, use a frequency in any part of the radio spectrum unless the frequency is assigned, or located within a band of frequencies assigned, by the Authority or the use is for the purpose and in compliance with the conditions specified by the Authority.

(Part VB added 36 of 2000 s. 17)

**BLIS ON
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Section of Enactment

▼				
Chapter:	106	Title:	TELECOMMUNICATIONS ORDINANCE	Gazette Number: 36 of 2000
Section:	32I	Heading:	Spectrum utilization fee	Version Date: 16/06/2000

- (1) Subject to the consultation requirement under section 32G(2), the Authority may by order designate the frequency bands in which the use of spectrum is subject to the payment of spectrum utilization fee by the users of the spectrum.
- (2) The Secretary may by regulation prescribe the level, or the method for determining the level, of spectrum utilization fees.
- (3) A spectrum utilization fee may be calculated on the basis of a royalty or any other basis that includes an element in excess of the simple recovery of the cost of providing a service by the Authority.

(Part VB added 36 of 2000 s. 17)

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INTERNET**

Section of Enactment

Chapter:	106	Title:	TELECOMMUNICATIONS ORDINANCE	Gazette Number:	48 of 2000
Section:	34	Heading:	General provisions as to licences, etc.	Version Date:	07/07/2000

(1) A licence granted under this Ordinance by the Governor in Council shall be valid for such period, and shall be subject to the payment of such fee, royalty or other charge whatsoever, annually or otherwise, as is specified therein, and shall be subject to such conditions as the Governor in Council may specify and, where the Governor in Council considers it desirable in the public interest, may confer on the person to whom it is granted an exclusive right to maintain any service to the public in connection with which the licence is granted.

(1A) A licence granted under this Ordinance by the Governor in Council may, with the consent in writing of the person to whom it was granted, be amended by order of the Governor in Council. (Added 92 of 1970 s. 2)

(1B) Without affecting the generality of subsection (1) or (3), a licence granted under this Ordinance may include a condition that the licensee shall procure, in favour of the Government, a first demand performance bond or bank guarantee, in such sum and in such form as the authority by whom the licence is granted may require, to secure the compliance by the licensee with any condition imposed under subsection (1) or (3). (Added 38 of 1993 s. 6)

(2) Every licence granted under this Ordinance by the Authority shall be valid for the period or until the day prescribed by the regulations, but, save as otherwise provided by the regulations, may be renewed for a period of one year at a time.

(3) Any licence, permit, permission or consent granted under this Ordinance by the Authority shall be subject to the conditions (if any) prescribed by or under the regulations and to such other conditions as the Authority specifies on the grant or renewal thereof, being conditions that the Authority considers necessary for the purpose of carrying out the objects of this Ordinance.

(4) Any licence, permit, permission or consent granted under this Ordinance may at any time be cancelled or withdrawn by the authority by whom it was granted, or suspended by such authority for such period, not exceeding twelve months, as the authority specifies, in the event of any contravention by the licensee or the person to whom the permit, permission or consent was granted, as the case may be, of this Ordinance or of any condition to which the licence, permit, permission or consent is subject, and any such licence may be cancelled or suspended at any time by the Governor in Council if he considers that the public interest so requires.

(4A) The Authority shall not exercise a power under subsection (4) unless the exercise of the power is, in all the circumstances of the case, proportionate and reasonable in relation to the contravention concerned referred to in that subsection giving rise to the exercise of the power. (Added 36 of 2000 s. 18)

(4B) Where the Authority proposes to exercise a power under subsection (4), he shall give the licensee or other person concerned a reasonable opportunity to make representations and shall consider all representations made before he decides whether or not to exercise that power in the case of the licensee or other person, as the case may be. (Added 36 of 2000 s. 18)

(4C) Where the Authority exercises a power under subsection (4), he shall provide reasons in writing for it to the licensee or other person concerned. (Added 36 of 2000 s. 18)

(5) Where any licence, permit, permission or consent granted under this Ordinance is cancelled, withdrawn or suspended, no part of any fee or other sum paid in respect thereof or thereunder shall be refunded.

(6) Nothing in this section applies in respect of a licence-

(a) granted under Part IIIA; or

(b) deemed to be granted under this Ordinance by virtue of Schedule 8 to the Broadcasting Ordinance (Cap 562). (Replaced 48 of 2000 s. 44)

(7) In the exercise of the power under subsection (4) by the relevant authority to cancel, withdraw or suspend a licence, permit, permission or consent granted under this Ordinance, the authority may cancel, withdraw or suspend (at such times and for such period as the authority determines) any part of the licence, permit, permission or consent without affecting the validity of the remaining part of the licence, permit, permission or consent. (Added 36 of 2000 s. 18)
