

SUBMISSION TO THE BILLS COMMITTEE - TELECOMMUNICATIONS (AMENDMENT) BILL 2001

Background

The Telecommunications (Amendment) Bill 2001 (the "Bill") was introduced into the Legislative Council on 14 February 2001 and is now being examined by the Bills Committee. This primary legislation will empower the Secretary for Information Technology and Broadcasting (the "Secretary") and Telecommunications Authority (the "TA") to allocate licences for 3rd generation mobile phones ("3G"). On 13 February the Information Technology and Broadcasting Bureau ("ITBB") issued a Legislative Council brief on the licensing framework for third generation mobile services (the "Framework").

When issuing the Framework, the TA took into consideration the experiences in Europe, ie the "success" of the European Governments in raising large sums of money from the auctions and the "mistakes" in letting the auction process get out of hand, with telcos paying large sums for the licences and being left struggling to raise finances to roll out their networks.

The approach proposed in the Framework is unique in that a two stage selection process is envisaged, the first stage being a beauty parade followed by a second stage where selection is done by way of auction.

In order to pass to stage two of the selection process, prospective licensees have to meet certain criteria, such as financial capabilities, investment, network rollout, service quality. The aim of the first stage selection process is to ensure an acceptable level of quality of 3G networks and services by eliminating those that cannot meet set standards.

The specific criteria for the stage one selection process envisaged by the Framework are yet to be announced.

Stage two of the selection process will be achieved by way of auction. The two stage selection process adopted by Hong Kong is novel and so is the actual method of auctioning which is by way of percentage royalty bidding (ie prospective licensees will have to bid a percentage of the future turnover they will receive from 3G operations). This novel method of auctioning is seen as a way of tying in the government's future income from 3G to the success of 3G.

A further auction is envisaged once the licences are allocated, in order to allocate frequencies. This is a cash auction and a lot of uncertainty and anxiety exists as to the result of such an auction. As in Europe, a cash auction may result in unreasonable bids being made and licensees getting cash-strapped by the end of the 3G licensing exercise.

The thinking behind the Framework, ie to relieve the financial burden on the operators and to tie in the success of 3G to the licence payment and hence revenue for the Government, is to be commended but the legislation must ensure maximum clarity for the licensing process and that no arbitrary or unconstitutional powers are granted.

The Telecommunication (Amendment) Bill 2001

Under the current telecommunications legislation, the TA and the Secretary of the Government Secretariat (the "Secretary") do not have the power to consider the fee to be paid for spectrum

utilisation as a determining factor in the application of telecoms licences nor for the assignment of frequencies.

The Bill's aim is to give a number of powers to the Secretary and the TA to prescribe the level of spectrum utilisation fee and the method of determining that fee.

The Bill has five sections which are intended to amend or add to the Telecommunication (Amendment) Ordinance 2000 (the "Ordinance"). The specific sections of the Ordinance mentioned are section 7 (issue of licences), section 32H (power to allocate frequency), section 32I (spectrum utilisation fee) and section 34 (general provisions as to licences).

As described in the Explanatory Memorandum of the Bill, the object is to:

- (a) empower the TA to regard the spectrum utilisation fee as a determining factor in determining applications for licences;
- (b) empower the TA to regard the spectrum utilisation fee as a determining factor in determining applications for the assignment;
- (c) give the Secretary power to calculate the spectrum utilisation fee by auction or tender or any other method as the Secretary thinks fit;
- (d) enable the Secretary to make regulations empowering the TA to specify the terms and conditions of the auction or tender;
- (e) clarify the ambit of the TA's power to specify and enforce the terms and conditions;
- (f) restrict the TA not to consider any fees or sum to cancel, withdraw or suspend the licence; and
- (g) state that the fee paid for spectrum utilisation is not refundable.

Comments on the Bill

The Management and Technology Committee is concerned about the wide discretionary powers granted to the Secretary and the TA, such as:

- (i) the power given to the Secretary to determine in his discretion whether the method of calculating a spectrum utilisation fee should be by auction or tender or such other method as the Secretary thinks fit (see proposed new section 32I(2)).
- (ii) the power given to the TA to specify the terms and condition of an auction or tender (see proposed new section 32I(2)).

Despite the Framework put forward by ITBB on 13 February, the effect of these amendments would be that the Secretary could, at the last minute, decide to do away with the proposed hybrid method of selecting 3G licensees and go the auction route as Europe or just the tender route.

In effect this means that despite all the industry consultations undertaken by OFTA and ITBB in 2000, the Secretary may decide on a method which would not benefit, or may even be detrimental to some operators. A possible way forward would be to amend this proposed provision by tying any decision to a consultation process, and stating that any regulation so prescribed would be subject to industry consultation. A similar provision exists for spectrum management in s32G (2) of the Ordinance where Industry consultation is carried out "as is reasonable in the circumstances."

Similar industry consultation provisions should be added for the terms and conditions of tender or auction to be formulated by the TA.

The Bill also contains some general provisions as to licences in Section 5.

This section sets out that if a licence is cancelled, withdrawn, or suspended then the spectrum utilisation fee paid pursuant to s321 is not refundable. It does not, however, state what is to become of the licence fee still payable. According to the Framework, 3G licensees are to bind themselves to a long-term payment scheme for the duration of the licence (15 years). It is therefore unclear what is to happen to such an obligation in the event of the operation of Section 5. A provision clarifying the position on payment post-operation of section 5 should be included.

This would provide the operators with some comfort that once their licence is cancelled, withdrawn or suspended they will no longer be bound to continue with the payment for the licence.

Management and Technology Committee

The Law Society of Hong Kong

24 March 2001

- (B) 運用於促進與電訊有關連的教育、或研究及發展；或
- (ii) 撥入一個由局長為於第 (i) 節所提述將款項支付或運用之前持有該等收益而設立的基金；
- (c) 就任何該等基金的設立和管理，向局長施加規定。
- (6) 根據第 (5) 款訂明的費用，其款額的釐定無須受任何號碼或編碼的編配、轉讓、租賃或出售所招致或相當可能會招致的行政或其他費用的款額所限制。
- (第 VA 部由 2000 年第 36 號第 17 條增補)

第 VB 部

無線電頻譜的管理以及防止干擾

32G. 頻譜的管理

- (1) 局長須促進無線電頻譜作為香港公眾資源的有效率的編配和使用。
- (2) 在不損害第 6C 條的一般性的原則下，局長在根據第 32H(2)(a) 及 (b) 及 32I(1) 條行使其權力之前，須向——
- (a) 電訊業；及
- (b) 其他可能直接受此事影響的人，
- 進行在有關個案的整體情況下屬合理的諮詢。

32H. 編配頻率的權力

- (1) 局長可——
- (a) 將在香港使用或在於香港註冊或領牌的船舶、航空器或空間物體上使用的無線電頻譜所有部分的頻率及頻帶指配；及
- (b) 為在香港註冊或領牌的衛星指配衛星軌道位置及參數，

- (B) applied towards promoting education, or research and development, connected with telecommunications; or
- (ii) paid into a fund established by the Authority for the purpose of holding such proceeds prior to the payment or application of the funds referred to in subparagraph (i);
- (c) impose requirements on the Authority in relation to the establishment and management of any such fund.
- (6) The amount of any fees prescribed under subsection (5) need not be limited by reference to the amount of administrative or other costs incurred or likely to be incurred in relation to the allocation, assignment, lease or sale of a number or code.

(Part VA added 36 of 2000 s. 17)

PART VB

MANAGEMENT OF RADIO SPECTRUM AND PREVENTION OF INTERFERENCE

32G. Spectrum management

- (1) The Authority shall promote the efficient allocation and use of the radio spectrum as a public resource of Hong Kong.
- (2) Without prejudice to the generality of section 6C, before exercising his powers under sections 32H(2)(a) and (b) and 32I(1), the Authority shall carry out such consultation with—
- (a) the telecommunications industry; and
- (b) such other persons who may be directly affected by the exercise of such powers,
- as is reasonable in all the circumstances of the case.

32H. Power to allocate frequency

- (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,