

## **Administration's Response to Bills Committee's Concern Raised at the Meeting of 26 April 2001**

### **Introduction**

Having considered our detailed response at the meeting of 26 April 2001, Bills Committee members discussed the need for amendments to Clauses 2 and 3 of the Bill to the effect that the Telecommunications Authority (TA) must regard the relevant fees as a determining factor in issuing licences. The remaining concern is whether, without a Committee Stage Amendment, TA would, by virtue of the current drafting, be conferred a discretionary power to such an extent as to able him to disregard and contravene the subsidiary legislation by not issuing licences to the highest bidders in an auction. Bills Committee requested the Administration to seek further legal advice.

### **Summary of Legal Advice**

2. We have sought further legal advice on Members' concern. We have received clear legal advice that both subsidiary legislation and primary legislation have the force of law in Hong Kong. It would be **ultra virus** for TA, as a statutory body, to disregard or contravene provisions of the subsidiary legislation to be made by the Secretary for Information Technology and Broadcasting (SITB) under section 32I. The revised draft subsidiary legislation as issued to Members for the meeting on 26 April provides that the highest bidders will be the successful bidders. Therefore, for the 3G licensing exercise, it would be ultra virus if, e.g.:

- (a) TA grants a licence to an unsuccessful bidder;
- (b) TA grants a licence to a person who has not participated in the auction; and
- (c) TA grants a licence with a spectrum utilization fee that is different from that determined in the auction (i.e. the method for determining the spectrum utilization fees prescribed by SITB under the draft regulation).

3. From the legal perspective, the TA, in carrying out its statutory functions and powers, must observe the law, including *both primary and subsidiary legislation*. Members can rest assured that the new section 7 will not automatically confer upon TA unbound discretion, as TA must observe the subsidiary legislation.

### **Members' Suggestion**

4. As explained at the meeting, the new section 7 in the Bill aims to remove any uncertainty that TA may have taken into account irrelevant consideration, which is the spectrum utilization fees prescribed by SITB, in considering applications for licences. We maintain our views on the appropriateness of our proposed arrangement (i.e. primary legislation being general empowering provision applicable to all licensing exercises, subsidiary legislation being specific to individual licensing exercise) in our response to the Bills Committee meeting on 26 April (extract attached at Annex).

5. We understand that Members accept that section 7, being a provision in the primary legislation, must cover all licensing exercises involving levy of spectrum utilization fees. Some Members however suggest that the relevant section may be amended to provide that in case of auction, TA “shall” regard the fees as the determining factor while in other cases, TA “may” regard the fees as a determining factor. We have carefully considered the suggestion with our legal advisers. The legal advice is that the suggestion is not appropriate for the following reasons:

- (a) For a particular licensing exercise, SITB may prescribe by regulation that the level of spectrum utilization fees should be set by auction, or by methods other than an auction (e.g. tender, combination of auction and tender). Introducing both the “shall” and “may” arrangements may open up legal argument whether the substance of the method for determining the spectrum utilization fees in a particular exercise conducted is indeed an auction, and hence which of the arrangement may apply in the particular exercise. Indeed, we note some Members already pointed out at the meeting of 26 April that such an arrangement

might have the unintended consequence of causing confusion to the bidders. The legal advice we receive confirms this view.

- (b) As some Members also pointed out at the meeting of 26 April, even in an auction, the bidders may need to be pre-qualified. In this 3G licensing exercise, bidders will need to be pre-qualified. Moreover, bidders must not breach the auction rules (e.g. to collude in an auction). Member's suggestion may require TA to award a licence to, say, an un-qualified bidder or a bidder in breach of auction rules who has made the highest offer.

## **Conclusion**

6. We take Members' suggestion very seriously. Nevertheless, we are cautious of any intended effect which may lead to legal challenges of the outcome of the auction. We believe that our proposed Bill and the draft regulation will sufficiently and suitably empower TA and SITB to conduct the 3G licensing exercise as we propose, and withstand legal challenges from unsuccessful bidders.

Information Technology and Broadcasting Bureau  
May 2001

**Extract of Administration's Responses to Bills Committee's  
Request for Follow-up Action  
at the Meeting of 6 April 2001**

**Q1: Clauses 2 and 3 of the Bill – Please consider drafting Committee Stage amendments to these clauses to the effect that the Authority or the Secretary must regard the relevant fees as a determining factor, where and when it is so provided for in the relevant regulation.**

**A1:** We have carefully considered Members' suggestion again. As we have explained, the primary legislation should be general empowering provisions while the subsidiary legislation and notice to be specified by the Telecommunications Authority (TA) under the new section 32I in the Telecommunications (Amendment) Bill 2001 would be specific to individual licensing exercise. The primary legislation should therefore be applicable to all licensing exercises involving the levy of spectrum utilization fees, which may be an auction, tender, a combination of auction or tender or any other methods. It is therefore not appropriate to mandate TA to regard the fees as a determining factor in all licensing exercises, such as a tender where successful licensees are selected on the basis of both their technical proposals and fees offered. For the 3G licensing exercise, the certainty that the highest bidders will be the successful bidders will be provided for in the subsidiary legislation. We maintain that the proposed arrangement (i.e. primary legislation to be general empowering provisions, with subsidiary legislation and notice made by TA to provide details specific to individual licensing exercises) is appropriate.

On Member's suggestion to expressly provide that TA must regard the fees as a determining factor where and when it is so provided for in the relevant regulation, we do not think that a CSA is necessary. In carrying out its functions under the Telecommunications Ordinance, including issuing of licences, TA is obliged to follow all the provisions in the Ordinance as well as the subsidiary legislation. It is therefore not necessary to expressly subject TA to the provisions of the subsidiary legislation.

In this connection, Members may wish to note that in granting the 3G licences, TA is obliged to follow other subsidiary legislation as well. For example, it must follow the validity period, fees and general conditions prescribed by the Secretary for Information Technology and Broadcasting

in the regulation for carrier licences under section 7(2). The Telecommunications Ordinance does not expressly provide under section 7 that TA must follow the requirements prescribed in the afore-mentioned regulation.