

**Responses to Assistant Legal Adviser's
Comments Raised on 16 February 2001
on Telecommunications (Amendment) Bill 2001**

Proposed section 32I(5)

- Q1. In proposed section 32I(5)(f) and (g), under what circumstances may the Telecommunications Authority ("TA") disqualify a bid or tender, forfeit or enforce all or part of the security lodged or cancel, withdraw or suspend a licence? According to the LegCo Brief, these penalties are intended to be imposed for breach of the terms of condition of an auction or tender. However, it appears that this intention has not been reflected clearly in the Bill. Will the Administration consider making clear in the Bill the circumstances under which TA may impose these penalties?
- A1. The proposed section 32I(5)(f) and (g) is intended to be a general enabling provision to empower the Telecommunications Authority (TA) to disqualify a bid or tender, forfeit or enforce all or part of the security lodged or cancel, withdraw or suspend a licence in the coming third generation (3G) mobile services licensing exercise and future licensing exercises where spectrum auctioning is involved. Although the general intention is to impose such penalty for breaches of terms and conditions of the auction, we do not intend to impose such penalty for every breach, say some minor breaches such as failure to supply certain non-essential information. Moreover, the specific circumstances which may give rise to the penalties will differ from one auctioning exercise to another, depending on the rules set for that particular exercise. We therefore consider it more appropriate for the TA to prescribe the specific circumstances for imposing penalties in

the detailed auction rules rather than to prescribe it in the primary legislation. This should allow the flexibility to tailor-made the circumstances that may give rise to penalties for each licensing exercise, having regard to the specific need of that exercise which could vary significantly from one exercise to another.

Q2. Before TA exercises his power to impose penalties for breach of the terms and conditions of an auction or tender, will the affected party be given a reasonable opportunity to make representations? If so, where will this be provided for?

A2. Under section 6A(3) of the Telecommunications Ordinance, TA is required to form an opinion or make a determination, direction or decision under this Ordinance only on reasonable grounds have regard to relevant considerations. He shall also provide reasons in writing for it. For the more serious penalty of revocation, cancellation and suspension of licence, TA is further required under section 34 (4B) to give the licensee concerned a reasonable opportunity to make representations and shall consider all representations before he decides whether or not to exercise that power.

Moreover, TA is under administrative law duty to carry out his statutory duties fairly and reasonably, including giving the affected party a reasonable opportunity to make representations. In any case, an aggrieved party can initiate a judicial review to challenge the decision of the TA.

We therefore consider that there should be sufficient safeguards to

ensure the interests of the affected parties.

- Q3. In proposed section 32I(5)(g)(ii)(A) and (9)(b), should it be made clear that what is assigned under section 32H(1) are the frequencies and bands of frequencies in the radio spectrum instead of the spectrum itself?
- A3. "Radio spectrum" under section 32H consists of a collection of individual frequencies or bands of frequencies. To "assign spectrum" means to assign individual frequencies or bands of frequencies within the radio spectrum. The meaning of "assigning spectrum" is clear and technically correct.

Proposed section 32I(7)

- Q4. As the terms and conditions of an auction or tender may be enforced under the law of contract, why is it necessary to have this provision?
- A4. As set out in the LegCo brief, the purpose of introducing the Telecommunications (Amendment) Bill 2001 is to provide, inter alia, the firm legal basis for the TA to conduct the 3G licensing exercise. For this purpose, we have expressly provided SITB with the power to empower TA to *specify* the terms and conditions under the proposed section 32I(4)(b)(ii). To avoid the legal challenge that TA may not have the power to *enforce* the auction or tender rules, we consider it appropriate to also codify the power to enforce the auction or tender rules in the primary legislation.
- Q5. What powers are intended to be included in "all necessary powers to enforce the terms and conditions of an auction or tender"? If it is intended that these powers should go beyond those available under the law of contract, should the scope of these powers be provided for in the Bill?
- A5. It is not intended that the powers envisaged under section 32I(7) would go beyond those available under the law of contract, the powers already provided for under the existing regulatory regime (e.g. the power to cancel, withdraw or suspend licences under section 34(4)) and the powers to be specified in the auction or tender rules under section 35I(5)(f) and (g) (e.g. forfeiture of deposit and disqualification).

Proposed section 32I(10)

- Q6. Why is the reference to "(including subsection (3))" necessary given that subsection (3) is part of section 32I and therefore should have been covered in the reference to "In this section" at the beginning of proposed section 32I(10)?
- A6. Both subsection (3) and subsection (10) have made references to the methods for calculating the spectrum utilization fees. A question may arise as to whether the calculation method as referred to in subsection (3) is to the exclusion of the method referred to in subsection (10). The words put in brackets are intended to put such queries beyond doubt.