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**Paper for the House Committee meeting
on 4 May 2001**

**Report of the Bills Committee on
Telecommunications (Amendment) Bill 2001**

Purpose

This paper reports on the deliberations of the Bills Committee on Telecommunications (Amendment) Bill 2001.

Background

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

3. The Administration has decided to issue four 3G carrier licences by a pre-qualification exercise followed by spectrum auctioning. The method of spectrum auctioning will be based on royalty payment, subject to a guaranteed minimum payment. Since it is the first time that spectrum auctioning is involved in issuing telecommunications licences in Hong Kong and having regard to the fact that there were legal disputes in European experience of spectrum auction, the Administration has reviewed the Ordinance to see if the Secretary and TA are sufficiently empowered to conduct the 3G licensing exercise involving payment of spectrum utilization fees. In order to provide a firm legal basis for the licensing exercise, the Secretary, with the advice of the Department of Justice, has proposed to make some technical amendments to the Ordinance.

The Bill

4. The Bill seeks to make provisions in respect of the following matters in preparation for the issue of carrier licences for 3G mobile services and future licensing exercises:

- (a) empowering TA to regard the spectrum utilization fees arising from a spectrum auction or tender as a determining factor in issuing telecommunications licences and assigning frequencies of the radio spectrum; and
- (b) spelling out clearly the respective roles of the Secretary and TA. Whilst the Secretary will prescribe the level of or the method of determining the spectrum utilization fee by regulation, TA will specify the terms and conditions of an auction and tender by notice published in the gazette, issue the licences, designate the relevant frequency band by order, and allocate the spectrum.

Whilst the regulation and the TA's order are subsidiary legislation subject to the negative vetting procedure of the legislature, the notice which sets out the terms and conditions of an auction or tender is not.

The Bills Committee

5. The House Committee agreed at its meeting on 16 February 2001 to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon James TIEN Pei-chun, the Bills Committee held 6 meetings, 4 of which were with the Administration and one jointly with the Administration, the 3G consultants and the industry. It also received 10 written submissions. A list of organizations which submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

7. In conjunction with the scrutiny of the Bill and with regard to the present 3G licensing exercise, the Administration has provided the Bills Committee with a copy of the draft regulation and TA's order, which are subsidiary legislation subject to the usual negative vetting procedure of the Legislative Council, and information on the outline of auction design and process, including the important principles of terms and conditions of the auction. The Administration informs the Bills Committee that a full set of terms and conditions of the auction is being prepared and will be issued as information memorandum later.

8. The main deliberations of the Bills Committee are summarized in the following paragraphs.

TA empowered to regard the fees arising from the auction, tender or other methods as a determining factor in issuing licences or assigning spectrum frequency

9. Clauses 2 and 3 of the Bill respectively amend sections 7 and 32H of the Ordinance to expressly provide that, in determining applications for the licence and the assignment of spectrum frequency, TA "may" regard the fees arising from the auction, tender or other methods prescribed under section 32I(2)(b) as a determining factor in relation to those applications. Some members are concerned that the clauses, as currently drafted, will give TA a discretionary

power to regard or disregard the fees offered as the only determining factor in making the selection. In response, the Administration explains that the primary legislation should be general empowering provisions applicable to all licensing exercises, while the subsidiary legislation made under proposed section 32I of the Bill would be specific to individual licensing exercise. The primary legislation should therefore be applicable to all licensing exercises involving payment of spectrum utilization fees, which may be determined by an auction, tender, a combination of auction and tender or some 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. The Administration therefore considers that the use of the word "may" in the primary legislation is appropriate. With regard to the 3G exercise, the Administration advises that there will be provision in the subsidiary legislation to provide for the certainty that the four bidders whose bids produce the highest common royalty percentage in accordance with the terms and conditions of the auction shall be the successful bidders. Both the subsidiary legislation and the 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 under section 32I. From the legal perspective, the TA, in carrying out its statutory functions and powers, must observe the law, including both primary and subsidiary legislation. Non-compliance with the law by TA could be subject to judicial review.

10. Some members however suggest that section 7 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. After seeking further legal advice, the Administration advises that 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. Such an arrangement may have the unintended consequence of causing confusion to the bidders, and may create grey areas where say, an unqualified bidder or a bidder in breach of auction rules who may claim that he has made the highest offer. The Administration is therefore cautious of any unintended effect which may lead to legal challenges of the outcome of the auction. At the Bills Committee's request and to address members' concern about TA's discretionary power

under proposed sections 7(12) and 32H(6), the Administration has agreed to give an undertaking in the Legislative Council when the Second Reading debate on the Bill is resumed that TA is bound by the provisions of subsidiary legislation, and in the case of 3G licencing exercise, TA must regard the fees arising from the auction exercise as the determining factor for granting the licences as provided for in the 3G-specific regulation, subject to compliance of terms and conditions of the auction.

The Secretary and TA to be subjected to the statutory obligation of consulting the industry

11. Clause 4(a) amends section 32I of the Ordinance to clarify that the Secretary will prescribe by regulation the level of spectrum utilization fees, or the method for determining the spectrum utilization fees, including auction, tender or any other method she thinks fit. Clause 4(b) also empowers the Secretary to specify the minimum amount of the fee and TA to specify the terms and conditions of an auction or tender to which the method relates. The Law Society of Hong Kong and members of the industry express that it should be expressly provided in the law that the Secretary and TA are required to consult the telecommunications industry and such other persons as may be directly affected before they exercise such powers. The Administration points out that the Secretary is required to prescribe the level or the method for determining the spectrum utilization fee by regulation under section 32I(2), which is subject to scrutiny of the legislature. The regulation must be passed together with TA's order to designate the relevant frequency band under section 32I(1), which contains an express requirement for consultation. TA's order is also subject to scrutiny of the legislature. In relation to the important points of the terms and conditions of the auction for the 3G licensing, TA has already conducted consultation on the rules on connected bidders. On the policy and regulatory issues on the 3G licensing exercise, TA had already conducted two rounds of consultation in March and October 2000, as well as an industry workshop on the open network requirement in January 2001. In drawing up the detailed terms and conditions, the Government has wider considerations in achieving its policy objectives, in ensuring that an auction or tender will be conducted in a fair, efficient and orderly manner, and in the wider public interest. In this regard, the Government is obliged to set out its terms and conditions clearly, and make them available to all potential bidders at the same time, to ensure equity and transparency. It is up to the bidders to decide

whether to participate. The Administration considers it inappropriate to subject the Secretary to the statutory obligation of consulting the industry on the exact level of the fee she would charge and the method she would use. Neither does the Administration considers it appropriate to subject TA to a consultation requirement regarding the detailed terms and conditions of auction or tender. Section 6C of the Ordinance has already required TA to consult before he performs his function or exercise his power. As requested by members, the Administration has agreed to give an undertaking in the Legislative Council when the Second Reading debate on the Bill is resumed that the Government will consult as appropriate on the important principles of the terms and conditions of an auction or tender.

The Secretary to be sufficiently empowered to specify the minimum spectrum utilization fees, including the minimum fees for the 3G licensing exercise

12. Clause 4(b) amends section 32I of the Ordinance to empower the Secretary to, by regulation, specify the minimum amount of the spectrum utilization fee, whether by notice published in the gazette or otherwise. The Administration explains to the Bills Committee that the minimum spectrum utilization fee the Secretary will set for the 3G licensing exercise will contain the following:

- (a) the minimum royalty percentage, and the spectrum utilization fee payable over the 15-year licence period based on that minimum royalty percentage, and these as a whole constitute what is commonly known as the "reserve price"; and
- (b) the series of minimum payments of spectrum utilization fee over the 15-year licence period based on the highest common royalty percentage set by the fourth winner.

In order to ensure that the Secretary is sufficiently empowered under proposed section 32I(4)(a) of the Ordinance to specify the minimum spectrum utilization fees, including the minimum fees for the 3G exercise, the Administration considers that it is necessary to empower the Secretary to set the minimum fees to be paid in the form of a reserve price commonly used for an auction and the minimum guaranteed payments for the royalty auction. The Administration has consulted the Department of Justice, and will propose a Committee Stage

amendment to clause 4(b) to that effect. The provision is the same as the minimum fee to be provided in the draft regulation. The Bills Committee accepts the explanation and notes the proposed amendment.

Connected bidders

13. Section 32I(5)(b) and (c) of the Ordinance, as proposed by clause 4(b), stipulates that the terms and conditions of an auction or tender which may be specified in a notice may include terms and conditions relating to the criteria by which TA shall determine whether 2 or more persons who are qualified to participate in the auction or tender are connected, and the criteria by which, or the procedure to be followed by which, TA shall determine which of the persons connected is qualified to participate in the auction or tender. The Bills Committee has asked about the details of the criteria and the procedure and been provided with the principles of the rules on connected bidders and other ownership issues by the Administration. The Bills Committee notes that these rules are intended to govern the treatment of closely related bidders in the auction as well as the manner in which 2G operators, or their commercial groups, may co-operate as a bidder to enter the auction. The Bills Committee notes that the industry has been consulted on these principles, which will be translated into detailed rules in the information memorandum to be issued for the auction exercise. The Bills Committee also notes that the industry has further views about the rules. Since these rules are outside the scope of the Bill, the Bills Committee suggests that these views should be dealt with later when the Legislative Council is studying the subsidiary legislation relating to 3G licensing.

Forfeiture or refund of a spectrum utilization fee that has been paid, where a licence is cancelled, withdrawn or suspended

14. Clause 5 provides for new section 34(4D) and amends section 34(5). The new section 34(4D) seeks to put it beyond doubt that when the Chief Executive in Council or TA decides whether to cancel, withdraw or suspend a licence, the spectrum utilization fee already paid by a licensee should not be a relevant consideration factor in such determination. The proposed section 34(5) seeks to stipulate that any spectrum utilization fee already paid will not be refunded upon licence cancellation, withdrawal or suspension. In response to the submission of the Law Society of Hong Kong that the clause does not

state what is to become of the licence fee still payable after the cancellation, withdrawal or suspension of such licence, the Administration explains that in the 3G licensing exercise, the licensees will have to provide to the Government a 5-year rolling guarantee of the guaranteed, minimum royalty payment, which the Government may enforce in case of revocation of licence. This will be clearly set out in the information memorandum and bidders will know the detailed arrangement. On the other issue raised by a member of the industry that the proposed section 34(5) could work substantial injustice to a licensee whose licence is cancelled or suspended by the Chief Executive in Council on grounds of "public interest", the Administration points out that the exercise of the power is subject to safeguards including representation by the licensee and judicial review. The power to cancel, withdraw and suspend a licence is a deterrent power of the Government. The Administration considers that it is a key policy principle that the 3G licensee which has paid a certain amount of spectrum utilization fee, should not, because of such fee paid, claim a certain degree of immunity from the deterrent power of licence revocation. At the request of the Bills Committee, the Administration agrees to give further consideration to members' views regarding whether it should be clearly spelt out in the law the circumstances under which "public interest" could be invoked to cancel or suspend a licence, and to inform the Panel on Information Technology and Broadcasting of its deliberation in this respect in six-month's time.

The Government to recover any outstanding spectrum utilization fees owed as a civil debt

15. The Government will recover any outstanding spectrum utilization fees owed by a licensee as a civil debt to the Government. The Administration will move a Committee Stage Amendment to add an express provision to this effect.

Committee Stage amendments (CSAs)

16. Apart from the CSAs mentioned above, the Administration will also move CSAs to clause 4(a) to replace the words "a combination of auction or tender" with "a combination of auction and tender", and to clause 4(b) to add a definition of the term 'event' and amend the Chinese version in order to make it

consistent with the English version. A full set of the CSAs to be moved by the Administration and agreed by the Bills Committee is at **Appendix III**. The Bills Committee has not proposed any amendments.

The regulation and the terms and conditions of auction

17. In studying the relevant draft regulation and the proposed auction design and process, the Bills Committee notes that the identity and number of, and bids made by the bidders during the auction will be kept confidential and the auction will continue beyond that point to where the fourth winner decides to leave. The industry has taken a very strong view against such blind-auction design and the royalty rate to be set at the point at which the fourth last bidder withdraws. The Bills Committee is concerned about the transparency of the auction and considers it important that there should be means to keep the public and the media informed of the auction process. These concerns, together with the one on the rules on connected bidders as mentioned in para. 13 earlier, are however related to the subsidiary legislation, the design and process and the terms and conditions of the auction and not the Bill. Since the Bills Committee has finished with the scrutiny of the Bill, which enactment is the prerequisite to the making of the subsidiary legislation and the invitation of applications for the 3G licences, the Bills Committee decides to recommend that the Second Reading debate on the Bill should be resumed. In order that there will be enough time to study the various concerns relating to the subsidiary legislation before its gazettal and to meet with the industry, and to work towards the timetable that the entire legislative process for the 3G licencing exercise can be completed within this legislative session, the Bills Committee considers it desirable that a Subcommittee should be set up immediately under the House Committee to scrutinize the draft subsidiary legislation and the proposed auction design and process, and to meet with the industry.

Recommendations

18. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed on 16 May 2001. The Bills Committee also recommends that a Subcommittee should be formed under the House Committee to study the draft subsidiary legislation

and the proposed auction design and process, and to meet with the industry.

Advice sought

19. Members are invited to support the recommendations of the Bills Committee at paragraph 18 above.

Legislative Council Secretariat

2 May 2001

**Bills Committee on
Telecommunications (Amendment) Bill 2001**

Membership list

Chairman Hon James TIEN Pei-chun, JP

Members Hon David CHU Yu-lin
Hon Eric LI Ka-cheung, JP
Hon CHAN Kwok-keung
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Emily LAU Wai-hing, JP

(Total: 8 Members)

Clerk Mrs Betty LEUNG

Legal Adviser Miss Connie FUNG

Date 1 March 2001

**Bills Committee on
Telecommunications (Amendment) Bill 2001**

Organizations submitted views to the Bills Committee

	Organisations	Written submission (No.)	Oral presentation (No.)
1.	PCCW-HKT Ltd	1	—
2.	The Law Society of Hong Kong	1	—
3.	Hong Kong CSL Limited	2	1
4.	Hutchison Telecommunications (HK) Ltd	2	1
5.	New World PCS Ltd.	1	1
6.	Peoples Telephone Company Ltd.	1	1
7.	SmarTone Mobile Communications Ltd.	1	1
8.	SUNDAY	1	1
Total:		10	6

Legislative Council Secretariat

2 May 2001

TELECOMMUNICATIONS (AMENDMENT) BILL 2001

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Information Technology and Broadcasting

<u>Clause</u>	<u>Amendment Proposed</u>
4	<p>(a) In paragraph (a), in the <u>proposed section 32I(2) (b) (i)</u>, by deleting "or tender; or" and substituting "and tender; or".</p> <p>(b) In paragraph (b) -</p> <p>(i) by deleting the <u>proposed section 32I(4) (a)</u> and substituting -</p> <p style="padding-left: 40px;">"(a) empowering the Secretary to specify the minimum fee of the spectrum utilization fee -</p> <p style="padding-left: 80px;">(i) by notice published in the Gazette or otherwise;</p> <p style="padding-left: 80px;">and</p>

- (ii) by means of -
 - (A) a minimum fixed fee;
 - (B) a minimum fee determined by reference to a formula or percentage or the occurrence of an event or series of events;
 - (C) a series of 2 or more minimum fees in relation to the same spectrum utilization fee where the relevant minimum fee is determined by reference to the occurrence of

an event or series
of events;

(D) a minimum fee the
determination of
which varies upon
the occurrence of
an event or series
of events;

(E) a minimum fee
determined by
reference to
another minimum
fee, or by
reference to the
means of
determining
another minimum
fee, whether or not
the other
minimum fee

is or will become payable;

(F) a minimum fee the determination of which varies, or is calculated by reference to, the period of validity of a licence or any part thereof; or

(G) any combination of 2 or more of any of the means specified in sub-paragraph (A), (B), (C), (D), (E) or (F), whether in whole or

in part;"

- (ii) in the proposed section 32I(5) -
 - (A) by deleting "可根據該款" and substituting "在該款所指的公告中";
 - (B) in paragraphs (e) and (f), by deleting "承" and substituting "出".
- (iii) in the proposed section 32I(7), by deleting "可根據第(4) (b) (ii)款指明" and substituting "在第(4) (b) (ii)款所指的公告中指明的拍賣或投標".
- (iv) by deleting the proposed section 32I(10) and substituting -

"(10) A spectrum utilization fee (including any part thereof) owing to the Government shall be recoverable by the Government as a civil debt.

(11) Without prejudice to the generality of subsection (4) (a), in this section (including subsection (3)) - "event () includes a date; "spectrum utilization fee" () includes a

fixed fee, a fee calculated by a formula or a fee
ascertained by another method, or any
combination thereof."