

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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