

**The Administration's Response to the Issues Raised at
the Bills Committee meeting of the Communications Authority Bill
held on 17 February 2011**

Litigation Costs of the Communications Authority (CA)

Members raised the question as to whether the Government would be responsible for the future injection of funding into the Office of the Communications Authority (OFCA) Trading Fund in the event that it would be depleted by litigation costs, if any, to be incurred by the future Communications Authority (CA). As we explained in our reply presented to the last meeting of the Bills Committee (LC Paper No. CB(1)1301/10-11(02)), the legal costs incurred by the Office of the Telecommunications Authority (OFTA) and the Television and Entertainment Licensing Authority over the past three financial years stood at less than 3% of their respective total annual operating expenses. As such, based on past statistics, it is unlikely that the financial position of the future OFCA Trading Fund would be adversely affected by its litigation costs.

2. In the unlikely event that the OFCA Trading Fund is insufficient to meet its litigation costs, the Government, where necessary, is prepared to seek the approval of the Finance Committee of the Legislative Council for a standby loan facility to the OFCA Trading Fund. The terms of the loan will be determined when the need for it arises.

Enforceability of Clause 21

3. There was enquiry about the enforceability of the provisions under Clause 21 of the Bill relating to the proposed offence to give or disclose confidential information obtained or received officially. We consider that the clause can be enforced as in the case of similar confidentiality provisions in other legislation as –

- (a) who is to be bound by the clause has been clearly set out;
- (b) what constitutes confidential information has been clearly defined;
- (c) the circumstances whereby the disclosure of confidential information is allowed have been clearly stipulated; and

- (d) defence provisions for persons to be charged with the offence are suitably provided.

4. There was suggestion that Clause 21(4)(a) of the Bill should be deleted to avoid uncertainty and ensure enforceability of the provisions. The clause provides that it is a defence for a person charged with the offence to show that at the time of the alleged offence, the defendant believed that there was lawful authority for the defendant to give or disclose the information to the other person and the defendant had no reasonable cause to believe otherwise. While this is a subjective test depending on the belief of the defendant, there is an objective element whereby the defendant has to satisfy the objective test that he has no reasonable cause to believe otherwise. The defence imposes a burden upon the defendant to establish its elements. The reasonable grounds which the defendant would rely on are a matter of fact to be determined by the court. As we now impose a criminal liability on a strict liability basis for a breach of confidentiality, we consider it onerous if such a defence is not provided. The proposed defence provides an appropriate balance to the clause. We note that there are now similar defences under the Official Secrets Ordinance (Cap 521).

Clause 21(2)(g): The Disclosure of Information by the Authority and Others in Summary Form

5. Members raised question about ensuring that the disclosure of information authorized by the CA or the OFCA in the form of a summary compiled under Clause 21(2)(g) of the Bill could prevent the particulars relating to the business or identity, or the trading particulars, of the persons who furnish the information or to whom the information relates, from being ascertained from it. The Clause allows the disclosure of information in such a way by the CA, a person authorized by the CA or OFCA only. The Clause has the essential function of enabling the CA or OFCA to present summary information (such as the overall performance of the telecommunications and broadcasting sectors) by drawing the business information submitted by individual operators. This facilitates the compilation and promulgation of generic industry related information drawn from what may include confidential information but without prejudicing the latter's confidentiality.

6. Under the Clause, a party which gives or discloses the information has a responsibility to ensure that the disclosure would only be in the form of a summary compiled from the information submitted to the CA or OFCA, and the summary is so compiled as to prevent such business, identity or trading particulars of the person who produces the information or to whom the information relates, from being ascertained from it. Failure to comply in full with the conditions in Clause 21(2)(g) would result in the prohibition in Clause 21(1) continuing to apply. Failure to comply with the prohibition will be an offence. Whether a particular disclosure would allow the above particulars to be ascertained is a matter of fact to be determined.

7. Provisions in similar formulation are widely available in other legislation such as the Monetary Statistics Ordinance (Cap. 356) applicable to the Hong Kong Monetary Authority, the Securities and Futures Ordinance (Cap. 571) governing the Securities and Futures Commission, and the Deposit Protection Scheme Ordinance (Cap. 581) applicable to the Hong Kong Deposit Protection Board and the Hong Kong Monetary Authority. These provisions are set out in **Annex A**.

Clause 13(7): Validity of CA's Proceedings

8. Members raised the question in respect of the necessity of Clause 13(7) of the Bill, i.e. to preserve the proceedings of the CA so that they would not be affected by a failure of a CA member to comply with the disclosure of interest requirement. Clause 13(7) is intended to avoid the chaos which could be caused by rendering invalid a decision taken in contravention of such requirements. In the absence of such a provision, the discovery of a conflict of interest, even many years after the decision was taken, may render the decision invalid and require the unwinding of all arrangements including contractual commitments based on that decision. This could adversely affect third parties and be totally impracticable, e.g. the unwinding of contracts concluded and completed long ago.

9. Provisions similar to Clause 13(7) of the Bill are widely available in various legislation governing other statutory bodies. We have provided in **Annex B** some examples for reference.

The Chinese version: Clauses 19(1) and 21(2)(a)

Clause 19(1)

10. The policy intention of the provision requires that all sums of money payable, owing or paid to the Authority must **on receipt** be credited to the account of the trading fund. The Chinese phrases of “須繳付”, “已繳付”, “拖欠” are adopted to describe the status of the concerned sum of money, while the phrase “一經收取” is used to indicate the **timing of the action** in respect of “crediting the money on receipt to the account of the trading fund”. There is no conflict between the phrases of “已繳付” and “一經收取”. We thus consider it necessary to retain the phrase “一經收取” in the Chinese text which accurately reflects the policy intention.

Clause 21(2)(a)

11. We consider the use of bracket instead of coma in the Chinese text more appropriate. To stipulate the exception in bracket can avoid distraction when we read the main text of the provision (i.e. the giving or disclosure of information) and enhance the language flow of the Chinese text. There is no strict requirement that if bracket is used in the Chinese version, then bracket has to be used in the English version if this could convey the meaning more clearly.

Clause 13(1): Examples of Interests – Direct and Indirect Pecuniary Interests and Personal interest Greater than That Which a Member Has as a Member of the General Public

12. At the last Bills Committee meeting, Members requested the Administration to explain what “direct” and “indirect” pecuniary interests in Clause 13(1)(a) and “a personal interest greater than that which the member has as a member of the general public” in Clause 13(1)(b) actually refer to.

13. A “direct pecuniary interest” is any such matter which would involve a financial benefit flowing to a member concerned in person, for example a paid consultancy agreement between the CA and the member personally or the purchase of goods or services by the CA from the member personally. An “indirect pecuniary interest” is any matter which would involve a financial benefit flowing to a third party in which that member has an interest. Examples include a paid consultancy

agreement with or purchase of goods or services from a company or partnership in which the member has an interest as a shareholder or partner.

14. As for a “personal interest greater than that which the member has as a member of the general public” provided in Clause 13(1)(b), a CA member may have an interest in a matter as a member of the general public while he may also have an interest greater than being in that capacity. For example, he may as a member of the general public benefit from the CA approving more telecommunications licences. However, his interest exceeds that a general member of the public has if he is a shareholder of the licensed company albeit the grant of licence may not entail immediate pecuniary benefits. A CA member deciding upon whether to grant such more licences has no conflict of interest merely because he is a member of the general public. However, conflict of interest would arise if he is a shareholder of the licensed company.

**Communications and Technology Branch,
Commerce and Economic Development Bureau
March 2011**

Provisions in Other Legislation on the Disclosure of Information in Summary Form

Ordinance and the Relevant section	Applicable to	Provision
Monetary Statistics Ordinance (Cap. 356) – Section 4	Hong Kong Monetary Authority	<p>(2) Neither the Monetary Authority nor any other person shall disclose to any unauthorized person any return or information submitted by any bank or deposit-taking company or restricted licence bank under this Ordinance.</p> <p>(5) Nothing in subsection (2) shall apply to the disclosure of information-</p> <ul style="list-style-type: none"> (a) ..; (b) in the form of a summary of similar information provided by a number of banks or deposit-taking companies or restricted licence banks if the summary is so framed as to prevent particulars relating to the business of any particular bank or deposit-taking company or restricted licence bank being ascertained from it; or (c)...
Securities and Futures Ordinance (Cap. 571) – Section 378	Securities and Futures Commission	<p>(1) Except in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any of the relevant provisions, a specified person-</p> <ul style="list-style-type: none"> (a) shall preserve and aid in preserving secrecy with regard to any matter coming to his knowledge by virtue of his

Ordinance and the Relevant section	Applicable to	Provision
		<p>appointment under any of the relevant provisions, or in the performance of any function under or in carrying into effect any of the relevant provisions, or in the course of assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions;</p> <p>(b) shall not communicate any such matter to any other person; and</p> <p>(c) shall not suffer or permit any other person to have access to any record or document which is in his possession by virtue of the appointment, or the performance of any such function under or the carrying into effect of any such provisions, or the assistance to the other person in the performance of any such function under or in carrying into effect any such provisions.</p> <p>(2) ..</p> <p>(3) Notwithstanding subsection (1), the Commission may disclose information-</p> <p>(a) in the form of a summary compiled from any information in the possession of the Commission, including information provided by persons under any of the relevant provisions, if the summary is so compiled as to prevent particulars relating to the business or identity, or the trading particulars, of any person from being ascertained from it;</p> <p>(b)..</p>

Ordinance and the Relevant section	Applicable to	Provision
		<p>(c)..</p> <p>..</p> <p>(15) In this section-</p> <p>..</p> <p>“specified person” (指明人士) means-</p> <p>(a) the Commission;</p> <p>(b) any person who is or was a member, an employee, or a consultant, agent or adviser, of the Commission; or</p> <p>(c) any person who is or was -</p> <p>(i) a person appointed under any of the relevant provisions;</p> <p>(ii) a person performing any function under or carrying into effect any of the relevant provisions; or</p> <p>(iii) a person assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions.</p>
<p>Deposit Protection Scheme Ordinance (Cap. 581) – section 46</p>	<p>Hong Kong Deposit Protection Board and Hong Kong Monetary Authority</p>	<p>(1) Except so far as it is necessary for the performance of any function under this Ordinance or for carrying into effect the provisions of this Ordinance, a specified person —</p> <p>(a) shall not suffer or permit any person to have access to any matter relating to the affairs of any person that comes to the specified person’s knowledge in the performance of any function under this Ordinance; and</p>

Ordinance and the Relevant section	Applicable to	Provision
		<p>(b) shall not communicate any such matter to any person other than the person to whom such matter relates.</p> <p>(2) Subsection (1) does not apply—</p> <p>(a) to the disclosure of information in summary form that is so framed as to prevent particulars relating to the business of any particular Scheme member from being ascertained from it;</p> <p>(b) ..</p> <p>(c)..</p> <p>..</p> <p>(8) In this section, “specified person” (指明人士) means—</p> <p>(a) any person who—</p> <p>(i) is or has been—</p> <p>(A) a member of the Board;</p> <p>(B) a related person of the Board; or</p> <p>(C) a person employed by or assisting a related person of the Board; and</p> <p>(ii) performs or has performed any function under this Ordinance; or</p> <p>(b) the Monetary Authority, or a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap 66) to assist the Monetary Authority.</p>

Provisions in Other Legislation on the Disclosure of Interest

Ordinance and the Relevant section	Applicable to	Provision
Airport Authority Ordinance (Cap. 483) – Section 13: Disclosure of interest, etc.	Airport Authority	(4) The validity of any proceeding of the Authority shall not be affected by the failure by a member of the Authority to comply with a provision of this section
Estate Agents Ordinance (Cap. 511) – Section 10: Disclosure of interest, etc.	Estate Agents Authority	(4) The validity of any proceedings of the Authority shall not be affected by the failure by a member of the Authority to comply with a provision of this section.
Urban Renewal Authority Ordinance (Cap. 563) – Section 7: Members to declare interests	Urban Renewal Authority	(7) The validity of any proceedings of the Authority shall not be affected by the failure by a member of the Board of the Authority to comply with this section.
West Kowloon Cultural District Authority Ordinance (Cap. 601) – Paragraph 15 of Schedule 1: Conflict of Interest	West Kowloon Cultural District Authority	(5) The validity of any proceedings of the Board is not affected by the failure of a Board member to comply with this section.