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The Government of the Hong Kong Special Administrative Region

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Dear Mr CHUI,

Free-Flow Tolling (Miscellaneous Amendments) Bill 2021

Thank you for your letter under reference dated 1 April 2021 concerning the Free-Flow Tolling (Miscellaneous Amendments) Bill 2021 (“the Bill”). Please find in the ensuing paragraphs our responses to the various matters raised in your letter.

Clauses 9 and 40

2. It is proposed in the Bill that the Commissioner for Transport (“C for T”) be empowered to designate a government tolled tunnel or Tsing Sha Control Area (collectively referred to as “Tolled Tunnels”) to be operated without toll booths by notice published in the Gazette, pursuant to the proposed section 8B of the Road Tunnels (Government) Ordinance (Cap. 368) and the proposed section 8A of the Tsing Sha Control Area Ordinance (Cap. 594). As rightly pointed out in your letter, C for T may make different designations in respect of a Tolled Tunnel for traffic flow in different directions. On the other hand, for

greater operational efficiency and to avoid confusing the motorists, the Bill proposes that, once free-flow tolling is adopted at a particular traffic bound of a Tolled Tunnel, it will be applied to all lanes for traffic flow in the same direction. It is therefore unnecessary to empower C for T to make different designations for traffic flow in the same direction. In other words, when a designation takes effect for a Tolled Tunnel for traffic flow in a direction, only payment methods in boothless mode (i.e. by automated payment made in accordance with arrangements made with a collecting authority; or by a means of payment, specified by C for T, within seven business days after the vehicle enters the Tolled Tunnel¹) will be allowed.

Clauses 16 and 53

3. With respect to your enquiry about whether the Data Protection Principles (“DPPs”) under the Personal Data (Privacy) Ordinance (Cap. 486) should be complied with before disclosing any relevant information pursuant to Clause 16 (i.e. the proposed section 20A of Cap. 368) and Clause 53 (i.e. the proposed section 27A of Cap. 594), the answer is in the affirmative. Having consulted the Privacy Commissioner for Personal Data (“PCPD”), the Transport Department (“TD”) and the Toll Service Provider (“TSP”) to be engaged by TD will take appropriate actions to ensure that the DPPs are duly complied with upon implementation of the Free-Flow Tolling System (“FFTS”), including but not limited to the following –

- (a) For compliance with DPP1², personal information required for the implementation of FFTS will be collected in a lawful and fair way. For example, mobile phone numbers or email addresses of responsible persons will be collected pursuant to Part 9 of the Bill. Suitable personal information collection statements (“PICSs”) will be formulated by TD and TSP to inform applicants of toll tags or the responsible persons of the purpose and manner of collection of their personal data, and to whom the data may be transferred;

¹ Pursuant to the proposed regulation 12AAC(1) of the Road Tunnels (Government) Regulations (Cap. 368A) under Clause 28 and the proposed section 4A(1) of the Tsing Sha Control Area (Tolls, Charges and Fees) Regulation (Cap. 594B) under Clause 71.

² In essence, DPP1 requires that personal data must be collected in a lawful and fair way, for a purpose directly related to a function/activity of the data user. All reasonable steps shall be taken to notify the data subjects of the purpose of data collection and the classes of persons to whom the data may be transferred. Data collected should be adequate but not excessive.

- (b) It is proposed in the Bill that any request for refund of a sum paid as toll must be lodged within 60 calendar days from the date on which the toll is allegedly incurred (see proposed regulation 12AAE of Cap. 368A and proposed section 4C of Cap. 594B). With due regard to DPP2³ and taking into account the turnaround time required for handling refund cases, TSP will keep the usage records of the Tolled Tunnels under FFTS for at most 90 calendar days after the use of the tunnel is recorded. Such records will be automatically deleted thereafter, except for cases (i) where the responsible person disputes his/her toll liability or (ii) if the outstanding toll and/or surcharge(s) are not settled within the 90-calendar day period;
- (c) For DPP3⁴, TD/TSP will use the personal data collected from the applicants within or directly related to the purposes of use as set out in PICS, and will not use the data for a new purpose unless prescribed consent of the data subject has been sought; and
- (d) To ensure that DPP4⁵ is duly complied with, TD/TSP will adopt appropriate measures for protection of personal data, including encrypting information before transmission across systems; allowing only authorised personnel to access information and such access records would be logged and inspected periodically; and putting in place cybersecurity measures, e.g. installing firewalls and anti-virus softwares etc.

4. Under the toll service agreement to be entered into between the Government and TSP, TSP will be required engage an external auditor for a detailed privacy impact assessment before the launch of FFTS. Comments from PCPD on the assessment report will be sought for TSP's follow-up and compliance. TSP will also be required under the toll service agreement to arrange annual privacy audit review to ensure adequate data protection measures are in place in relation to the collection and recovery of tolls.

³ Among other things, DPP2 stipulates that practicable steps shall be taken to ensure the personal data is not kept longer than is necessary to fulfil the purpose for which the data is used.

⁴ DPP3 provides that personal data is used for the purpose for which the data is collected or for a directly related purpose, unless voluntary and explicit consent is obtained from the data subject.

⁵ DPP4 provides that a data user needs to take practicable steps to safeguard personal data from unauthorised or accidental access, processing, erasure, loss or use.

5. As regards whether the exemptions under sections 58, 59, 60B and 63C of Cap. 486 should fall within the ambit of lawful authority under Clauses 16 and 53 of the Bill, we would like to clarify that the requirements of Cap. 486 (in particular, personal data collected for a certain purpose is to be used only for that purpose or a directly related purpose, or with the data subjects' prescribed consent, or by virtue of an exemption) and the requirements for "lawful authority" for disclosure of information under Clauses 16 and 53 of the Bill are separate requirements. In case that the information to be disclosed constitutes personal data, it may only be disclosed with lawful authority under Clauses 16 and 53 of the Bill, and the disclosure also needs to be in compliance with the requirements of Cap. 486.

6. In other words, the fact that certain information is exempt from relevant DPPs under Cap. 486 does not form the basis for a person to have lawful authority to disclose personal data information under the Bill. One has to consider the scope of lawful authority under the Bill itself. For example, if a government department/law enforcement agency makes an information request (involving personal data) for the purpose of prevention/detection of crime, emergency rescue operations or provision of emergency relief services, TD/TSP may accede to the request if the disclosure serves to facilitate the department/law enforcement agency to perform a function under a law of Hong Kong (see proposed section 20A(2)(a)(iii) of Cap. 368 under Clause 16 and proposed section 27A(2)(a)(iii) of Cap. 594 under Clause 53), say the Crimes Ordinance (Cap. 200) or the Fire Services Ordinance (Cap. 95). Such lawful disclosure of information, nonetheless, is not due to the mere fact that the requested information is exempt from DPP3 pursuant to section 58 or 63C of Cap. 486. The same principle applies to the exemptions under sections 59 and 60B of Cap. 486.

7. As for why "without reasonable excuse" is not an element of the offence under Clauses 16 and 53, reference has been made to similar provisions under other existing laws, such as section 42 of the Fire Safety (Industrial Buildings) Ordinance (Cap. 636) and section 41 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485). We consider the scope covered by lawful authority as specified in Clauses 16 and 53 optimal in striking an appropriate balance between allowing sufficient flexibility for relevant officers to perform their duties competently on the one hand, and exerting appropriate control over their disclosure of information obtained under FFTS on the other.

Clause 19 (proposed regulation 22C of Cap. 368A) and 48 (proposed section 24A of Cap. 594B)

8. In respect of the proposed financial penalty to be imposed on TSP, our responses to the enquiries (in the order of your letter) are as follows –

(a) If TSP fails to comply with any requirement of Cap. 368 or Cap. 594, or is in breach of a toll service agreement, C for T may consider if the failure or breach is capable of being remedied and impose, with the approval of the Chief Executive in Council, a financial penalty on TSP.

(b) C for T will assess, on a case-by-case basis, whether the failure or breach is capable of being remedied with due regard to the nature of the failure or breach, in particular whether it can be set right with the acquisition of a reasonable amount of resources by TSP. In making the assessment, C for T will seek input from TSP and obtain advice from relevant experts, if necessary. We may illustrate the above by way of the following examples -

(i) If a responsible person fails to pay the outstanding toll and surcharges within the 42-day period upon receipt of a surcharge notice, TSP is required to submit a case, with sufficient evidence, to TD within a timeframe to be specified in the toll service agreement for commencing recovery proceedings as appropriate. If TSP has failed to comply with this requirement due to manpower shortage, which results in creating a backlog of cases, it may be regarded as a breach of a toll service agreement capable of being remedied, as TSP may engage additional manpower resources to remedy the situation; and

(ii) On the other hand, one of TSP's duties is to report the breakdown of FFTS to the maintenance party in accordance with the toll service agreement. If TSP has identified but failed to report a fault accordingly which renders the usage of all Tolled Tunnels by vehicles undetected for a significant period of time (i.e. the responsible persons who should be liable for toll payment cannot be traced), this may amount to a breach not capable of being remedied.

- (c) Taking into account the nature and circumstances of each case, C for T will afford TSP a reasonable opportunity to comply with the requirement or remedy the breach. Taking the example of the breach capable of being remedied in paragraph 8(b)(i) above, TSP would be allowed reasonable time (say one month) to recruit additional staff, such that the relevant requirement can be complied with and clearing the backlog.
- (d) and (e) Apart from the financial penalty proposed under the Bill, it is intended that there will be other consequences for TSP who fails to comply with relevant requirement or is in breach of the toll service agreement, including -
 - (i) TSP will be required to indemnify and keep indemnified the Government for any damages, costs, losses, etc. arising from the breach of any provision of the toll service agreement;
 - (ii) If TSP fails to comply with the basic performance standards, a written notice may be issued to TSP and its failure will be duly considered if TSP bids for contracts of similar nature in future. The Government may also claim liquidated damages according to the terms of the toll service agreement if TSP fails to meet the performance standards of some of the tasks, e.g. TSP fails to issue surcharge notices within the specified timeframe according to the toll service agreement; and
 - (iii) If TSP fails to observe or perform any of its material obligations, for instance if it has failed to transfer the toll revenue collected to the Government when due, TD may terminate the contract before the original expiry date.

These other consequences will be stipulated in the toll service agreement, making reference to the existing contracts with the management, operation and maintenance ("MOM") operators of government tunnels. We consider that no express provision on such consequences is required in the Bill given the absence of similar clauses in Cap. 368 and Cap. 594 for MOM operators.

Clauses 28 (proposed regulation 12AAD of Cap. 368A) and 71 (proposed section 4B of Cap. 594B)

9. The defences in the proposed regulation 12AAD(b) of Cap. 368A and the proposed section 4B(b) of Cap. 594B are not criminal in nature. The said defences are designed to be advanced by a responsible person in toll recovery proceedings (which are specified in the respective proposed Division 3 of Cap. 368A and Cap. 594B); and they are not defences to any criminal offences. With reference to similar provisions in the existing laws⁶, we are of the view that a responsible person shall prove, on the balance of probabilities, the defences in the said provisions and no express provision is required in the Bill. Requiring the responsible person to prove the defence he/she advanced on the balance of probabilities also serves to achieve our policy intent of ensuring a timely and efficient recovery of tolls, and it may help minimise chances of abuse of such defences by defendants.

Clause 92

10. According to the proposed amendments to regulation 59A of Road Traffic (Registration and Licensing of Vehicles) Regulations (Cap. 374E), C for T "may" require the applicant to produce the proof of mobile phone number or email address. Regarding the proof of mobile phone numbers, TD plans to accept a copy (either in paper or electronic format) of the service contract or monthly statement of mobile service plans, or an image of account information shown in the mobile application developed by the telecommunications service provider, etc. For email addresses, the person concerned may show his/her ownership of the email account in paper or electronic format.

Yours sincerely,



(Ms Vivien LI)

for Secretary for Transport and Housing

⁶ C.f. section 14 of the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237), section 7 of the Housing (Traffic Contraventions) (Fixed Penalty) Bylaw (Cap. 283C) and section 38 of the Mass Transit Railway (Transport Interchange) Bylaw (Cap. 556D).

c.c. Department of Justice (Attn: Miss Betty CHEUNG)
(Attn: Miss Celia HO)
(Attn: Miss Florence LING)
Transport Department (Attn: Ms Polly CHAN)
Clerk to Bills Committee