

SUBMISSION ON THE SECOND CONSULTATION PAPER WITH REGARD TO THE LICENSING OF MOBILE SERVICES ON EXPIRY OF EXISTING LICENCES FOR SECOND GENERATION MOBILE SERVICES

1. INTRODUCTION

1.1 This document sets out our comments in response to the second consultation paper published by the Telecommunications Authority (*TA*) on 19 March 2004 with regard to the licensing of mobile services on expiry of existing licences for second generation (*2G*) mobile services (*second consultation paper*).

1.2 In this submission, we offer a critique of the TA's statutory duty under the Telecommunications Ordinance (Cap. 106) with regard to the TA's proposals in the second consultation paper and also how the proposal compares to the actions taken by regulators in other jurisdictions with similar duties, objectives and goals.

1.3 In particular we refer to the TA's proposal in the second consultation paper to withdraw the CDMA and TDMA licences when they expire during the second half of next year.

2. THE TA'S DUTY

2.1 The TA's duty is set out under certain sections in the Telecommunications Ordinance (Cap. 106). Under section 6A, the TA is required to form an opinion or make a determination, direction or decision only on reasonable grounds and having regard to relevant considerations. Section 32G states that the TA shall promote the efficient allocation and use of the radio spectrum as a public resource of Hong Kong.

2.2 In the second consultation report, the TA stated that, amongst others, ensuring efficient use of spectrum and maintaining technology neutrality were relevant considerations for deciding the future licensing arrangements for mobile services.

2.3 Furthermore, in the Vision, Mission and Values statement published on the website of the Office of the Telecommunications Authority (*OFTA*), the TA states that it is committed to providing "*a fair regulatory environment conducive to business investment*" and that its values include "*neutrality, equity, transparency, accountability and openness*".

2.4 We submit that the proposal by the TA in the second consultation paper to withdraw the CDMA and TDMA licences upon their expiry is arguably inconsistent both with the regulator's statutory duty in relation to spectrum allocation and international best practice.

3. INTERNATIONAL BEST PRACTICE

3.1 Currently, OFTA has the power to withdraw and reassign spectrum on the termination of an operator's licence. In Hong Kong, there is no fixed statutory period of prior notice which needs to be given before a licence may be revoked.

3.2 In other regulatory regimes where regulators have comparable goals to those of the TA, stringent safeguards have been put in place to ensure that the regulator maintains an open and neutral regulatory environment. We set out below the policies, objectives and safeguards of the regulatory regimes in the United Kingdom, Australia and New Zealand, each of which have comparable goals to those of the TA.

United Kingdom

3.3 In the United Kingdom, the regulator states that “*open management of the radio spectrum is one of [its] key objectives*”.¹

3.4 Every year a report is published against a long term strategic plan for the exploitation of the radio spectrum in which it outlines “*in some detail... our approach to managing the spectrum, the criteria we take into account, and what we see as the main issues and decisions facing us, across the whole of the spectrum, over the coming years*”.²

3.5 The annual reports typically recommend changes or developments five to seven years in advance. An example would be that the 1998 report gave existing operators seven years’ notice to migrate analogue (**1G**) customers to 2G networks.

3.6 As a result of this protocol, a lengthy period of prior notice of any change is given to the spectrum user which allows it to plan accordingly ahead of time, instead of being faced with unanticipated decisions from the regulator.

Australia

3.7 Australia adopts a similar approach to the United Kingdom and has a methodical, transparent spectrum planning process which provides substantial prior notice of any changes in spectrum use and allocation.

3.8 If spectrum is to be reallocated, an embargo is imposed for a period of time before the intended date for reallocation. The embargo gives notice to the existing users of the anticipated reallocation. The current spectrum or apparatus licensees may renew licences during the embargo, but usually for a period not longer than the remaining embargo period. No new licences are granted during this period.

3.9 The embargo period usually lasts for five years but must at the very least last for two years. For example, the embargo on 3G spectrum started five years before 3G allocations. In fact, the Australian regulator had given the current users further time to depart from the spectrum and the allocations were made on the basis that the bands had not yet been vacant at the time of the public sale.³

¹A Strategy for the Future Use of the Radio Spectrum in the UK – Second Edition May 1996. – <http://www.ofcom.org.uk/static/archive/ra/topics/spectrum-strat/future/strat96/strat1.htm>

²A Strategy for the Future Use of the Radio Spectrum in the UK, 2002 – page 2 at <http://www.ofcom.org.uk/static/archive/ra/topics/spectrum-strat/future/strat02/spectrum-strategy2002.pdf>

³ http://www.aca.gov.au/radcomm/frequency_planning/spectrum_embargoes/emb23.pdf

New Zealand

3.10 The regulator in New Zealand expresses in its policy approach that it's "*underlying theme is competitive neutrality*".⁴

3.11 New Zealand has recognised the importance of ensuring predictability and certainty concerning the expiry of spectrum licences. It has said that "*a lack of certainty... can have a negative impact on economic growth and innovation.*"⁵

3.12 Notice of not less than five years before the expiry of the term of licence must be given to the operator, if the regulator decides not to allow the spectrum to be re-licensed on the same basis to the current operator.

3.13 Additionally, if the current operator wishes to re-new its licence on the expiry of its initial 20 year term, the regulator must grant the licence for a further 20 year term at a commercially negotiated price.

4. TA'S APPROACH INCONSISTENT WITH ITS DUTIES AND INTERNATIONAL BEST PRACTICE

4.1 If a comparison is made between the TA's duties and the approach proposed in the second consultation paper and the approach adopted in other jurisdictions identified with similar duties, it is plain to see that the TA is not following the international best practice of giving lengthy prior notice to operators whose spectrum is to be reallocated.

4.2 We have chosen the United Kingdom, Australia and New Zealand as comparisons to illustrate the point made in 4.1 above because the objectives of the regulators in these three countries are similar to those of the TA in Hong Kong. In the United Kingdom, the key objective is for "*open management*". Australia also adopts this approach. In New Zealand, the underlying theme is "*competitive neutrality*". In Hong Kong, the TA states in its mission statement on the OFTA website that its values include "*neutrality... transparency...and openness*".

4.3 The United Kingdom, New Zealand and Australia have all imposed safeguards to ensure that their objectives are reached. In the United Kingdom, operators were given seven years to migrate 1G customers to 2G networks. In Australia, an embargo is usually imposed for five years but must last at least two years when spectrum is to be reallocated. In New Zealand, five years' prior notice must be given to the operator if the regulator decides not to allow the spectrum to be re-licensed on the same basis as before. Additionally, upon expiry of the initial 20 year term, the regulator in New Zealand must grant an extra 20 year term at a commercially negotiated price to the licensee if he wishes to continue using his licence.

4.4 The TA proposes in the second consultation paper that it will reallocate the spectrum currently held by the CDMA and TDMA licensees, stating that there has

⁴ <http://www.med.govt.nz/rsm/legislation/environment.html#treatment>

⁵ http://www.med.govt.nz/pbt/rad_spec/rights-at-expiry/background.html

been inefficient use of scarce spectrum resource by the licensees. These licences will expire in the second half of 2005. This indicates that if the TA's proposal goes through, the licensees will only have approximately one year's prior notice (or less) of the reallocation. This is obviously inconsistent with international best practice, as this amount of time is less than even half of that which has been offered by the United Kingdom, Australia and New Zealand in the past. In these jurisdictions, the regulators try to give as much time as possible to the operator if they are to reallocate the spectrum. Furthermore, it is also inconsistent with the previous practice in Hong Kong whereby a period ranging from two to five years was given to operators for the conversion from analogue systems to digital systems.

4.5 The TA is under a duty to promote the efficient allocation and use of the radio spectrum (section 32G, Telecommunications Ordinance). However the TA is also required, by law, to make a decision only on reasonable grounds and with regard to relevant considerations (section 6A, Telecommunications Ordinance), and further, the TA is committed to providing a fair regulatory environment conducive to business investment.

4.6 Given the similarity of the goals and objectives of the TA and those of the regulators in other jurisdictions with comparable goals and objectives, it is surprising that the TA, in discharging its duty, proposes to adopt a position inconsistent with that adopted by regulators in those other jurisdictions.

4.7 There are good and legitimate reasons for the United Kingdom, Australia and New Zealand to have offered such long periods of prior notice. Specifically, such notice:

- Enables market participants to maintain and improve their competitiveness and to provide a sound basis for long term planning;
- Enables licensees to plan for future growth;
- Avoids the negative impact on economic growth and innovation arising from a lack of predictability and certainty concerning expiry of spectrum licences;
- Optimises incentive to invest;
- Minimises stranded investment; and
- Minimises supply discontinuity and disruption of service to subscribers.

4.8 As the TA is under a duty to make a decision with regard to relevant considerations, we encourage the TA to reconsider its proposed approach with regard to this issue.

5. CONCLUSION

5.1 We submit that the proposal in the second consultation paper to withdraw the CDMA and TDMA licences when they expire during the second half of next year is at odds with international best practice, due to the short period of prior notice which it

affords to the subject operators. In other jurisdictions where regulators have similar objectives to those of the TA, a minimum period of at least five years is generally given.

5.2 Not only is this proposal at odds with international best practice, it also arguably contradicts the TA's statutory duty under section 6A of the Telecommunications Ordinance. The TA is required to make a decision on reasonable grounds and with regard to relevant considerations. We submit that it is unreasonable that the TA should not follow international best practice, given the similarity in objectives between the TA and regulators in other jurisdictions.

5.3 Accordingly, we urge the TA to reconsider its proposal both in light of its statutory duty and having regard to international best practice.

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18 June 2004