

# **Inclusion of a “Fit and Proper Person” Criterion as One of the Licensing Criteria for Public Telecommunications Services**

## **An Industry Consultation Paper**

**15 March 2012**

### **Introduction**

Generally, save under and in accordance with a licence granted under the Telecommunications Ordinance, Cap 106 (the “Ordinance”), and unless exempted otherwise from licensing thereunder, no person shall in Hong Kong establish, operate or maintain any means of telecommunications. Pursuant to section 7(5) of the Ordinance, the Telecommunications Authority (“TA”) is empowered to issue telecommunications licences other than exclusive licences. Interested parties may submit applications for telecommunications licences to the TA, who will determine each application and exercise his discretion as to whether to grant the licence to the applicant, taking into account the circumstances of each case.

2. To assist interested parties in formulating their applications for telecommunications licences, the TA has published a number of guidelines<sup>1</sup> under section 6D(2)(a) of the Ordinance, setting out the licensing criteria and other relevant matters he would take into account when considering applications for various telecommunications licences. The guidelines are reviewed and updated from time to time in light of the rapidly changing technological, market and regulatory environment.

3. In this regard, this consultation paper is issued to solicit the views and comments of the industry on the TA’s proposal to include, as one of the licensing criteria for his consideration and determination of grant of telecommunications licences, a “fit and proper person” criterion.

4. For the avoidance of doubt, all the views expressed in this consultation paper are for the purpose of discussion and consultation only. Nothing in this consultation paper represents or constitutes any decision made by the TA and the consultation contemplated by this consultation paper is without prejudice to the

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<sup>1</sup> Please refer to [http://www.ofta.gov.hk/en/legislation/guideline\\_6d\\_2a/main.html](http://www.ofta.gov.hk/en/legislation/guideline_6d_2a/main.html).

exercise of the TA's power under the Ordinance or any subsidiary legislation made thereunder.

### **Guidelines for Licence Applications and Licensing Criteria**

5. The guidelines issued by the TA under section 6D(2)(a) of the Ordinance thus far have set out inter-alia the broad licensing criteria that he would take into account when considering a licence application. Depending on the scope and nature of the telecommunications service which may be authorised under individual type of licence, the licensing criteria may differ. For licences authorising holders to provide public telecommunications services, notably the unified carrier licence ("UCL")<sup>2</sup> and the services-based operator ("SBO") licence<sup>3</sup>, at the moment the licensing criteria generally include the following –

- (a) the proposed telecommunications services to be operated;
- (b) the applicant's business plan, planned investment and financial capability to fund the investment and operation;
- (c) the applicant's managerial and technical expertise and his relevant experience in operating telecommunications networks, systems and services; and
- (d) the benefits that the granting of licence to the applicant will bring to the telecommunications industry and the community.

The licensing criteria set out in the guidelines are not definitive or exhaustive. The TA may take into account other factors which he considers appropriate in the specific circumstance in exercising his discretion whether to grant a licence to the applicant<sup>4</sup>.

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<sup>2</sup> Holders of UCL are facility-based operators who establish their telecommunications networks, which may cross unleased Government land and public streets, for the provision of public telecommunications services.

<sup>3</sup> Holders of SBO licence are service-based operators who rely on the networks established by the facility-based operators for provision of their own telecommunications services.

<sup>4</sup> Pursuant to section 6D(2)(a) of the Ordinance, the TA may issue guidelines which may include the licensing criteria and other relevant matters he proposes to consider.

## **Including a “Fit and Proper Person” Criterion as One of the Licensing Criteria**

6. “Fit and proper person” is a criterion commonly used in the regulated sectors (e.g. banking, financial services, insurance, real estate agency and travel agency) for the licensing or registration of individual persons or corporations, with the aim of ensuring that only persons of integrity and credibility may operate or practise in the regulated industries. In Hong Kong for example, the authorities administering the ordinances listed in the Annex apply the “fit and proper person” test for assessing applications for licence or registration under the respective ordinances.

7. With the advent of the information age, telecommunications networks are increasingly becoming the critical infrastructures of our society. Whether established by wireline or wireless technology, telecommunications networks are relied upon for the transmission of messages, delivery of contents and support of applications not only to satisfy the communications needs of the public, but also to ensure the normal transactions of the day-to-day business activities and the proper functioning of essential public services. They are essential for the well-being of our society and are one of the key ingredients for social and economic growth.

8. The law enforcement agencies have been working hand-in-hand with telecommunications network operators in maintaining the law and order of the society. Therefore, the integrity and competence of these operators is of paramount importance to protect the sensitive information they encounter in the process. Given the important role played by the telecommunications network operators, any unlawful management or use of telecommunications networks would have adverse impact on and be detrimental to the interest of our society as a whole. In this regard, the TA proposes to include a “fit and proper person” criterion as one of the criteria that he will take into account when considering applications for the relevant licences.

9. The consideration under the Ordinance of whether an operator is a fit and proper person is not a novel concept. In the auction of radio spectrum conducted under the Ordinance, the TA may disqualify a bidder from participating in the auction if he is of the opinion that the bidder is not a “fit and proper” person to hold the relevant licence<sup>5</sup>. Also, to enhance the transparency of the licensing criteria governing the grant of sound broadcasting licences under Part IIIA of the Ordinance, the Government piloted legislative amendments which were passed by the Legislative

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<sup>5</sup> An example of this requirement can be found in paragraph 7.2.1 of Annex B (“Gazette Notice of Terms and Conditions of the Auction (including the Form of the Licence)”) of the Information Memorandum for the Auction of Radio Spectrum in the 2.3 GHz Band for the Provision of Broadband Wireless Access Services issued on 11 November 2011.

Council in January 2010, to *inter-alia* introduce the concept of “fit and proper person”<sup>6</sup> as one of the factors to be considered for granting of a sound broadcasting licence.

10. For the avoidance of doubt, when the TA exercises his discretion on whether to grant any particular licence, he will have regard to all relevant considerations in each individual case, including the “fit and proper person” criterion and such other criteria as specified in the licensing guidelines.

***Question 1: Do you have any views on the inclusion of a “fit and proper person” criterion as one of the criteria for the licensing of public telecommunications networks in Hong Kong?***

11. In line with the principle of transparency that he has adhered to all along, the TA would like to set out below for consultation with the industry (a) the proposed factors that he will consider in applying this new licensing criterion of “fit and proper person”, and (b) the category of licences that will be subject to the new licensing criterion.

### **Assessment of Whether a Person is “Fit and Proper”**

12. To assess whether the applicant for a public telecommunications licence is “fit and proper”, the TA proposes to model on the arrangements that have been adopted for sound broadcasting licences, as stipulated in section 13C of the Ordinance. Under section 13C(4), in exercising the discretion whether to grant a sound broadcasting licence, the Chief Executive in Council must have regard to, *inter alia*, whether ***the applicant*** and ***all persons exercising control of the applicant*** (emphasis added) are fit and proper persons.

13. In assessing whether the applicant, and all persons exercising control of the applicant, are fit and proper persons for the purpose of granting a telecommunications licence, the TA proposes to take into account the following -

- (a) the business record of the person;
- (b) the record of the person in situations requiring trust and candour;

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<sup>6</sup> Section 13C(4)(a) in Part IIIA of the Ordinance.

- (c) the criminal record in Hong Kong of the person in respect of offences under the laws of Hong Kong involving bribery, false accounting, corruption or dishonesty; and
- (d) the criminal record in places outside Hong Kong of the person in respect of conduct that, if done in Hong Kong, would constitute or form part of the criminal record in Hong Kong of the person as mentioned in paragraph (c).

The above is a direct transplant from section 13C(5) of the Ordinance.

14. As regards the consideration of whether a person is “exercising control” of an applicant, drawing reference from the corresponding provisions set out in section 13A of the Ordinance for sound broadcasting licence, the TA proposes to take into account whether the person -

- (a) holds office in that applicant company or corporation; or
- (b) is the beneficial owner of more than 15% of the voting shares in that applicant company or corporation.

The above is modelled on section 13A(2) of the Ordinance.

***Question 2: Do you have any views on the factors proposed above for assessing the “fit and proper person” criterion in the TA’s consideration of licensing of public telecommunications networks in Hong Kong?***

### **Applicability of the New Licensing Criterion**

15. Having regard to the considerations for introducing the “fit and proper person” criterion in paragraphs 6 to 10 above and the resource requirement in processing licence applications, the TA considers that the new licensing criterion should be applicable only to facility-based operators running local fixed or local mobile telecommunications networks in Hong Kong. This is so as the networks and operations of these operators are much more extensive in scope, and they are granted with rights for the establishment, maintenance and operation of networks on a

territory-wide basis in Hong Kong<sup>7</sup>.

16. With the implementation of the UCL regime since August 2008, facility-based operators providing local fixed or local mobile telecommunications services are licensed under the UCL<sup>8</sup>. The TA therefore proposes that the “fit and proper person” criterion should be included as one of the licensing criteria for the granting of UCL for the provision of local fixed or local mobile telecommunications network services only. The TA further proposes to apply the “fit and proper person” criterion only for assessing *new applications* for the relevant licence, or applications for issue of a new UCL in replacement of an existing carrier licence<sup>9</sup> due to the expiry of the licence or other reasons<sup>10</sup>.

***Question 3: Do you have any views on the proposal to apply the “fit and proper person” criterion as one of the licensing criteria for assessing new applications, and licence replacement applications upon expiry, for the operation of local fixed or local mobile telecommunications networks?***

### **Invitation for Comments**

17. The TA would like to invite views and comments from the industry on the issues raised above. All views and comments should be made in writing and should reach the Office of the Telecommunications Authority, preferably in electronic form, on or before **16 April 2012**. The TA reserves the right to publish all views and comments as well as the identity of the source. Accordingly, any part of a submission that is considered commercially confidential should be clearly marked. Submission should be addressed to –

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<sup>7</sup> These rights include, among others, the right to lay telecommunications lines across unleased government lands, the right to access private premises to lay telecommunications lines and install equipment, and the right to use radio spectrum and the right to open up roads.

<sup>8</sup> The implementation of the UCL regime does not affect the validity of existing fixed telecommunications network service (“FTNS”) licences, fixed carrier licences (“FCLs”) and mobile carrier licences (“MCLs”) for the provision of local fixed / local mobile telecommunications services. Licensees may continue to operate under these licences or voluntarily apply for converting or replacing their licences with UCLs before expiry.

<sup>9</sup> As defined under section 2 of the Ordinance.

<sup>10</sup> For example, under the existing licensing framework for UCL, a carrier licensee may apply for a new UCL for conversion of its carrier licence prior to licence expiry due to changes in its scope of service. Reference could be made to the “Guidelines for the Submission of Proposals for Applying Unified Carrier Licence” issued by the TA ([http://www.ofta.gov.hk/en/report-paper-guide/guidance-notes/gn\\_201122.pdf](http://www.ofta.gov.hk/en/report-paper-guide/guidance-notes/gn_201122.pdf)).

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**Office of the Telecommunications Authority**  
**15 March 2012**

**Examples in the Laws of Hong Kong which have Provisions  
Concerning the “Fit and Proper Person” Criterion**

1. Section 6C of the Betting Duty Ordinance (Cap. 108)
2. Section 12 of the Travel Agents Ordinance (Cap. 218)
3. Sections 19 & 20 of the Estates Agents Ordinance (Cap. 511)
4. Section 21 of the Electronics Transaction Ordinance (Cap. 553)
5. Sections 6, 19 & 24 of the Entertainment Special Effect Ordinance (Cap. 560)
6. Section 129 of the Securities and Futures Ordinance (Cap. 571)
7. Section 5 of the Buildings Energy Efficiency (Registered Energy Assessors) Regulation (Cap. 610B)
8. Sections 8, 11, 13A, 13B, 14, 37, 41, 69 & 70 of the Insurance Companies Ordinance (Cap. 41)
9. Sections 58A, 70, 70A, 71 & 71C, Banking Ordinance (Cap. 155)
10. Section 13C of the Telecommunications Ordinance (Cap. 106)
11. Section 21 of the Broadcasting Ordinance (Cap. 562)