

**Consultation Paper “Arrangements for the Frequency Spectrum in the 1.9 – 2.2 GHz
Band upon Expiry of the Existing Frequency Assignments for 3G Mobile Services”
 (“CP”)**

Supplementary Submission

Introduction

We refer to the “Supplemental Submissions” made by China Mobile Hong Kong Company Limited (“CM”) and published by OFCA in early August 2012 and the “Supplementary Submission” made by Hong Kong Telecommunications (HKT) Limited (“HKT”) published by OFCA on or about 20 August 2012.

Please find enclosed our supplemental submission for your consideration.

Before we give our views on submissions of each of HKT and CM, we would like to state several principles that we hope the regulator and the public will acknowledge.

- 1) Hutchison Telecommunications Hong Kong Holdings Limited (“HTHKH”) welcomes competition. Hong Kong’s telecommunications industry, as the regulator and other government officials have frequently said, is amongst the most competitive in the world. Additional players in the industry are welcome and could be introduced with other available spectrum.
- 2) Current spectrum is just sufficient for current customers based on usage, and will be very tight should mobile broadband usage continue to increase at the current rate.
- 3) Even if an operator repurchases spectrum at a much higher price, the increased cost and debt incurred will be adverse to the operators’ competitiveness.
- 4) Options 2 and 3 will undoubtedly make the current 3G operators less competitive, thereby diminishing the industry’s competitiveness.
- 5) Options 2 and 3 will relegate some 3G operators to the sidelines and will force the customers to migrate to LTE or more expensive platform, both will limit the customers’ choice of telecom operators and services.

Nothing in CM’s submissions alters the views we expressed in our submission dated 12 July in response to the CP. In particular, nothing alters the fact that Option 1 in the CP is the only one which satisfies the CP’s stated decision-making criteria, the statutory duties of the Communications Authority (“CA”), and the duties of the CA and Government under administrative law.

Before refuting CM’s arguments on these issues, we start by demonstrating briefly that two additional arguments that CM has made are manifestly irrelevant or have no substance, namely that Option 2 should be preferred because it is “fair”, and because it would maximise the amount of revenue for the Government.

“Fairness”

“Fairness” has not been stated in the CP as a relevant criterion in deciding which of the three options is chosen, and rightly so. “Fairness” is an inherently subjective notion: what one person may believe to be fair, another person may believe to be unfair. It begs the question “fair to whom”? CM believes that Option 2 is the fairest option, because it would be fair to it.

However, if fairness were to be a relevant criterion (which it clearly should not), it would be extremely unfair to the Hong Kong public (whose interests should prevail) to cause them disruption, increase their communication costs and jeopardise the continuous innovation and competition they have enjoyed, as well as to the 3G operators which have provided them with those benefits, by failing to renew the existing licences under Option 1.

Maximising Revenue

Maximising revenue is not stated in the CP as a relevant criterion in deciding which option to adopt, and rightly so. Such a criterion would imply that the public prefers to extract resources from the 3G operators which would otherwise continue to be deployed to their benefit in the form of new, innovative, and cheaper services. This would be illogical, and without any factual foundation. There is empirical evidence going back several years as to how the Hong Kong public wishes the 3G operators' resources to be used, not least a mobile penetration rate of at least 210%, according to the Government's own figures.

Moreover, international precedent supports our view. In the EU, for example, extracting revenue is not necessarily a relevant factor:

“...under the EU regulatory framework, Member States may assign such spectrum on the basis of criteria other than the maximisation of income from spectrum fees. Member States may assign spectrum also on the basis of qualitative criteria and thus waive financial revenues, as it were, in exchange for other policy objectives such as cheaper retail tariffs, better geographical coverage, more advanced services etc. This might result in economic externalities and social benefits that are not reflected in the amounts collected in the form of spectrum fees.”¹

The Government and CA's Decision-making Criteria

(a) Continuity of Service

We explained at length in our first submission why and how customer service would be severely disrupted if either Option 2 or Option 3 was chosen. The CP itself acknowledges that this is the case. CM's only argument under this head is that there is no guarantee that the 3G operators would renew their licences even if Option 1 was chosen, and if they do not, services would be disrupted.

Clearly there is no rational basis to believe that the theoretical risk of customer disruption from this hypothetical scenario is greater than the actual disruption which would arise if the real risk of a 3G operator losing spectrum in an auction process materialised. CM cannot be seriously suggesting that the 3G operators would not wish to renew their licences on fair and reasonable terms.

CM also grossly understates the cost, and damage and disruption to consumers and the incumbent 3G operators which would be caused if spectrum was removed from them under Option 2 and 3. CM in its submission loosely made statements like “operators should have foreseen ... the possible consequences”, “spectrum expiry is not new”, “offloading of traffic

¹ Hocepić and Held “The Assignment of Spectrum and the EU State Aid Rules” EU Competition Policy Newsletter 2011-3.

to other spectrum”, etc. Such statements of CM are made without meaningful or material evidence. As evidenced by the number of leading scientists and engineers around the world working in 3G and 4G businesses, the establishment and operation of 3G and 4G networks are very complex businesses. Unlike CM, we have in the first submission explained the substantial costs, damage and disruption to consumers and the telecommunications sector, supported by sound evidence and international experts and authorities, which would be caused by adopting Options 2 or 3.

Unlike CM, advanced economies like Australia, Canada, the United States have made very substantial and detailed surveys and analyses before deciding on the presumption of licence renewal, which is essentially Option 1. Likewise, after carrying out similar work, world organisations and experts like GSMA recommend a presumption of licence renewal. By loosely putting together a submission of six and half pages without meaningful or material evidence in support of its statements, the CM seeks to cause the Government to concede to its position, against the global trend of presumption of licence renewal.

Consumers would have a legitimate concern that CM appears to be seeking to cause the Government to support its interests, without putting forward meaningful or material evidence in support of its statements.

(b) Investment and Innovation

The CP itself recognises that Option 1 is clearly the favoured option under this criterion. As stated in our initial submission and re-iterated below, the CA’s duties under the Communications Authority Ordinance (which it is reasonable to presume the Government supports) include “the encouragement of innovation and investment in the communications market.” To decide consciously against the option which the Government and CA themselves acknowledge best serves this objective would be irrational. CM’s argument to the contrary – that there is no guarantee the operators will continue to invest and innovate if Option 1 is chosen – misses the point. The relevant issue is whether, based on experience of how the Hong Kong market as it has developed over a period of several years, Option 1 is more or less likely than the other options to allow investment and innovation to continue uninterrupted. The CP answers that question already – Option 1 is clearly the only one which does so.

(c) Efficiency

CM merely selectively re-iterates statements from the CP which favour its case, namely that greater spectrum efficiency may be possible through an auction process, and that paying a high price for spectrum will mean that operators would put the spectrum to the most productive uses. We pointed out in our initial submission the flaws in these points. First, they contradict the (correct) view in the CP that the keen competition which exists in Hong Kong drives the efficient use of spectrum. Secondly, a high price for spectrum does not necessarily mean spectrum will be efficiently used: keen competition supplemented by spectrum trading are the best guarantees of efficiency. If the Government and CA are serious about efficiency, they should introduce spectrum trading without further delay.

After merely referring to “re-farming technology” and “the trend of migrating services and customers to 4G spectrum” but without putting forward evidence in support of their relevance, CM questions the necessity of the incumbent 3G operators keeping 15MHz x 2. Unlike CM,

we put forward in the first submission detailed arguments that substantial damages and costs to consumers, the telecommunications industry and Hong Kong would occur under Option 2 or 3, not simply a possibility or a “doubt” put forward by CM. The arguments are supported by sound evidence relating to technology, network operation, commercial facts, international authorities, experts and organisations (like 3rd Generation Partnership Project).

Re-farming technology as put forward by CM would have no material effect on the critical importance of Option 1 to each of consumers, the telecommunications industry and Hong Kong as re-farming technology has severe limitations and restrictions (including those relating to commercial availability of infrastructure and terminal equipment) and the inevitable fact that the relevant frequency spectrum will be further heavily utilised. ITU in 2005 hugely underestimated the 2010 mobile data traffic by seven times. Therefore, renewing the 3G spectrum licences of the incumbent operators under Option 1, as opposed to relying on the restricted re-farming technology, will be critical.

If there is such a trend of migrating services and customers to 4G spectrum, it must be the free choice of consumers- they must not be compelled to do so against their wishes as a result of the self interest of CM or a decision by the Government to support CM. As put forward in our first submission and supported by sound evidence, under Option 2 or 3, consumers will also suffer from higher prices, lesser choice, lesser innovative and advanced service.

(d) Competition

We note that CM does not dispute the CP’s findings that the market in Hong Kong is already highly competitive, and offers no arguments or evidence that the market would be more competitive if a new player was introduced. CM’s assertion that “new entrants will bring [customers] more quality and innovative services” is just that – mere assertion. The evidence points to the opposite, and as the CP itself already states, investment and innovation will actually suffer if Option 1 is not chosen.

Compliance with the CA’s Statutory Duties

The option which is chosen to allocate the spectrum must be the one which complies with the CA’s duties under the Communications Authority Ordinance. Even if it is the Government, and not the CA, which ultimately decides how the spectrum will be allocated, it is reasonable to presume that the Government will act in a way which is consistent with the CA’s statutory duties. It is our contention, and one supported by the statements in the CP itself, that Option 1 is clearly the option which best satisfies the objectives of:

- (a) the fostering of an environment that supports a vibrant communications sector to enhance Hong Kong’s position as a communications hub in the region;
- (b) the encouragement of innovation and investment in the communications market;
- (c) the promotion of competition and adoption of best practices in the communications market for the benefit of the industry and consumers; and
- (d) acting in a manner consistent with the provisions of the Hong Kong Bill of Rights Ordinance.

Compliance with Administrative Law

We have explained in our initial submission why a decision to proceed with an auction, as opposed to renewal under Option 1, would breach the 3G operators' legitimate expectations. CM's submission contains nothing to refute our views. The mere fact that the licences are due to expire in 2016, or that the Government has said there is no legitimate expectation, does not alter the fact that the 3G operators have a legitimate expectation based on previous policy decisions on licence renewal.

In addition, given the statements in the CP itself, the CA's statutory duties, and the other arguments in our submission (including the reference to international opinion), a decision not to proceed with Option 1 in our view would be irrational. It would also inevitably call into question the even-handedness of the decision-making process, and indicate that the decision was influenced by considerations which are, and should be, irrelevant. As such it would be challengeable as a matter of administrative law.

Hutchison Telephone Company Limited

14 September 2012