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Legislative Council

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Report of the Panel on Constitutional Affairs

"Negative vetting procedure" of subsidiary legislation

Purpose

This paper reports on the deliberations and recommendation of the Panel on Constitutional Affairs on the existing arrangement for scrutiny of subsidiary legislation under the "negative vetting procedure".

Introduction

2. In considering the Securities (Margin Financing) (Amendment) Bill 1999, members of the relevant Bills Committee expressed concern about the little time available for the scrutiny of subsidiary legislation under the "negative vetting procedure". The Bills Committee agreed to refer the matter to the Panel on Constitutional Affairs for follow-up.

Background

3. The Legislative Council (LegCo) has delegated the power to make subsidiary legislation under various ordinances to bodies including the Chief Executive-in-Council, Bureau Secretaries, heads of departments, statutory bodies and corporations (e.g. the Securities and Futures Commission and the Mass Transit Railway Corporation). As defined in the Interpretation and General Clauses Ordinance (Cap. 1), subsidiary legislation means any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect. Subsidiary legislation made is subject to the vetting and amendment of LegCo by way of either of the following procedures :

- (a) Positive vetting procedure - under section 35 of Cap. 1, where an ordinance provides that subsidiary legislation made under the

ordinance shall be subject to the approval of LegCo or contains words to the like effect, subsidiary legislation made by a body with delegated power is required to be submitted for the approval of LegCo. The approval is by way of a resolution and LegCo may also by resolution amend the whole or any part of the subsidiary legislation. After approval the subsidiary legislation is published in the Gazette.

- (b) Negative vetting procedure - subsidiary legislation not subject to the positive vetting procedure in (a) above is required to be published in the Gazette and laid on the table of LegCo. Under section 34 of Cap. 1, LegCo may amend (including repeal) such subsidiary legislation by a resolution passed at a meeting held not later than 28 days after the meeting at which the subsidiary legislation was laid. The section also provides that the LegCo may by resolution extend the amendment period to the next meeting.

4. While it is legally in order for subsidiary legislation under the "negative vetting procedure" to take effect upon gazettal, the Administration has made it a practice to, as far as possible, set the commencement date of the particular subsidiary legislation to be at least 28 days plus one LegCo meeting after its tabling in LegCo if the subsidiary legislation involves revision of fees and charges.

Deliberations and recommendation of the Panel

5. The Panel has taken up the matter with the Administration. The deliberations and recommendation of the Panel are set out in the following paragraphs.

The Administration's views

Negative vetting procedure

6. The Administration has explained to the Panel that the main reasons why subsidiary legislation has become a normal feature of law-making are pressure on the legislature's time and the technical character of such subsidiary legislation. Having regard to the objectives of the "negative vetting arrangement" and the volume of such subsidiary legislation, the Administration is conscious of the fact that changes, if any, to the procedure should not generate unnecessary workload or distract Members from other more important legislative functions.

7. The Administration points out that for subsidiary legislation which is very technical and/or controversial or have significant impact on the parties affected, a mechanism is already in place whereby Members may repeal the item of subsidiary legislation in question pro temp to allow more time for scrutiny. The

Administration will table it again after Members have thoroughly examined its provisions.

Experience in the first term LegCo

8. The Administration has drawn members' attention to the fact that 322 and 302 pieces of subsidiary legislation were tabled in LegCo for negative vetting in 1998/99 and 1999/2000 legislative sessions respectively. A total of 17 motions covering 38 pieces of subsidiary legislation were moved to extend the scrutiny period. Of these 38 pieces of subsidiary legislation, no action was taken by the Council on 31 items. Amendments to four items were moved and carried while the remaining three items were repealed.

9. The Administration has further explained that an analysis of the three pieces of subsidiary legislation repealed by LegCo has revealed that two of them were repealed because LegCo did not have sufficient time for scrutiny, even after the scrutiny period had been extended by one meeting pursuant to section 34(4), Cap. 1. The third piece of subsidiary legislation was repealed because Members did not agree to the implementation details proposed in it. It was the merits of the subject matter rather than the need for more time for consideration that was at issue.

10. The Administration is of the view that experience in the first term of LegCo, and in the pre-1997 LegCo, has indicated that the existing "negative vetting procedure" has worked reasonably well. The 28-day scrutiny period can be seen to be operating effectively and the "extended by one-meeting" provision also seems to be able to cater for ad hoc needs in most circumstances.

The Panel's considerations

11. In considering the matter, the Panel has taken into account the changes made over the years to section 34 of Cap. 1. Members note that prior to the enactment of the Interpretation and General Clauses (Amendment) (No. 2) Ordinance (Ordinance No. 89 of 1993), section 34 provided that the 28-day scrutiny period could be extended *by a further period not exceeding 21 days*. In the course of scrutinizing the Amendment Bill in 1993, the then Legal Unit of the former LegCo pointed out that because of the timing of some mid-session breaks (particularly Christmas and New Year), the 21-day extension period could be rendered meaningless, e.g. if there was no Council meeting on the 21st day of the extended period. The then Legal Unit recommended that the provision should be amended to provide that if there was no meeting on the date of expiry of the extended period, that period should be deemed to be further extended to the meeting next following the 21-day period. After consideration, the provision was subsequently amended to its present form, i.e. replacing "by a further period not exceeding 21 days" with "to the next sitting".

12. The Panel agrees that there should be a mechanism to allow Members more time, where necessary, for scrutinizing subsidiary legislation which is complicated and/or lengthy or has significant impact on the parties concerned. In considering whether the existing "extended by one-LegCo meeting" provision should be modified, the Panel considers that a number of factors should be taken into account. These include the possibility that the 28-day scrutiny period could be "eroded" by holiday breaks, the requirement for giving notice to amend subsidiary legislation, and the need for subcommittees formed to study subsidiary legislation to report its deliberations to the House Committee before expiry of the deadline for giving notice of motion to amend the subsidiary legislation.

13. Having regard to the concern expressed by members of the Bills Committee on the Securities (Margin Financing) (Amendment) Bill 1999, the Panel requests the Administration and the Legal Adviser to LegCo to explore ways on how the existing "extended by one-LegCo meeting" provision under section 34(4) of Cap. 1 might be modified.

Options

14. The following options have been put forward by the Administration and the Legal Adviser to LegCo for members' consideration -

Option A - To modify the "extension period" from the existing "one LegCo meeting" to "one LegCo meeting or 21 days whichever is the later"

This option is proposed by the Administration. Prior to 1993, LegCo could extend the 28-day scrutiny period by a further period not exceeding 21 days. The Administration considers that this option is an improvement over both the existing arrangement and the pre-1993 arrangement.

Option B - To modify the "extension period" from the existing "one LegCo meeting" to "two LegCo meetings"

This option is also proposed by the Administration. Under normal circumstances, the 28-day scrutiny period will be extended by two LegCo meetings.

Option C - To modify the "extension period" from the existing "one LegCo meeting" to "21 days and, if there is no meeting on the day of expiry of these 21 days, the vetting period is deemed to be extended to the meeting next following the 21-day period"

This option is proposed by the Legal Adviser to LegCo. Members note that this is the proposal made by the then Legal

Unit in 1993. Under this option, the scrutiny period is proposed to be 28 days plus a 21-day extension, but if there is no Council meeting at the expiry of the 21-day period, then the extension would be deemed to be further extended to the Council meeting next following the 21-day period.

Recommendation of the Panel

15. Taking into account the fact that the longest break the Council has in this legislative session is two weeks, four examples have been worked out to illustrate the "extension period" under the existing arrangement vis-à-vis those under the three Options (**Appendix**). The Panel notes that each of the three Options discussed in paragraph 14 above could provide a longer period of scrutiny than the existing arrangement, depending on the timing of the LegCo breaks. Under normal circumstances (i.e. LegCo meets every Wednesday), the effect of Options A and C is the same in that both Options provide a longer scrutiny period than that under the existing arrangement (**Example 1**). In the case where there is a long holiday break such as the Christmas and New Year break in the period immediately following the 28-day scrutiny period, either Option B or C will provide a longer period for scrutiny depending on the timing of the two weeks break (**Examples 2 - 4**).

16. After consideration, the Panel is in support of Option C which will ensure that the "extension period" will not be "eroded" by holiday breaks coming in towards the end of the 21-day period (**Example 4**).

17. The Administration is initially of the view that Option A is the most appropriate as it could strike a balance between the need to enable Members to have more time, where necessary, for the scrutiny of subsidiary legislation which is complicated and/or lengthy, and the need to ensure that the scrutiny of simple and straightforward subsidiary legislation would be completed in an expeditious manner. Having reconsidered the matter in the light of the Panel's view, the Administration has agreed to accept the Panel's recommendation and to make arrangements for amendments to the relevant provisions of section 34 of Cap. 1 to give effect to the revised extension period.

18. The Panel has also examined the situation of subsidiary legislation tabled in LegCo towards the end of a LegCo session. Members note that under section 34(3) of Cap. 1, the 28-day scrutiny period will be automatically extended to the second meeting of LegCo in the next session if the period expires after the last meeting before the end of a session or dissolution of LegCo. This arrangement will not be affected by any option implemented to revise the "extension period".

Advice sought

19. Members are invited to note the deliberations and recommendation of the Panel.

Council Business Division 2
Legislative Council Secretariat
17 April 2001

Appendix

Example 1

	Subsidiary legislation tabled at Council meeting on 1 November 2000	
1 st week	Council meeting on 8 November 2000	 <p>28 days' scrutiny period expires on 29 November 2000</p>
2 nd week	Council meeting on 15 November 2000	
3 rd week	Council meeting on 22 November 2000	
4 th week	Council meeting on 29 November 2000	
5 th week	Council meeting on 6 December 2000	Under existing arrangement , deadline for amendment on 6 December 2000
6 th week	Council meeting on 13 December 2000	Under Option B , deadline for amendment on 13 December 2000
7 th week	Council meeting on 20 December 2000	Under Options A and C , deadline for amendment on 20 December 2000

Example 2

	Subsidiary legislation tabled at Council meeting on 22 November 2000	
1 st week	Council meeting on 29 November 2000	 <p>28 days' scrutiny period expires on 20 December 2000</p>
2 nd week	Council meeting on 6 December 2000	
3 rd week	Council meeting on 13 December 2000	
4 th week	Council meeting on 20 December 2000	
5 th week	No Council meeting on 27 December 2000)))) Christmas and New Year
6 th week	No Council meeting on 3 January 2001))) break
7 th week	Council meeting on 10 January 2001	Under existing arrangement, Options A and C , deadline for amendment on 10 January 2001
8 th week	Council meeting on 17 January 2001	Under Option B , deadline for amendment on 17 January 2001

Example 3

	Subsidiary legislation tabled at Council meeting on 15 November 2000	
1 st week	Council meeting on 22 November 2000	 <p>28 days' scrutiny period expires on 13 December 2000</p>
2 nd week	Council meeting on 29 November 2000	
3 rd week	Council meeting on 6 December 2000	
4 th week	Council meeting on 13 December 2000	
5 th week	Council meeting on 20 December 2000	Under existing arrangement and Option A , deadline for amendment on 20 December 2000
6 th week	No Council meeting on 27 December 2000))) Christmas and New Year) break
7 th week	No Council meeting on 3 January 2001)))
8 th week	Council meeting on 10 January 2001	Under Options B and C , deadline for amendment on 10 January 2001

Example 4

	Subsidiary legislation tabled at Council meeting on 8 November 2000	
1 st week	Council meeting on 15 November 2000	 <p>28 days' scrutiny period expires on 6 December 2000</p>
2 nd week	Council meeting on 22 November 2000	
3 rd week	Council meeting on 29 November 2000	
4 th week	Council meeting on 6 December 2000	
5 th week	Council meeting on 13 December 2000	Under existing arrangement , deadline for amendment on 13 December 2000
6 th week	Council meeting on 20 December 2000	Under Options A and B , deadline for amendment on 20 December 2000
7 th week	No Council meeting on 27 December 2000)))) Christmas and New Year
8 th week	No Council meeting on 3 January 2001))) break
9 th week	Council meeting on 10 January 2001	Under Option C , deadline for amendment on 10 January 2001