

**立法會**  
***Legislative Council***

LC Paper No. LS121/00-01

**Paper for the Panel on Financial Affairs**  
**Legal Adviser's comments on legal advice**  
**on issues related to the purchase of permanent office accommodation**  
**received by Chief Executive of Hong Kong Monetary Authority**  
**and provided to the Panel**

Legal Adviser (LA) has studied the papers provided by Hong Kong Monetary Authority (HKMA) very carefully and is of the view that sufficient regard has not been given to the importance of the interaction between the Basic Law and the Exchange Fund Ordinance (Cap. 66) (EFO) when concluding that section 6(a) of the EFO could be relied on to justify charging to the Exchange Fund the expenditure for the purchase of a multi-billion dollar permanent office accommodation for HKMA.

2. Attached to this paper is a table setting out detailed comments on the legal advice provided by the General Counsel of HKMA (GC) to Chief Executive, HKMA dated 18 May 2001 which has incorporated points contained in GC's advice dated 9 and 27 April 2001.

3. Some of the more important points in LA's comments are summarized below (numbers appearing at the end of subparagraphs are reference numbers in the attached table where details are set out)-

- a) Legislative Council's constitutional power and function to approve public expenditure is a fundamental constitutional principle enshrined in the Basic Law. Proper recognition and faithful application of this principle is pivotal to maintaining the balance of the governance of Hong Kong Special Administrative Region (HKSAR) intended by the Basic Law. (Ref. Nos. 2 and 4)

- b) The purposes of Article 113 of the Basic Law are for-
  - i) reflecting one of the general principles of the Joint Declaration that the HKSAR shall have independent finances;
  - ii) making clear that the Exchange Fund should exclusively belong to the HKSAR and shall not be incorporated into the foreign exchange treasury of the Central People's Government;
  - iii) restricting the purpose of use of the Exchange Fund; and
  - iv) defining the responsibility and power of the Government in respect of the management and control of the Fund. (Ref. Nos. 8 to 15)
- c) There is no question of whether Article 113 of the Basic Law should prevail over Article 73(3) of the Basic Law because they respectively relate to different contexts in the Basic Law. (Ref. Nos. 16 and 17)
- d) If the use of the Exchange Fund is for the purpose specified in Article 113 of the Basic Law and within the ambit of what is allowed under the EFO, there will be no question of such use being subject to the approval of the Legislative Council. (Ref. Nos. 13 to 15, 18 to 20)
- e) A purely textual interpretation of section 6(a) of the EFO is not appropriate in the light of the common law principle that unless contrary intention appears, an enactment by implication imports any principle or rule of constitutional law which is relevant to the operation of the enactment. The interpretation arrived at by this inappropriate approach would effectively result in giving an uncontrolled power to the FS in the use of the Exchange Fund and nullifying Legislative Council's constitutional function of approving public expenditure. (Ref. Nos. 23 to 30)

- f) That part of the speech of the then Secretary for Monetary Affairs made at the Second Reading debate of the Exchange Fund (Amendment) Bill 1992 and referred to by GC should be understood in the overall context of the speech. Firstly, the "Authority" referred to in the statement quoted was HKMA. It was, and still is, a government department. It was not referring to Monetary Authority; the public officer appointed under section 5 of the EFO. Secondly, the reference to "taking the Authority outside the resource allocation constraints" should be read in the context of what is authorized under the law, and the scope and policy of section 6(a) of the EFO. (Ref. Nos. 23 to 30)
  
- g) According to the speech referred to above, the policy objective of section 6(a) of the EFO is to facilitate the attraction and retention of high calibre staff with the right experience and expertise. Section 6(a) was last amended in 1983, before the creation of Monetary Authority. The amendment was to recast the wording in section 6(a) which charges to the Exchange Fund the cost of the emoluments and expenses of the persons employed in managing the Exchange Fund. Section 6(a) has never been intended to enable the FS to charge to the Exchange Fund the expenditure for purchasing permanent office accommodation for HKMA, which is a government department. (Ref. Nos. 23 to 30)

4. In Legal Adviser's view, the key issue of whether expenditure for the purchase of permanent office accommodation for Hong Kong Monetary Authority is public expenditure and therefore is subject to the approval of the Legislative Council has not been adequately addressed.

MA Yiu-tim, Jimmy  
Legal Adviser  
Legislative Council Secretariat  
11 June 2001

Encl.



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Ref No.	Advice of General Counsel of HKMA	Comments by Legal Adviser of LegCo
2.	<p><b><u>Introduction</u></b></p> <p>The Legal Adviser states that,</p> <p><i>“... to seek to include within the meaning of “staff costs” the purchase of a multi-billion dollar permanent office accommodation raises the issue of whether such an interpretation is in contravention of the Basic Law since it effectively nullifies the Legislative Council’s constitutional function of approving public expenditure under Article 73(3).”<sup>1</sup></i></p> <p>He also says,</p> <p><i>“... against the constitutional requirement that public expenditure has to be approved by the Legislative Council under the Basic Law and the fact that the use of the Exchange Fund to purchase office accommodation for a government department is no doubt public expenditure, the reliance on section 6(a) to justify charging that expenditure to the Exchange Fund would need very strong and compelling arguments. To simply argue that “staff costs” means staff-related costs and therefore covers the cost of accommodating staff may not be conclusive.”<sup>2</sup></i></p> <p>The Legal Adviser is not advising that the Financial Secretary’s</p>	<p>It is quite clear from the two passages quoted in the General Counsel's advice that the Legal Adviser was of the view that the arguments advanced by the General Counsel (GC) to justify his interpretation of "staff costs" in section 6(a) of the Exchange Fund Ordinance (EFO) were not convincing.</p> <p>If GC's interpretation of "staff costs" in section 6(a) of the EFO was a correct one, it would effectively result in giving an uncontrolled power to the FS in the use of the Exchange Fund and nullifying Legislative Council's constitutional function of approving public expenditure under Article 73(3) of the Basic Law.</p>

<sup>1</sup> See paragraph 15 of the Paper.

<sup>2</sup> See paragraph 16 of the Paper.

	<p>(“FS”) use of the Exchange Fund (“Fund”) to purchase office accommodation is <i>ultra vires</i>. However, in view of the Legislative Council’s role in respect of public expenditure generally under the Basic Law, he is asking some questions about the way in which the Exchange Fund Ordinance (“EFO”) and the Basic Law interact.</p> <p>3. The starting point in this discussion should be Article 160 of the Basic Law, which provides that <i>“Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law...”</i>. Pursuant to the “Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China”, the EFO was adopted as the law of the Hong Kong Special Administrative Region (“HKSAR”). It follows that there is a presumption that the EFO is consistent with the Basic Law as the Standing Committee of the National People’s Congress has not declared it to be in contravention of the Basic Law.</p>	
<p>4.</p>	<p>Article 73(3) of the Basic Law provides that the Legislative Council shall have the power,</p> <p><i>“To approve taxation and public expenditure”</i>.</p> <p>However, I assume that the statement in paragraph 7 of the Paper that this power is “without qualification” is not intended to be taken literally. There are other Articles that impact on Article 73(3), for example,</p>	<p>Legislative Council's power to approve public expenditure is described as "without qualification" in the context of the Basic Law's requirement that all public expenditure has to be approved by the Legislative Council (LegCo). Paragraph 7 of Legal Adviser's paper does not seek to comment on the manner in which LegCo's power should be exercised nor considerations relevant to the exercise of that power. However, it should be stressed that LegCo's power and function to approve public expenditure is a fundamental</p>

	<p>(a) Article 106 provides that the HKSAR has independent finances and that its financial revenues are to be used “... <i>exclusively for its own purposes, and they shall not be handed over to the Central Peoples’ Government.</i>” It would therefore be unlawful for the Legislative Council to approve the use of the HKSAR’s revenues for projects of the Central Peoples’ Government (“CPG”).</p> <p>(b) Article 107 requires the HKSAR to “... <i>follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.</i>”</p> <p>(c) Article 108 requires the HKSAR to take the low tax policy previously pursued in Hong Kong as a reference when enacting fiscal legislation.</p> <p>I do not imagine that it is suggested that the Legislative Council could approve taxation and public expenditure without regard to these restrictions. Similarly, it must go without saying that there can be no approval of public expenditure for purposes inconsistent with those National Laws applicable in the HKSAR or for purposes inconsistent with the CPG’s responsibility for foreign affairs relating to the HKSAR.</p>	<p>constitutional principle enshrined in the Basic Law. Proper recognition and faithful application of this principle is pivotal to maintaining the balance of the governance of Hong Kong Special Administrative Region intended by the Basic Law. The Executive Authorities should not be seeking to deploy arguments to erode this principle.</p>
<p>5.</p>	<p><b><u>Context of Article 73(3) – Public Finance vs. Monetary Affairs</u></b></p> <p>This illustrates the importance of construing provisions of the Basic Law with due regard to their context and specific provisions which may, in a particular instance, limit a statement of general principle. The importance of context has been clearly expounded by the Court of Final Appeal<sup>3</sup>. It has been held that,</p> <p><i>“It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to</i></p>	<p>The Legal Adviser has not taken any exception to the view of the Court of Final Appeal on the general principles of interpretation of the Basic Law. It is not an issue before the Panel.</p>

<sup>3</sup> Ng Ka Ling (an infant) & Anor v Director of Immigration [1999] 1 HKC 291, 325-6.

*be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in light of the context, context being of particular importance in the interpretation of a constitutional instrument.*

...  
*The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.*

*As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.”*  
**(emphasis added)**

6. Bearing in mind what the court has said, I have the following observations on the interpretation of Article 73(3). That Article relates to the approval of “taxation and public expenditure”. The Basic Law contains no specific definition of “public expenditure”. We can however look to the Basic Law as a whole for some guidance as to what it means in this context. Article 64 requires the government of the HKSAR, amongst other things, to obtain approval from the Legislative Council for “taxation and public expenditure”. The phraseology used in the two Articles is

Since the purchase of permanent office accommodation is for the use of Hong Kong Monetary Authority, which is a government department, it is no doubt public expenditure.



	<p>identical.</p> <p>7. Chapter V Section 1 is relevant. It deals with “Public Finance, Monetary Affairs, Trade, Industry and Commerce”. The provisions regarding public finance and monetary affairs are helpful in ascertaining the meaning of “public expenditure”. As appears above, Article 106 is concerned with “financial revenues” and the levying of “taxes”. Article 107 is concerned with the principle of keeping “expenditure” within the limits of “revenues” when the HKSAR draws up its budget. It is concerned with the attempt to achieve fiscal balance. Article 108 refers to the HKSAR’s independent taxation regime and the HKSAR’s power to enact taxation law. In each of these Articles, the focus of the language is expenditure related to the fiscal as opposed to the monetary aspect of government’s receipts and expenditure. Articles 106-108 impose obligations on “The Hong Kong Special Administrative Region” as opposed to the “government of the Region”. Article 73(3) embeds the Legislative Council’s role prior to the resumption of sovereignty in relation to the collection of taxation and its expenditure from the general revenue. In contrast, Articles 109-113 which are concerned with monetary matters impose obligations and confer powers on the government of the HKSAR/ Region i.e. the executive authorities of the HKSAR as opposed to the HKSAR. Article 59 provides that “<i>The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region.</i>” The Legislative Council and the “government of the Region” are treated as separate entities throughout the Basic Law (e.g. Article 64 above).</p>	<p>GC tries to read a dichotomy between "public finance" and "monetary affairs" into the heading of Section 1 of Chapter V of the Basic Law. Legal Adviser does not see any need to read the alleged dichotomy into this part of the Basic Law.</p>
<p>8.</p>	<p>Article 109 requires the government to provide the legal and economic environment for the HKSAR to remain an international financial centre. Article 110 requires the government to formulate monetary and financial policies, to safeguard the free operation of financial business and financial markets and to supervise them. Article 111 gives the government the authority to issue currency and requires that it is backed by a 100 per cent reserve fund. It empowers the government to authorise note-issuing banks in a manner consistent with the object of</p>	<p>The purposes of Article 113 are for a) reflecting one of the general principles of the Joint Declaration that the Hong Kong Special Administrative Region (HKSAR) shall have independent finances, b) making clear that the Exchange Fund should exclusively belong to the HKSAR and shall not be incorporated into the foreign exchange treasury of the Central People's Government, c) restricting the purpose of use of the Exchange Fund, and d) defining the responsibility and power of the Government in respect of the management</p>

	<p>maintaining the stability of the currency. Article 112 prohibits foreign exchange control policies within the HKSAR and requires the government to safeguard the free flow of capital into, within and out of the HKSAR. Article 113 specifically relates to what is and was before the resumption of sovereignty a discrete government fund separate from the general revenue. Article 113 provides that,</p> <p><i>“The Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the government of the Region, primarily for regulating the exchange value of the Hong Kong dollar.”</i></p> <p>This unambiguously vests both management and control of the Fund in the “government of the Region”. All of these powers, including those conferred by Article 113 relate to the HKSAR’s monetary policy. The Fund is an instrument of monetary policy and therefore it is logical that reference to the government’s powers in respect of the same should be in this part of Chapter V.</p>	<p>and control of the Fund. (Wang Shuwen ed., <i>Introduction to the Basic Law of the Hong Kong Special Administrative Region</i> (Chinese edition), at page 346). The proposition that since the control and management of the Exchange Fund of HKSAR are vested in the Government of HKSAR, Article 73 of the Basic Law is irrelevant to examining the propriety of any decision for the use of the Exchange Fund, is an over-simplification of the issues. The constitutional effect of Article 113 should be understood in its proper context.</p>
9.	<p>Article 113 makes no reference to the use of the Fund whether by expenditure or otherwise that is dependent on the receipt of tax revenues. Given that there is a clear distinction between fiscal and monetary activities, it is logical that the title to Chapter V distinguishes between “Public Finance” and “Monetary Affairs”. If the two were intended to be synonymous, such a distinction would not be necessary.</p>	<p>Article 113 expressly delimits the uses to which the Exchange Fund may be put. The distinction emphasized by GC between "Public Finance" and "Monetary Affairs" is not relevant to the issues before the Panel.</p>
10.	<p>The term “manage” in Article 113 refers to the administration of the Fund, that is to say, its use. “Control” denotes the overall command of the Fund. “Control” is the function of the Fund’s regulating body. The concept of another body having power to approve the use of the Fund is, therefore, inconsistent with the powers of management and control conferred on the executive if one gives the words of Articles 113 their plain meaning. The conferring of powers on the “government” in Article 113 is consistent with the policy of giving the “government” charge of “monetary” matters in Articles 109-113 inclusive.</p>	<p>"Manage" includes "administration" but does not include "use" in the sense of expending at will. The need for LegCo's approval for public expenditure does not conflict with the stipulation that management and control of the Exchange Fund is for the Government of the Hong Kong Special Administrative Region under Article 113. Although Article 113 of the Basic Law may be categorized as an empowering provision, it does not have the effect of displacing LegCo's constitutional function to approve public expenditure under Article 73(3) of the Basic Law.</p>

	<p><b><u>The Joint Declaration</u></b></p> <p>11. The Basic Law was drafted with reference to the system of administration which existed prior to the resumption of sovereignty to ensure a smooth transition. The Court of Final Appeal has held<sup>4</sup> that the Sino-British Joint Declaration on the Question of Hong Kong (“the Joint Declaration”) can serve as an aid to the interpretation of the Basic Law. Section V of Annex 1 of the Joint Declaration deals with finance including budget, taxation and public expenditure. That section relates to the fiscal aspect of government receipts and expenditure. In contrast, section VII of Annex 1 of the Joint Declaration deals separately with the monetary system i.e., the monetary and financial systems operating prior to the resumption of sovereignty. The section provides that “...<i>The monetary and financial systems previously practised in Hong Kong ... shall be maintained.</i>” Section VII of Annex I at 104 of the Joint Declaration provides expressly that “<i>The Exchange Fund shall be managed and controlled by the Hong Kong Special Administrative Region Government, primarily for regulating the exchange value of the Hong Kong dollar.</i>”</p> <p>12. Chapter V of the Basic Law reflects this distinction made in the Joint Declaration. Articles 106 – 108 deal with public finance and preserve the principles laid down in Part V of Annex 1 of the Joint Declaration. Articles 109 – 113 deal with monetary affairs and reflect Section VII of Annex 1 of the Joint Declaration. Thus, as the Fund was a discrete fund under the exclusive management and control of the Hong Kong Government before 1 July 1997, there is a presumption that this is to continue after the resumption of sovereignty. This approach is consistent with the theme of</p>	<p>Neither Article 113 of the Basic Law nor anything in the Joint Declaration was intended to make any changes to matters related to the Exchange Fund as governed by the EFO. However, due regard has to be given to the Basic Law when construing provisions of the EFO.</p> <p>The argument is, with respect, misconceived. The effect of Article 113 has to be understood in its proper context. The Court of Appeal judgment quoted is not directly relevant to the issues before the Panel.</p>

<sup>4</sup> Ng Ka Ling (an infant) & Anor v Director of Immigration [1999] 1 HKC 291, 326.

	<p>continuity in the Basic Law identified by the Court of Appeal in <i>HKSAR v Ma Wai Kwan David &amp; Ors</i><sup>5</sup>. Mr Justice Chan, in the first judgment regarding the Basic Law following the resumption of sovereignty, made the following statement,</p> <p><i>“The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.”</i><sup>6</sup></p> <p>I would argue that this places the burden of establishing that the use of the Fund today is subject to the Legislative Council’s approval under Article 73(3) as “public expenditure”, on those who suggest such a change in its control and management has been effected by the Basic Law.</p> <p>13. Under the Public Finance Ordinance, which was enacted prior to the coming into force of the Basic Law, the annual estimates of the revenue and expenditure of the government are required to be laid before the Legislative Council.<sup>7</sup> In addition, the heads contained in the estimates of expenditure for a financial year are required to be included in an Appropriation Bill which is introduced into the Legislative Council at the same time as the estimates.<sup>8</sup> These functions have broadly been entrenched in Articles 73(2) and 73(3) when read in conjunction with Articles 106-108 of the Basic Law.</p>	<p>Since the purchase of permanent office accommodation for a government department such as Hong Kong Monetary Authority is public expenditure, the expenditure should be approved by LegCo in accordance with the Public Finance Ordinance (Cap. 2) (PFO).</p>
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<sup>5</sup> [1997] 2 HKC 315.

<sup>6</sup> Ibid, 323.

<sup>7</sup> Section 5(1) of the Public Finance Ordinance.

<sup>8</sup> Section 6(1) of the Public Finance Ordinance.

14.	<p>However, there was no equivalent requirement under the EFO prior to the enactment of the Basic Law. The only reference to the Legislative Council was and is in section 3(5). Under that provision, the Council may set the aggregate maximum limit on borrowing for the account of the Fund that may be secured on the general revenue - not on the Fund. This is consistent with the Legislative Council's functions generally in relation to the general revenue.</p>	<p>LegCo's power to approve public expenditure under the PFO operates independent of its power to regulate borrowing for the account of the Exchange Fund under the EFO. The purchase of permanent office accommodation for Hong Kong Monetary Authority is an item of public expenditure which should be approved in accordance with the PFO.</p>
15.	<p>Article 113 refers to the government's management and control of the Fund "primarily" for regulating the currency's exchange value. It does not say that the Fund can only be used by the government exclusively for the purpose of regulating the currency's exchange value and that any secondary use must be approved by the Legislative Council as "public expenditure". Giving Article 113 its plain meaning, it contemplates use of the Fund for both primary and secondary purposes provided for in the EFO prior to and since the resumption of sovereignty. The intention of the drafters of the Basic Law was clearly to place the authority for the use of the Fund in the hands of the executive, subject to the various checks and balances set out in the EFO and subject, of course, to the inherent supervisory jurisdiction of the courts.</p>	<p>If the use of the Exchange Fund is for the purpose specified in Article 113 and within the ambit of what is authorised under the EFO, there will be no question of such use being subject to the approval of the Legislative Council.</p>
16.	<p><b><u>General vs. Specific Provisions</u></b></p> <p>Article 73(3) deals with the general power of the Legislative Council to approve taxation and public expenditure. This provision is importing the general. As stated in Article 113 of the</p>	<p>The argument is built on two mistaken premises. The first is that Article 73 of the Basic Law is a general provision and Article 113 of the Basic Law is a specific provision. The</p>

	<p>Basic Law, the Fund shall be managed and controlled by the “government of the Region”. If the government is to control and manage the Fund, how can it exercise those functions if it is subject to the approval of another body? Surely, that body would be the controller/manager. The words used in Article 113 are unambiguous and should be given their plain meaning.</p>	<p>second is that Article 73(3) and Article 113 are mutually exclusive.          Bearing in mind that the Basic Law is a constitutional instrument, provisions in the Basic Law should be read both in their individual and overall contexts. A straight-jacket categorization for the purpose of displacing the effect of one by the other is not appropriate. There is no question of whether Article 113 should prevail over Article 73(3) because they respectively relate to different contexts in the Basic Law. If the use of the Exchange Fund is for the purpose specified in Article 113 and within the ambit of what is allowed under the EFO, there will be no question of such use being subject to the approval of the Legislative Council.</p>
<p>17.</p>	<p>The common law, including the rules relating to the interpretation of legislation are “grandfathered” by Article 8 of the Basic Law. It is a rule of statutory interpretation that whenever there is a general enactment in a piece of legislation which, if taken in its most comprehensive sense, would override a particular enactment in the same piece of legislation, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of that piece of legislation to which it may properly apply<sup>9</sup>. It follows that Article 73(3), which is a general provision, should not override Article 113.</p>	<p>There is no question of overriding or subordination in relation to Articles 113 and 73(3) of the Basic Law because of the difference in their respective contexts.</p>
<p>18.</p>	<p><b><u>Ultimate Approval by Legislative Council</u></b></p> <p>Let us assume for the sake of argument that the above analysis is not accepted. In that case, it is strongly arguable that the Legislative Council has “approved” the use of the Fund by the FS for the purposes stipulated in the EFO provided the procedures under the EFO are complied with, as it enacted the EFO and may amend or replace the same in accordance with the Basic Law.</p>	<p>There is no provision in the EFO which would give rise to the argument that LegCo has approved public expenditure not expressly authorised under it.</p>

<sup>9</sup> See para 1486 of Halsbury’s Laws of England, Vol. 44(1).

	<p>Article 73(3) does not provide how this power of “approval” of the Legislative Council is to be exercised. The common usage of the word “approve” is recorded as meaning “<i>Confirm authoritatively; sanction</i>”<sup>10</sup>. Prior approval is a form of approval.</p> <p>19. Another example of prior approval, other than by the enactment of statute is to be found in section 29 of the Public Finance Ordinance, which enables the Legislative Council by resolution to provide for the establishment of funds for specified purposes to which moneys appropriated and received are credited. Also, moneys may be expended from funds under the authority of a funds warrant issued by the FS. Once these funds are established, the Legislative Council does not generally approve every individual expenditure from these funds. However, this is not to say that the Legislative Council has not approved the expenditure.</p> <p>20. As mentioned by the Legal Adviser in paragraph 7 of the Paper, “... <i>it should be accepted that if an enactment should empower a designated person to incur public expenditure, that enactment would not contravene the Basic Law if the Legislative Council retains the ultimate control of the public expenditure in question.</i>” As the Legislative Council passed the EFO (including all subsequent amendments) and has power to amend the EFO in a manner consistent with the Basic Law, the Legislative Council retains the “ultimate control” over the use of the Fund.</p>	<p>Section 29 of the PFO operates on the principle that if expenditure charged to a fund established under the provision is incurred in accordance with the conditions and within the limitations for establishing the fund, no further approval of the LegCo is required.</p> <p>The constitutionality of section 6(a) of the EFO is not in issue. The issue before the Panel is whether the purchase of a multi-billion dollar permanent office accommodation for Hong Kong Monetary Authority is authorized by law.</p>
<p>21.</p>	<p><b><u>Accountability to the Legislative Council</u></b></p> <p>Article 64 of the Basic Law provides that,</p> <p style="text-align: center;"><i>“The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present</i></p>	

<sup>10</sup> The New Shorter Oxford English Dictionary.

<p>22.</p>	<p><i>regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.”</i></p> <p>In paragraph 9 of the Paper, the Legal Adviser states that “... it would be quite legitimate for the Legislative Council to ask the government questions on the management and control of the Exchange Fund as one means to hold the government accountable.” I am instructed that the government, acting on its own initiative, has been keeping the Legislative Council informed of the acquisition. The Chief Executive of the Hong Kong Monetary Authority has attended meetings of the Legislative Council Panel on Financial Affairs to brief members on the progress of the acquisition and to answer members’ questions.</p>	<p>GC agreed with the Legal Adviser's view. However whether the Government has fulfilled its duty to be accountable to the Legislative Council is a matter for Members.</p>
<p>23.</p>	<p><b>Section 6(a)</b></p> <p>The Legal Adviser has queried the FS’ reliance on section 6(a) of the EFO. Section 6 of the EFO provides that,</p> <p><i>“There shall be charged to the Fund –</i></p> <p><i>(a) the emoluments payable to, and other staff costs relating to, the persons employed in connection with the purposes of the Fund, ...”.</i></p> <p>Section 5A(4) of the EFO provides that,</p> <p><i>“... the Monetary Authority and persons appointed to assist him under subsection (3) shall be regarded, for all purposes, as employed in connection with the purposes of the Fund.”</i></p> <p>It follows that all of the staff costs relating to the Monetary Authority (“HKMA”) and his staff are to be met from the Fund. Section 6(a) specifically identifies emoluments of staff (i.e. salaries, fees etc.) as one of the relevant types of “staff costs”</p>	<p>To correctly understand section 6(a), it is necessary to bear in mind the purpose of the section as it appears both from its terms and its legislative history (<i>Interlego A.G. v. Tyco Industries Inc &amp; Ors.</i> [1988] 2 HKLR 509 at 515, per Lord Oliver of Aylmerton).</p> <p>Before its amendment by the Exchange Fund (Amendment) Ordinance 1983 (No. 26 of 1983), section 6(a) of the EFO read as follows:</p> <p><i>“There shall be charged to the Fund -</i></p> <p><i>(a) expenses incidental to the remuneration, cost of passages and superannuation in respect of officers employed in connexion with the management of the Fund including any appropriate share of such expenses in respect of the service of officers of the Government so employed as part of their duties:</i></p>



<p>which are to be met from the Fund. However, it specifically refers to “other staff costs” as well. There is no definition of the word “costs” in the EFO. Therefore, regard should be had to its common usage,</p> <p><i>“What must be given in order to acquire, produce, or effect something; the price (to be) paid for a thing.”<sup>11</sup></i></p>	<p><i>Provided that the number of the appointments and the rates of emoluments of such staff have been approved by the Governor and the Secretary of State; ...”</i></p> <p>It is quite obvious that section 6(a) then covered only money payments to or in respect of individual staff such as cost of passage and superannuation. Any other costs necessary for the performance of functions under the Ordinance were not covered. Expenditure for these other costs has to be approved in accordance with the PFO.</p> <p>Section 4 of the Exchange Fund (Amendment) Ordinance 1983 (No. 26 of 1983) repealed paragraph (a) of the above provision and substituted a new one as follows:</p> <p><i>“(a) the emoluments payable to, and other staff costs relating to, the persons employed in connexion with the purposes of the Fund including the investment thereof, and also including any appropriate share of such emoluments or staff costs in respect of the services of public officers so employed as part of their duties:</i></p> <p><i>Provided that the number of the appointments and the rates of emoluments of such staff have been approved by the Financial Secretary;”</i></p> <p>In the Explanatory Memorandum to the Bill, it was stated in respect of the amendment as follows:-</p> <p><i>“Clause 4 re-casts section 6(a) of the principal ordinance which charges to the Fund the cost of the emoluments and</i></p>
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<sup>11</sup> The New Shorter Oxford English Dictionary.

*expenses of persons employed in managing the Fund."*  
*(my emphasis)*

Please note that the word used in the Explanatory Memorandum is "re-casts". That means that it was not the policy intent for introducing the Bill to implement a policy different from that enshrined in the then existing EFO; it was but a change of wording. It follows that, same as for the repealed paragraph, costs other than money payments to or in respect of individual staff were not within the ambit of this paragraph. Puts in another way, as suggested by GC in paragraph (d) of his letter of 19 April 2001, "other staff costs" are those which flow from the appointments of staff [and rates of their emoluments] approved by the FS under section 6(a) of the EFO. Any application of this provision for charging expenditure to the Exchange Fund must be confined within the true scope and policy of the EFO.

The Exchange Fund (Amendment) Ordinance 1992 (No. 82 of 1992) which created the Monetary Authority as a person who has to be appointed by FS for the performance of functions provided in that Amendment Ordinance did not make any amendment to section 6 at all. Hence, the construction set out above remains valid. That is to say, expenditure authorised for payment from the Exchange Fund is confined to money payments to or in respect of individual staff such as cost of passage and superannuation.

According to Bokhary PJ in the Court of Final Appeal case of *Medical Council of Hong Kong v. Chow Siu Shek, David*, [2000] 2 HKC 428, one of the interpretative considerations for interpreting a statute is that "there is the reluctance of the courts to attribute to the Legislature an intention to make a radical change by way of a side-wind".

GC's proposed interpretation of section 6(a) of the EFO

		<p>could only stand if it was the clear intention of the 1983 and 1992 amendments to the EFO that a radical change to section 6(a) should be effected. The radical change would be to change the original scope of authorised payment of a personal and individual nature to a much enlarged scope of including payments for the purchase of permanent office accommodation for Hong Kong Monetary Authority which did not even exist in the EFO.</p> <p>It was considered by the then Secretary for Monetary Affairs in 1992 when he introduced the Exchange Fund (Amendment) Bill 1992 that the FS already had authority under section 6 of the EFO "to employ people in connection with the purposes of the Fund and charge their emoluments and related costs to the Fund". These people could be employed on terms different from those of the Civil Service in order to attract and retain high calibre staff with the right experience and expertise.</p> <p>In the case of the 1983 and 1992 amendments to the EFO, there were no amending provisions proposed which would change the original scope and policy of the section 6(a) authorisation to allow use of the Exchange Fund for the purchase of permanent office accommodation for Hong Kong Monetary Authority.</p> <p>Further examination of section 6(a) also confirms the conclusions reached above.</p> <p>The expression "staff costs" appears the second time in the second limb of section 6(a). It is used in relation to public officers employed in connection with the purposes of the Exchange Fund. It provides that there shall be charged to the Exchange Fund "any appropriate share of such</p>
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<p>24.</p>	<p>Staff costs can take a variety of forms including the cost of accommodating staff and their equipment – the cost of providing appropriate physical space from which they can conduct operations designed to achieve the purposes for which they have been employed. The provision of equipment for staff would be</p>	<p>emoluments or staff costs in respect of the services of public officers employed in connection with the purposes of the Fund as part of their duties". The expression "staff costs" in this part of section 6(a) could not have been intended to cover the costs of office accommodation. In practice, the share of staff costs in this respect is calculated as the emoluments paid to the public officers and the 'on costs' incurred by the Government. 'On cost' covers expenditure such as pension and other welfare benefits. To reach the opinion stated in paragraph 25 of his Advice, GC has disregarded the basic principle of statutory interpretation that "same words to be given same meaning" in the same piece of legislation (Bennion, <i>Statutory Interpretation</i>, 3<sup>rd</sup> ed. (Bennion), Pages 900 &amp; 942).</p> <p>Even in the context of the first limb of section 6(a) as quoted by GC, his interpretation of "other staff costs" fails to respect another applicable rule of construction.</p> <p>GC recognized that emoluments of staff are one of the relevant types of "staff costs" and are specifically identified in section 6(a). He did not, however, mention the fact that since "other staff costs" is mentioned immediately subsequent to "emoluments". In such circumstances, the normal rule of construction that words or expressions of the same genus should be confined to things of the same kind as those specified (Bennion, Page 961), would apply. The effect is that "other staff costs" must be interpreted as referring to items of the same genus as emoluments, i.e. monetary payments.</p> <p>It follows from the above that all the forms of costs described in paragraph 24 of GC's advice could not have been within the scope of authorisation intended by section 6(a) of the EFO. These costs, when properly analyzed could only be classified as "costs relate to staff" as suggested</p>
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	<p>another example. Staff training, to provide officers with the necessary information and skills to discharge their functions, and the cost of travel and accommodation for officers who must attend meetings connected with their duties overseas would be other examples. These costs relate to staff but are not emoluments, i.e. profits or gains arising in the hands of the staff from their employment. Section 6(a) draws the same distinction.</p> <p>25. On the basis of the above, it is my opinion that the accommodation of staff and their equipment is a “staff cost” within the meaning of section 6(a) and may be met out of the Fund provided such expenditure is reasonable and is incurred in good faith.</p> <p>26. I have received instructions from my clients on the reasoning behind the purchase of permanent accommodation. Briefly, the principal points are as follows:-</p> <p>(i) At present, the HKMA’s main offices are held on leasehold from commercial landlords in a building closely identified with an international commercial bank which has signage</p>	<p>by GC. But, they are not staff costs as such. Authorisation for incurring these costs should be obtained in accordance with the PFO.</p> <p>Although not mentioned by GC here, it has been confirmed by his letter of 19 April 2001 that Hong Kong Monetary Authority's "office rental has been accounted for as recurrent expenditure on the Exchange Fund accounts which are audited under section 7 of the EFO". Since Hong Kong Monetary Authority is a government department, unless it is provided by law in express terms to the contrary, office rental expenditure should be paid by the Government from the General Revenue or other authorised sources in accordance with the PFO.</p> <p>The proper approach in construing section 6(a) of the EFO is to apply the canons of interpretation including the common law principle that unless contrary intention appears, an enactment by implication imports any principle or rule of constitutional law which is relevant to the operation of the enactment. (Bennion, Page 811) The relevant principle of constitutional law here is that LegCo has the constitutional function to approve public expenditure. The interpretation arrived at by the GC is untenable because it would effectively result in giving an uncontrolled power to the FS in the use of the Exchange Fund and nullifying LegCo's constitutional function of approving public expenditure.</p> <p>Since it is clear that there is no express provision in the EFO to authorise the FS to charge to the Exchange Fund the expenditure for the purchase of permanent office accommodation for Hong Kong Monetary Authority, it would not be necessary under the circumstances to examine whether the decision to purchase the property in question was made reasonably and in good faith. Nevertheless, it</p>
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rights. The Basic Law requires the government of the HKSAR to manage the Fund and the HKMA is charged with the day-to-day task of doing so. The HKMA has been delegated with functions relating to the stability of the currency and of the financial and monetary systems under the EFO. The HKMA, as banking supervisor, is also responsible for the stability of the banking system. It is therefore considered imperative that the HKMA is able to conduct uninterrupted operations in the discharge of these functions, particularly at times of financial or economic volatility. Unfortunately, the HKMA has no security of tenure beyond the expiry of a given lease/option in its present premises. Its uninterrupted operation from 3 Garden Road and future plans for accommodation are therefore dependent on the business plans of a commercial landlord. All of the other monetary authorities and central banks the HKMA has dealings with are housed in permanent accommodation over which they exercise control. In this respect, the HKMA is out of step with current international practice. In such circumstances, it therefore appears reasonable that the FS should acquire permanent premises for the HKMA to operate from, particularly if they are situated in the central business district close to institutions which the HKMA's operations directly affect and with whom the HKMA frequently communicates and cooperates in the exercise of its strategic and investment powers.

- (ii) It is necessary as part of its forward strategic planning for the HKMA to ensure there is sufficient office space available to cater for the possible expansion of its responsibilities. At present, issues such as the regulation of exempt dealers, the provision of a measure of consumer protection for bank customers and the creation of a deposit insurance scheme are foreseeable areas of additional work requiring additional space. There may be others. It therefore seems reasonable for the FS to acquire premises that allow room for expansion which is reasonably foreseeable, particularly if

may be useful to quote the following: "A laudable desire to save public money has led many authorities into the error of using their powers for financial profit when that is not a legitimate purpose." (Wade, Administrative Law, 8<sup>th</sup> Edition, at page 392) Section 6(a) is to enable the FS to appoint the Monetary Authority and other persons to assist him in the performance of functions provided under the EFO, it is not for securing permanent office accommodation of a standard required for the operation of Hong Kong Monetary Authority nor for "conserving and enhancing the Fund" as suggested in paragraph 26(iv) of GC's advice.

The reasoning set out by GC for the purchase of permanent accommodation will be relevant to the consideration of the question of whether money should be appropriated from the General Revenue for the purchase when a financial proposal is put forward by the Financial Secretary in accordance with the PFO.

space which is unused initially can be let on commercial terms until it is required for accommodating staff.

(iii) It has been apparent for some time that there are security issues which cannot be adequately addressed in the HKMA's present accommodation:-

(a) the HKMA receives a significant number of distinguished guests from the Mainland and overseas during the course of the year. Whilst they are in the HKMA's premises, their security is the HKMA's responsibility. At present, they can only enter the HKMA's offices through a public concourse and by the use of public lifts. It is not possible to provide adequately for their security in these circumstances and there is little that can be done to alter that position given the configuration and commercial/public use of 3 Garden Road; and

(b) the HKMA has a substantial quantity of confidential and market sensitive information electronically stored at 3 Garden Road. The CMU which is connected to the RTGS payment system for banks is situated there and the Fund's assets are managed from that address. In all cases, electronic storage and communication systems are used. It is not possible to separate the HKMA's cabling and telephone lines from those of the other tenants in its present premises. In the new premises, it will be possible to have all of the wiring and telephone lines laid in dedicated trunking. Further, as the top of the new building is not overlooked by or on a level with other buildings, the possibility of "tapping" is, the HKMA is advised, substantially reduced.

It seems reasonable for the FS to take the opportunity to acquire premises in which these security concerns may be addressed.

	<p>(iv) Over time, the acquisition of permanent premises is likely to be significantly cheaper than continuing to pay rent to commercial landlords. In acquiring the new premises, the FS will acquire an asset for the Fund which is likely to maintain its value or increase in value and result in a saving of rent. It therefore appears that in terms of conserving and enhancing the Fund, the acquisition of permanent premises is a prudent option.</p> <p>27. In paragraph 5 of the Paper, the Legal Adviser suggests that “... <i>the term [“staff costs”] could be given a more restrictive meaning by confining the costs to expenditure which is payable because of a condition in a staff’s contract of employment or is reasonably incidental to such condition.</i>” Section 6(a) contains no words imposing such a “restrictive” interpretation either expressly or impliedly. This is logical because a number of staff costs an employer has to meet may not arise as a term in contracts of employment enforceable by staff members against the employer. For example, training and the type of equipment provided to staff may not be the subject of rights enforceable by employees.</p> <p>28. Further, section 19 of the Interpretation and General Clauses Ordinance provides that “<i>An Ordinance ... shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.</i>” The “intent, meaning and spirit” of section 6(a) of the EFO can be ascertained from the following statement of the then Secretary for Monetary Affairs, when speaking at the Second Reading of the Exchange Fund (Amendment) Bill 1992 (as quoted by the Legal Adviser in paragraph 13 of the Paper) :</p> <p><i>“The staff and operating costs of the Authority would be charged directly to the Exchange Fund instead of to the general revenue, thus taking the Authority outside the resource allocation constraints applicable to other parts of government”.</i></p>	<p>The different possible interpretations which might be put on the term “staff costs” are set out in order to explain in context why it is necessary to have an understanding of the constitutional framework on the control of public expenditure and the government policy behind the creation of the Monetary Authority when ascertaining the true meaning of the term. It is clear from judicial statements that in order for a court to come to the conclusion that “staff costs” should include the cost for purchasing a multi-billion dollar permanent office accommodation for Hong Kong Monetary Authority, it would need very clear statutory wording. In the case of <i>A.-G. v. Wilts. United Dairies Ltd.</i> (1921) 39 TLR 781, Atkin LJ said: “The circumstances would be remarkable indeed which would induce the courts to believe that the Legislature had sacrificed all the well-known checks and precautions, and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers for imposing charges upon the subject for purposes connected with his department.” If it was intended that Hong Kong Monetary Authority or the FS was to be given all the financial powers similar to those normally given to statutory corporations providing public service and with financial autonomy, express provisions would have been enacted in 1992 when the Exchange Fund (Amendment) Ordinance 1992 was passed into law. Indeed, as explained by the then Secretary for Monetary Affairs, the only thing special about Hong Kong Monetary Authority as a government department was</p>
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<p>29.</p>	<p>In view of the plain words of section 6(a), section 19 and the above policy statement, it is difficult to support the argument that the term “other staff costs” could be given a more restrictive meaning than the plain words of section 6(a) import. It is clear that the legislative intent was to charge all of the costs of running the HKMA to the Fund whether they relate to emoluments or other staff costs and the EFO makes no distinction expressly or impliedly between costs of a capital nature or otherwise. I therefore respectfully disagree with the Legal Adviser’s views as stated in paragraph 15 of the Paper that <i>“Although it would seem more convenient if all the public expenditure relating to the operation of the Hong Kong Monetary Authority could be charged to the Exchange Fund, there is no clear provision in the Exchange Fund Ordinance allowing this to be so either expressly or by implication.”</i> There is a provision consistent with a clear policy statement that staff costs of all kinds are to be met from the Fund. Let us, however, assume for the sake of argument, that such a restrictive interpretation is correct. In that case, it could reasonably be argued that it is an implied condition of contracts of employment with the HKMA, that staff will be provided with suitable office accommodation from which they are expected to carry out their duties.</p>	<p>to have the flexibility of having the Authority’s staff and operating costs charged directly to the Exchange Fund instead of the General Revenue. There was no mention by the Secretary that it was the Administration’s intention to have all the resources necessary for the functioning of Hong Kong Monetary Authority, including permanent office accommodation purchased from the private sector, to come from the Exchange Fund. Again, the Court of Final Appeal’s recently given guidance that courts are reluctant to attribute to the Legislature an intention to make a radical change by way of a side-wind is relevant.</p> <p>The legal basis for the Legal Adviser’s view on “other staff costs” has been comprehensively set out in this column opposite paragraphs 23 to 28.</p> <p>Members will note paragraph 29 seeks to deploy an argument to justify charging to the Exchange Fund “all of the costs of running” the Hong Kong Monetary Authority whether they be costs of a capital nature or otherwise without giving due regard to LegCo’s constitutional function of approving public expenditure for the provision of public service by a government department.</p>
<p>30.</p>	<p>In paragraph 15 of the Paper, emphasis is placed on the cost of the proposed accommodation as a factor, apparently a substantial factor, in arguing that section 6(a) may not be used. Whether a given sum is too large to justify its expenditure under a statute is a relevant consideration only if it exceeds a restriction in the statute on the amount that can be used. Neither section 6 nor section 3 of the EFO contain any express words or words which may reasonably be inferred to restrict the use of the Fund by reference to a given sum of money. Of course, all expenditure must be incurred reasonably and in good faith. Contrast these provisions with section 3(4) of the EFO which imposes an unambiguous restriction by reference to an amount of borrowing secured on the general revenue. For these reasons, the FS may, in my view, rely on section 6(a) of the EFO.</p>	<p>Members are in the process of holding the public officers concerned accountable for their decision on the purchase permanent office accommodation for Hong Kong Monetary Authority. Members can better appreciate the magnitude of the problem with a reminder of the size of the public expenditure involved so that they may decide how best to perform their constitutional role of monitoring the government.</p>

31.	<p><b><u>Section 3(1)</u></b></p> <p>Whilst the discussion of this purchase has focused on section 6(a), I have also advised in relation to sections 3(1) and 3(1A) of the EFO.<sup>12</sup> Under section 3(1) of the EFO, the Fund is placed under the control of the FS,</p> <p><i>“and shall be used primarily for such purposes as the Financial Secretary thinks fit affecting, either directly or indirectly the exchange value of the currency of Hong Kong and for other purposes incidental thereto.”</i></p> <p>The HKMA conducts operations designed to effect the exchange value of the currency directly or indirectly. The term “indirect” has no specific meaning in the statute, therefore regard should be had to its current usage,</p> <p><i>“... not acting or exercised with direct force”.</i><sup>13</sup></p> <p>Providing accommodation and systems to enable the HKMA to conduct such operations from a permanent base on an uninterrupted basis could reasonably argued to be an example of the indirect use of the Fund for currency stability purposes. However, section 3(1) also empowers the FS to use the Fund for purposes “incidental” to the primary strategic purpose of affecting the foreign exchange value of the currency. Again, the term “incidental” is to be construed by reference to its common usage,</p> <p><i>“Occurring as something casual or of secondary importance; not directly relevant to; following (up) on as a subordinate circumstance ... Of an expense or charge: incurred apart from the main sum disbursed.”</i><sup>14</sup></p>	<p>The arguments of GC is a good illustration of how far one can try to justify something as incidental to a clear statutory purpose. On the meaning of "incidental to", there is judicial opinion saying that it means "consequent on" (<i>Re Fahy's Will Trusts, McKnight v. Fahy</i> [1962] 1 All ER 73 at 75, per Plowman J.). It is clear that the Exchange Fund is not presently used for its primary purpose. What Monetary Authority has to do is to keep the Fund ready for use when required. There cannot presently be any purpose consequent on the primary purpose expressly stated in section 3(1) of EFO and Article 113 of the Basic Law. It is misleading to speak of secondary purpose. The words of the statute are simply "other purposes incidental thereto", i.e. incidental to the primary purpose. Since the Fund is not applied for its primary purpose, there is no other purposes incidental to the primary purpose.</p> <p>GC's reference to the explanation in the New Shorter Oxford Dictionary is again an attempt to read words into the legislation that are not there.</p>

<sup>12</sup> Please see paragraphs 10 and 11 of my advice to you dated 9 April 2001.

<sup>13</sup> The New Shorter Oxford English Dictionary.

<sup>14</sup> The New Shorter Oxford English Dictionary.

	<p>Even if it were argued that the expense of appropriate accommodation with secure systems did not directly or even indirectly affect the currency's exchange value, the provision of the same in order to provide a base from which operations may be conducted must be "incidental" to that strategic purpose provided that the FS acts reasonably and in good faith in incurring the same.</p>	
<p>32.</p>	<p><b>Section 3(1A)</b></p> <p>Under section 3(1A), the FS may additionally (and subordinately)</p> <p><i>"... with a view to maintaining Hong Kong as an international financial centre, use the Fund as he thinks fit to maintain the stability and the integrity of the monetary and financial systems of Hong Kong."</i></p> <p>Again, as the FS has appointed the HKMA pursuant to the EFO to conduct operations relating to these purposes, it is within his vires, provided he acts reasonably and in good faith, to provide accommodation and systems to enable the HKMA to do so.</p>	<p>This is another attempt by GC to stretch the ambit of a statutory provision. No reasonable man would insist that unless Hong Kong Monetary Authority, as a government department, is given a permanent office accommodation, the stability and integrity of the monetary and financial systems of Hong Kong could not be maintained.</p>
<p>33.</p>	<p>In accordance with the EFO's requirements to seek the advice of the Exchange Fund Advisory Committee ("EFAC") in relation to the overall control of the Fund and not simply in relation to its use under section 3 as suggested by the Legal Adviser<sup>15</sup>, I am instructed that the FS sought advice from the EFAC on the pros and cons of the acquisition in the process of forming his opinion on the subject.</p>	<p>The advice of EFAC could not turn what is outside the ambit of EFO into something within the scope of EFO.</p>
<p>34.</p>	<p>The analysis of the interaction of the EFO and the Basic Law set out above applies equally in the case of sections 3(1) and 3(1A) of the EFO. The power and control of the Fund and its use for the purposes set out in these sections is clearly vested in the "government of the Region" as required by Article 113.</p>	<p>GC's first advice on the matter dated 9 April 2001 does not contain an analysis of the interaction of the EFO and the Basic Law. His analysis in this respect is for justifying the removal of Article 73(3) from his consideration of the provisions of the EFO.</p>

<sup>15</sup> See paragraph 13 of the Paper.

35.	<p><b><u>Conclusion</u></b></p> <p>I regret the length of this advice and, in particular, the repetition of my earlier advices (herewith for reference). However, the Legal Adviser has raised a number of points that are probably best addressed in one paper. For the reasons given, it is my opinion that the use of the Fund by the FS to purchase the office accommodation in question is <i>intra vires</i> the EFO and that the EFO as presently drafted embodies the words and the spirit of the Basic Law on the control and management of the Fund.</p>	<p>Sufficient regard has not been given to the importance of the interaction between the Basic Law and the EFO when concluding that section 6(a) of the EFO could be relied on to justify charging to the Exchange Fund the expenditure for the purchase of a multi-billion permanent office accommodation for Hong Kong Monetary Authority. The key issue of whether expenditure for the purchase is public expenditure and therefore is subject to the approval of the LegCo has not been adequately addressed.</p>

11 June 2001