

Legal Adviser's Comments on Administration's Reply dated 7.3.2002

Clerk to Panel's letter dated 12.11.2001	Administration's Reply dated 7.3.2002	Legal Adviser's Comments
<p>With regard to the letter from the Financial Secretary's Office to the Panel dated 3 September 2001, members sought explanation for the Chief Executive's decision to approve the expenditure for the purchase of the office accommodation in question for HKMA to be charged to the Exchange Fund under section 6(b) of the Exchange Fund Ordinance (Cap. 66). The explanation should include justifications for regarding the expenditure as incidental and necessary for the due performance of duties laid upon the Financial Secretary and the Exchange Fund Advisory Committee in connection with the operation of the Fund.</p>	<p>In July 2001 in view of the concerns expressed by some Members of the Legislative Council, the Financial Secretary as Controller of the Exchange Fund took further advice from the Department of Justice on steps he should take before completing the purchase of the premises at Two International Finance Centre for use as permanent office accommodation for the Hong Kong Monetary Authority.</p> <p>The Department of Justice advised that provided the Chief Executive, having considered all relevant circumstances, concluded that the proposed purchase was necessary for the due performance of the duties laid upon the Financial Secretary and the Exchange Fund Advisory Committee in connection with the operation of the Fund, and approved the expenditure, then the expenditure should be charged to the Fund under section 6(b) of the Exchange Fund Ordinance.</p>	<p>The Reply addresses the issue of whether the Chief Executive's view that the expenditure for the purchase of the office accommodation for the Hong Kong Monetary Authority (HKMA) was incidental and necessary by referring to the CE's considerations in general terms, that is, "specific accommodation needs of the HKMA" and "the suitability of the proposed property to meet these needs". No other details have been provided.</p> <p>Members may wish to refer to the minutes of the Panel meeting held on 5 November 2001 which records Members' discussion on the issues relating to the legality of using the Exchange Fund for the purchase (Appendix I).</p>

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<p>2. The Administration was also requested -</p> <p>a) to confirm whether the Government had taken into account the views and sentiments of the community towards the then proposed purchase of office accommodation for HKMA before making its decision to complete the purchase agreement;</p>	<p>On the basis of the advice and for the avoidance of doubt, <u>the Chief Executive, having considered the specific accommodation needs of the HKMA and the suitability of the proposed property to meet these needs, took the view that the purchase of the premises was incidental expenditure which was necessary for the due performance of the duties laid upon the Financial Secretary (which include those of the HKMA) in connection with the operation of the Fund under section 6(b) of the Exchange Fund Ordinance.</u> (underlining added)</p> <p>2a) As in the case of other major initiative, the Government took into account community sentiment, and community interest, before making the decision to complete the purchase agreement for the purchase of permanent office accommodation for the HKMA. The Government also took into account the cost effectiveness of purchasing against renting, and thus cost savings to the Exchange Fund, over the long run. Financial projections indicate that, over the long run, the savings in rent will outweigh the cost of purchase.</p>	<p>No comments.</p>

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<p>b) to confirm whether in the course of completing the purchase of the office accommodation in question or at any earlier stage, the Director of Lands had been involved in assessing the value of the office premises to be acquired, and if the answer is in the affirmative, to provide the assessment results;</p> <p>c) to clarify the legal identity of the purchaser of the office accommodation in question;</p> <p>d) to confirm whether the control and management of the office accommodation in question falls under the purview of the Government Property Administrator; and</p>	<p>b) It is not a requirement for the Director of Lands to assess the value of the office premises in question in giving consent under the Memorandum of Agreement for the Agreement for Sale and Purchase to proceed. Nevertheless, before the acquisition proceeded, advice was sought from the Government Property Agency (GPA) on the value of the premises. The actual purchase price of the premises was lower than the market value assessed by the GPA.</p> <p>c) The permanent office accommodation has been purchased in the name of the Financial Secretary Incorporated for the account of the Exchange Fund. The property is shown as an asset on the books of the Exchange Fund.</p> <p>d) The control and management of the office premises is vested in the Financial Secretary Incorporated. The HKMA will be responsible for the use and management of the new premises in like manner as the HKMA uses and manages the present leased premises.</p>	<p>b) No comments.</p> <p>c) & d) The Financial Secretary Incorporated (FSI) is a corporation sole established by the Financial Secretary Incorporated Ordinance (Cap. 1015), and is constituted in the person who is performing the duties of the office of Financial Secretary. It is a common practice of the Administration to use the FSI to hold properties belonging to the Government. The Reply has not confirmed explicitly whether the control and management of the office accommodation falls under the purview of the Government Property Agency.</p>

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<p>e) to clarify the details of the expenditure for fitting out the office accommodation in question including systems and equipment and to confirm if that expenditure would require the approval of the Legislative Council or the Finance Committee; and if the answer is in the negative, to provide an explanation as to why it would not be necessary.</p>	<p>e) The details of the expenditure for fitting out of the office accommodation in question will be worked out at a later stage. It is HKMA's intention to move all of its existing furniture and equipment that are still serviceable to the new office. The fitting out expenditure will mainly involve ensuring that the premises have the basic furnishings, facilities, and technical equipment to enable HKMA to carry out its operations. The expenditure involved is chargeable to the Exchange Fund as it is necessary for the due performance of the duties laid down upon the Financial Secretary and the Exchange Fund Advisory Committee in connection with the Fund.</p>	<p>e) If Members are satisfied that the expenditure for the purchase of the office accommodation for the HKMA may be justified as "incidental" and "necessary" within the meaning of section 6(b) of the Exchange Fund Ordinance (Cap. 66), it seems to follow that expenses for fitting out could also be so justified. However, it would still be lawful for the Administration to seek approval of the Legislative Council or Finance Committee for the expenditure to be charged to the General Revenue.</p>

Encl.

19 April 2002

立法會
Legislative Council

LC Paper No. CB(1)634/01-02
(These minutes have been
seen by the Administration)

Ref : CB1/PL/FA/1

**Legislative Council
Panel on Financial Affairs**

**Minutes of Meeting held on
Monday, 5 November 2001 at 9:30 am
in the Chamber of the Legislative Council Building**

Members present : Hon Ambrose LAU Hon-chuen, GBS, JP (Chairman)
Hon Henry WU King-cheong, BBS (Deputy Chairman)
Hon James TIEN Pei-chun, GBS, JP
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Eric LI Ka-cheung, JP
Dr Hon David LI Kwok-po, GBS, JP
Hon NG Leung-sing, JP
Hon James TO Kun-sun
Hon Bernard CHAN
Hon CHAN Kam-lam
Hon SIN Chung-kai
Dr Hon Philip WONG Yu-hong
Hon Jasper TSANG Yok-sing, JP
Hon Emily LAU Wai-hing, JP
Hon MA Fung-kwok

Non-Panel members attending : Hon CHAN Yuen-han, JP
Hon LAU Kong-wah
Hon Albert CHAN Wai-yip
Hon LEUNG Fu-wah, MH, JP
Hon Audrey EU Yuet-mee, SC, JP

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- VI Permanent accommodation for the Hong Kong Monetary Authority**
LC Paper No. CB(1) 169/01-02(05) - Background brief on permanent accommodation for the Hong Kong Monetary Authority prepared by the LegCo Secretariat

42. The Deputy Secretary for Financial Services (DS/FS) updated members on the purchase of permanent accommodation for HKMA. He said that with the approval of FS, the Sale and Purchase Agreement for the purchase of 12 office floors and two auditorium floors at Two International Finance Centre had been signed on 5 October 2001. The total area of the premises purchased was 341 711 square feet and the purchase price was HK\$3,699 million. The expenditure had been charged to the Exchange Fund.

43. Regarding the legality of the office purchase, DS/FS recapitulated that pursuant to members' request, FS had sought the legal advice of the Department of Justice (DoJ) on the matter. In gist, DoJ was of the view that according to the Exchange Fund Ordinance (EFO) (Cap. 66), it was appropriate to charge the expenditure for the office purchase to the Exchange Fund. Specifically, section 6(b) of EFO provided that the Chief Executive might approve any incidental expenditure to be charged to the Exchange Fund as necessary for the due performance of the duties laid upon the Financial Secretary and the Exchange Fund Advisory Committee in connection with the operation of the Fund.

44. DS/FS further said DoJ had also examined the comments of the Legal Adviser of the Legislative Council Secretariat (LA) regarding the application of certain provisions in the Basic Law to the office purchase and the interaction between these provisions and the provisions in the EFO. Having regard to the constitutional background, DoJ was of the view that the Hong Kong SAR Government had the power to invoke the relevant provision in the EFO to allocate funds from the Exchange Fund to finance the purchase of office accommodation for the HKMA. There was no need to obtain the approval of the Legislative Council (LegCo) for the relevant expenditure. The details of DoJ's advice had already been set out in the letters issued by FS's Office to this Panel on 19 July 2001 and on 3 September 2001. Hopefully, the advice of DoJ would be able to remove any doubt of Members and the public on the legality of the office purchase.

Legality of using the Exchange Fund for the purchase

45. Miss Emily LAU and Ms Audrey EU expressed appreciation to the legal advice provided by LA for the Panel in the course of its deliberation on the matter. Miss Emily LAU expressed regret for the confusing manner in which the Administration had handled the matter, highlighting that initially, the former FS relied on the advice of the General Counsel to HKMA in approving the office purchase, asserting that the cost of providing accommodation for HKMA could properly be regarded as a "staff cost" which might be charged to the Exchange

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Fund under section 6(a) of the EFO. It was only upon the request of the Panel that the former FS sought the advice of DoJ on the matter. In July 2001, FS's Office informed the Panel of DoJ's advice that FS, who was vested with the delegated authority to approve expenditure under section 6(b) of the EFO, had been satisfied that the expenditure on the accommodation was necessary and approved it. When the purported delegation of the power from the Chief Executive (CE) to FS to approve the purchase under section 6(b) was again challenged by LA, FS sought further advice from DoJ and thereafter informed the Panel in September 2001 that FS had sought and received the approval for the purchase from CE under Section 6(b) of EFO. Miss LAU further said that she maintained her strong reservation on the propriety of using \$3.7 billion for the office purchase under the current economic climate and her doubt on the legality of the purchase.

46. Mr Albert HO commented that given the huge sum of public monies involved and the important legal issues to be fully addressed, the Administration should not have made hasty decisions on the purchase by entering into the Memorandum of Understanding (MOU) for the purchase in April 2001 and signing the Sale and Purchase Agreement in October 2001. Mr HO expressed regret for the handling of the matter by the former FS and HKMA, in particular their reckless approach in handling the legality issue of the purchase.

47. Pointing out that the MOU for the purchase had been signed in April 2001, when the Administration was still relying on section 6(a) of the EFO as the legal basis for the purchase, Miss Emily LAU questioned whether the Administration's subsequent switch to rely on section 6(b) of the EFO was acceptable from the legal viewpoint.

48. In response, DS/FS reaffirmed the Administration's position that the purchase of the office accommodation in question for HKMA was entirely lawful.

49. LA recapitulated the principles underlying his legal analyses on the matter as follows-

- (a) the expenditure for the purchase of office accommodation for HKMA as a government department was definitely a public expenditure;
- (b) given that this was a public expenditure, the approval of the Legislative Council (LegCo) for the purchase was required in accordance with the Basic Law, unless LegCo had, in accordance with the law, delegated the authority to a specified person; and
- (c) even if CE considered that the proposed expenditure was within his power to approve under section 6(b) of EFO, he might still cause that to be proposed to LegCo for approval in accordance with the Public Finance Ordinance (Cap. 2).

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50. LA further said that as he did not have the knowledge of the legal details surrounding the transaction in respect of the office purchase, he could not comment on the propriety and strength of the legal basis on which the parties to the transaction relied in the process. As regards the Administration's switch from relying on section 6(a) to relying on section 6(b) of the EFO to substantiate the legality of the purchase, LA said that this change of stance appeared to raise the issue of how the Administration should properly discharge its duty of accountability to LegCo on the issues relating to the office purchase.

51. Miss Emily LAU sought clarification on whether the approval by CE for the expenditure of the purchase to be charged to EFO under section 6(b) was consistent with the principle that the expenditure was a public expenditure.

52. LA said that as analysed in his paper for the Panel, when a person outside the LegCo had been delegated the authority to approve a public expenditure, he should exercise the authority in accordance with the conditions stipulated under such delegation. In this case, as stipulated in section 6(b) of EFO, CE had to be satisfied that the nature of the expenditure was incidental and that it was necessary for the due performance of duties laid upon FS and the Exchange Fund Advisory Committee in connection with the operation of the Fund. In exercising the power, CE should follow the general principles that such statutory power should be exercised in good faith and in accordance with the usual standards of reasonableness consistent with the scope and policy of the ordinance in question.

53. Mr Albert HO sought clarification on whether CE had been delegated the authority to approve the expenditure of the purchase, and whether the office purchase in question satisfied the necessity criterion stipulated in section 6(b) of the EFO.

54. Miss Audrey EU commented that the crux of the whole issue lay in whether the strength of the legal and operational justifications provided by the Administration were proportionate to the vast sum of money spent on the purchase. She sought the advice of LA on whether, from the legal viewpoint, the expenditure for the purchase could be regarded as an incidental expenditure in the context of section 6(b) of the EFO, and if the answer to the question was in the affirmative, given that LA had confirmed his view that the expenditure was a public expenditure, whether the Administration was still required to obtain the approval of the LegCo for the expenditure in accordance with the Basic Law.

55. LA advised that section 6(b) of the EFO was a clear delegation of authority to CE. He reiterated his view that even if CE considered that the proposed expenditure was within his power to approve under section 6(b), he might still cause that to be proposed to LegCo for approval in accordance with the EFO. It was CE's own judgement on which course of action was appropriate. Referring to Article 64 of the Basic Law which provided that the Administration should be accountable to LegCo, LA said that CE would be

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accountable to the LegCo for his decision to approve the purchase under section 6(b) of the EFO and this decision was amenable to judicial review.

56. LA further advised that whether the purchase was necessary was a matter of judgement. According to the letter from FS's Office dated 19 July 2001 to the Panel, DoJ had not expressly given a view on the necessity of the purchase, but had mentioned that "the Monetary Authority clearly requires accommodation to enable him and his staff to undertake their functions and duties under the Ordinance". A general observation was that this factor alone was insufficient to satisfy the conditions stipulated under section 6(b). Other factors including the location, size, tenure and price etc. of the office to be acquired vis-à-vis the operational requirements of HKMA might also be relevant. However, the Administration had not revealed how CE had arrived at his decision to approve the purchase. As such, Members might consider inviting the Administration to explain this decision.

57. As to whether the expenditure for the purchase was an incidental expenditure, LA advised that there was no precise definition of "incidental expenditure" in the law, but two relevant principles were observed in precedent cases. Firstly, the expenditure should be incurred for purposes subsidiary but necessary for attaining a pre-determined primary objective. Secondly, the question of whether an expenditure was "incidental expenditure" should be considered 'in the context' of the reasons and factors surrounding the expenditure and this to a certain extent involved matters of judgement.

Consideration of public sentiments in deciding the office purchase

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58. Mr SIN Chung-kai expressed dissatisfaction that despite the poor performance of the Exchange Fund and the difficult economic climate, the Administration still insisted on using a huge sum of public money to purchase a new office of the premium standard for HKMA. He questioned whether the Administration had taken into account the views and sentiments of the community towards the then proposed purchase before making its decision to complete the purchase agreement. DS/FS said that as he was not directly involved in the decision-making process, he would relate Mr SIN's question to the responsible officer(s) for a reply after the meeting. He then affirmed the Administration's position that there was a need to purchase permanent accommodation for HKMA and the premises acquired met the operational requirements of HKMA. The Administration also considered that from the long-term perspective, the purchase was a sound investment.

Review of HKMA's powers and management structure

59. Members noted that at the Panel meeting on 20 April 2001, CE/HKMA had informed members that the Administration had plans to further clarify the policy objectives, the mandates, the authority, and the governance and accountability arrangements of HKMA to ensure that it was able to discharge its functions effectively and professionally. In response to Miss Emily LAU's

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enquiry about the progress of the review, DS/FS said that according to his understanding, the former FS had mentioned about the plan to review the powers and management structure of HKMA to reinforce its accountability and transparency in the 2001-02 Budget Speech. At this stage, the Administration did not have a timetable on the matter.

60. Miss Emily LAU expressed disappointment that the Administration was not able to report any progress of the review to members although the plan to conduct the review had already been announced in March 2001 by the former FS. DS/FS said that he would convey members' views on the matter to FS. At Miss LAU's request, the Chairman agreed to write to FS to convey members' concern and draw FS's attention to the need to take up the matter.

(Post-meeting note: The Chairman's letter to FS and FS's reply were issued to members vide LC Paper No. CB(1)373/01-02 dated 21 November 2001 and CB(1)610/01-02(01) dated 14 December 2001.)

Security of the new office

61. Mr Albert HO expressed concern about the security of the new office. Noting that it would be located at the top floors (at levels 77 to 88) of Two International Finance Centre, he asked whether the security aspect had been reviewed in the light of the terrorist attacks in the United States on 11 September 2001. In response, DS/FS advised that according to the Administration's assessment, the risk associated with terrorist attacks in Hong Kong was very low. Hence, there was no reason to believe that Two International Finance Centre would be a probable target of terrorist attacks. In terms of internal security control, there would be improvement upon removal of HKMA from the current accommodation to the new accommodation, as the security requirements of HKMA would be taken into account in the design and fitting-out of the new office. The Executive Director (Corporate Services), HKMA (ED/HKMA) supplemented that there would be separate lifts designated for exclusive use by HKMA and this would facilitate better security control by HKMA.

Expenditure for fitting out the new office and other concerns

62. Miss Emily LAU asked whether the Administration concurred that the expenditure for the purchase was a public expenditure and sought confirmation on whether the Administration would seek the approval of LegCo for the expenditure for fitting out the new office accommodation. In response, ED/HKMA advised that this expenditure would also be charged to the Exchange Fund and would be subject to FS's approval. However, HKMA would be pleased to provide relevant information to members when the details were confirmed.

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63. To clarify the Administration's position, DS/FS referred members to the advice of DoJ set out in paragraph (d) of the letter from the FS's Office dated 19 July 2001 to the Panel that "...Following from this, it is unlikely that the duty to obtain approval for public expenditure is applicable in the context of the Exchange Fund under Article 113 of the Basic Law (BL 113), as long as the relevant expenditure falls within the terms of BL 113 and the EFO". He said that as the expenditure for the office purchase fell within the terms of BL 113 and the EFO, there should be no need to obtain LegCo's approval for the expenditure. DS/FS added that it was not uncommon for legal experts to have different view points on a legal issue.

64. LA said that while he agreed to DoJ's analysis set out in paragraph (d) of the letter from the FS's Office dated 19 July 2001, his understanding of the advice was different from that of DS/FS. He pointed out that the duty to obtain approval for public expenditure was not applicable only if the relevant expenditure fell within the terms of BL 113 as well as those of the EFO. He was of the view that while the expenditure referred to in sections 3(1) and 3(1A) of the EFO was covered by BL 113, the expenditure referred to in sections 6(a) and 6(b) of the EFO was not covered by BL 113.

65. The Chairman suggested that in view of the complicated legal issues involved, LA be invited to provide written views on the issues for further consideration by members. Miss Emily LAU suggested that the Panel Clerk should seek further information from the Administration, including the justification for CE's decision to approve the purchase, and work together with LA to prepare a paper for the Panel.

66. Mr NG Leung-sing requested the Administration to confirm whether the control and management of the office accommodation in question fell under the purview of the Government Property Administrator.

67. Mr Albert HO said that he was given to understand that the Director of Lands had made an assessment of the value of the premises in question before the MOU was signed. He requested the Administration to confirm this and to inform the Panel of the results of the assessment.

68. The Chairman concluded that the Panel would decide how it would proceed with the deliberation on the matter upon receipt of further information from the Administration and perusal of the paper to be prepared by LA and the Panel Clerk.

69. DS/FS remarked that as the Administration was accountable to LegCo, the Administration would try its best to facilitate the Panel's deliberation on the matter.