

For information

**Subcommittee on the Six Orders
Made under Section 5(1) of the
Public Bus Services Ordinance and Gazetted on 20 January 2012**

**Response to Members' Request for Information / Suggestions
Supplementary Information**

Purpose

This paper provides the Administration's views on whether the six Orders may be amended by the Legislative Council ("LegCo") under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) to include, for the specified routes, a benchmark for deviation from the relevant Schedule of Services.

A franchise vs an Order

2. Two different instruments may be made under the Public Bus Services Ordinance (Cap. 230) section 5(1), i.e. an Order to specify routes and a franchise to grant a right to a public bus company to operate a public bus service.

3. At the time when the six Schedule of Routes Orders (L.N. no. 4 – 9 of 2012) ("Orders") were made (10 Jan 2012), there already existed (since dates between 2003 and 2007) six franchises to bus companies to operate bus services. The franchise documents were published in the Gazette as General Notices and have been uploaded to the website of the Transport Department. Each franchise took the form of a grant for ten years made by the Chief Executive in Council ("CE in C") in favour of the franchisee upon the conditions therein set out.

4. Those grants were made by virtue of the statutory authority conferred on CE in C by Cap. 230 section 5(1). The CE in C at that time had power to impose conditions upon the franchisees (section 5(3)).

5. Those franchises conferred rights on franchisees to operate bus services during the period of ten years, but they did not specify particular bus

routes. Each franchise expressly provided that the CE in C would specify the particular routes allocated to the franchisee by means of an Order under Cap. 230 section 5(1) (or as might be varied subsequently by section 14 or 15).

6. The source of the legal power to specify the routes on which a franchisee is entitled to operate bus services (as agreed in each franchise) is the same as the source of the power vested in the CE in C to grant a franchise; see Cap. 230 section 5(1). The difference is that the power to specify routes, whenever exercised, must be exercised by an Order of the CE in C.

7. Each grant of franchise is made subject to Cap. 230. Part III of Cap. 230 –

- (a) places additional obligations on a franchisee in relation to a specified route (sections 11, 12, 12A);
- (b) enables the CE in C to regulate fares on a specified route (section 13); and
- (c) enables the Commissioner for Transport (“the Commissioner”) to give directions (after consultation with the franchisee) on service frequency, bus types and carrying capacity on a specified route (section 16).

8. A franchise may, with consent of the franchisee, be amended by CE in C (Cap. 230 section 5(4)). Except in the particular situation set out in Cap. 230 section 5(5), CE in C cannot unilaterally amend the terms of the franchise. Where section 5(5) is applicable, the franchisee can seek compensation (Cap. 230 section 5(5) to (8)).

The Orders as subsidiary legislation

9. The Legal Service Division of the LegCo Secretariat has raised the issue of whether the Orders are within the definition of “subsidiary legislation” under Cap. 1 (see paragraph 5 of LC Paper No. LS43/11-12). However, the Administration is prepared to proceed on the basis that these Orders, like others previously, are to be treated as subsidiary legislation and should be laid before LegCo in accordance with Cap. 1 section 34(1). It is however willing to engage in discussions with LegCo in the context of a more appropriate forum/panel as to whether they are subsidiary legislation within the meaning of Cap. 1 and whether the current practice should be changed.

LegCo's powers over subsidiary legislation

10. By Cap. 1 section 34(2), LegCo has a wide power to amend the Orders as subsidiary legislation. However, the amendment to be made should be “in a manner consistent with the power to make such subsidiary legislation”; Cap. 1 section 34(2).

11. The Administration's view has been summarized in paragraph 4.25 of the “Report of the Subcommittee to Study Issues relating to the Power of the Legislative Council to Amend Subsidiary Legislation” (Appendix I to LC Paper No. CB(2)975/11-12) (“Report”), namely: “The Administration has pointed out that under section 34(2) of Cap. 1, LegCo may amend an item of subsidiary legislation in any manner whatsoever consistent with the power to make such subsidiary legislation. Section 28(1)(c) of Cap. 1 provides that subsidiary legislation may at any time be amended by the same person and in the same manner by and in which it was made. When read with section 28(1)(c) of Cap. 1, LegCo's power to amend an item of subsidiary legislation under section 34(2) has to be consistent with the delegate's power to make the subsidiary legislation as set out in the primary legislation. The scope of the LegCo's amendment powers is primarily a matter of statutory interpretation of section 34(2) as read with section 28(1) of Cap. 1 and the empowering provision in the primary legislation which delimits the power of the maker of that subsidiary legislation.” As noted in the Report (paragraph 4.27), the Hong Kong Bar Association does not consider the Administration's construction aforesaid to be objectionable.

The Hon. Lee Wing Tat's proposal

12. The proposal of the Honourable Member is in substance for LegCo to resolve by way of an amendment to the Orders of the CE in C that for each of the routes “a benchmark for deviation from the Schedule of Services be included”.

13. A “Schedule of Service” is an “administrative instrument” prepared by the Transport Department to incorporate the relevant arrangements for the operation of a specified route by each bus company, showing for each route operating details including the approved routing, time table, frequency and the bus allocation.

Whether Hon. Lee Wing Tat's proposal is consistent with the CE in C's power in making the Orders

14. The Administration considers that Hon Lee Wing Tat's proposal is not consistent with CE in C's powers in making the Orders under Cap. 230 section 5(1) for the following reasons:

- (1) Under Cap. 1 section. 34(2), LegCo cannot do what the CE in C could not do in the exercise of the power vested in it;
- (2) The CE in C made the Order in exercise of its statutory power to specify routes for the franchised bus companies; see Cap. 230, section 5(1);
- (3) The CE in C was not in January 2012 exercising a power to grant franchises for bus services under Cap. 230 section 5(1). ;
- (4) By the same token, the CE in C was not exercising its power under Cap. 230 section 5(3) to specify conditions of the franchise.

15. It has been suggested by the Legal Service Division of the LegCo Secretariat (in the LC Paper No. LS43/11-12 dated 7 Mar 2012) that when exercising the power to specify the routes, the CE in C and hence LegCo are entitled to impose "reasonable conditions", and that this could extend to matters such as time-tabling, frequency and bus allocation.

16. The authority cited is Cap. 1 section 40(2)(b), the material parts of which are as follows:

"where any Ordinance confers power ... (b) to grant a licence, Government lease, permit, authority, approval or exemption, such power shall include power to impose reasonable conditions subject to which such licence, Government lease, permit, authority, approval or exemption may be granted"

17. With respect, for the reasons set out herein including those summarized below, the Administration is unable to agree with this suggestion:

- (1) For the reasons given in paragraph 14, it is incorrect to think that in making these Orders in 2012, the CE in C was granting anything in the nature of a licence. He was not.
- (2) By these 2012 Orders, the CE in C was merely specifying particular routes on which the franchisees could operate bus services.
- (3) Having already exercised its power to impose conditions (Cap. 230 section 5(3)) when making those grants of franchise to endure for 10 years, CE in C could not subsequently seek to add further conditions to the grant without the consent of the franchisee or payment of compensation (Cap. 230 section 5(4) to (8)).
- (4) The franchises are subject to Cap. 230 in that (a) the franchisees must operate proper and efficient public bus services to the satisfaction of the Commissioner (section 12(1)), and that (b) setting standards for the operation of the bus services (frequency, carrying capacity and bus types) is a matter for the Commissioner to give directions, but only after consultation with the franchisees (section 16).
- (5) In those circumstances, it could not be “reasonable” (because it would be contrary to the terms of the primary legislation) for the CE in C or for LegCo to impose in the Orders conditions or “benchmarks” for the operation of bus services. Nor would it be “reasonable” to do so without consulting the franchisees.
- (6) In this case, a franchise is governed by and granted pursuant to a power under a specific Ordinance (Cap. 230) expressly permitting conditions to be imposed upon the franchisee (section 5(1)). The terms of section 40(2)(b) which are intended to supplement other Ordinances (Cap. 1 section 2(1)) accordingly serve no purpose in this context.

18. It is of course entirely right and proper that a member of LegCo should bring forcibly to the attention of the Commissioner any concerns he or she may have over the number and extent of recorded deviations on certain bus routes.

It would be open to the Commissioner, after consultation with the responsible franchisees, to give formal directions on the matter (including benchmarks) in order to ensure the provision of a proper and efficient public bus service. If these are not complied with, the CE in C is empowered to impose financial penalties (Cap. 230 section 22).

Conclusion

19. The Administration submits that the amendment proposed by Hon Lee Wing Tat is not consistent with the power of the CE in C under Cap 230 section 5(1) to make an order to specify routes and hence may not be made under Cap. 1 section 34(2) by LegCo.

Transport and Housing Bureau
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