

立法會
Legislative Council

LC Paper No. LS43/11-12

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

**Amendments to the Schedule of Routes Orders 2012
(L.N. 4 to 9 of 2012)**

The Orders

The six Schedule of Routes Orders 2012 (the Orders) were made by the Chief Executive in Council (CE in Council) under section 5(1) of the Public Bus Services Ordinance (Cap. 230) ("the principal Ordinance") to repeal the Schedule of Routes Orders made in 2011 (L.N. 12 to 17 of 2011) and to set out in the new schedules specified routes on which each of the franchised bus companies has the right to operate a public bus service. The Orders seek to formalize the bus service changes introduced during the period between 1 October 2010 and 30 September 2011. The Orders will come into operation on 1 April 2012.

Background

2. At the meeting of the Subcommittee on the Orders held on 23 February 2012, a member enquired whether amendments to the Orders could be made by the Legislative Council ("the LegCo") so as to include a benchmark for deviation from the Schedule of Service.

3. To assist the Subcommittee, the Administration and the legal adviser to the Subcommittee have been asked to advise on whether the Orders may be amended and the scope of such amendments (if any), with particular reference to the provision of a "benchmark" in the Orders.

The Orders as subsidiary legislation

4. It would appear from the Legislative Council Brief (Ref: THB(T)L 2/4/115) that the Orders are intended to be subsidiary legislation in that the Brief contains a legislative timetable, the Orders have been published as Legal Notices in Part A of Legal Supplement No. 2 of the Gazette and laid on the table of the Legislative Council.

5. However, "subsidiary legislation" is defined in the Interpretation and General Clauses Ordinance (Cap. 1) to mean "any ... order ... or other instrument made under or by virtue of any Ordinance and having legislative effect". Despite that the Orders are labelled as Orders and treated as subsidiary legislation, the Administration may wish to clarify in the first instance whether the Orders do have legislative effect in view of the following observations –

- (a) the relevant franchises to which the Orders relate are also granted under section 5(1) of the principal Ordinance, but they are not treated as subsidiary legislation, being published as General Notices in the Gazette and not laid on the table of LegCo;
- (b) the bus routes are "specified" but not "prescribed"¹;
- (c) the current Schedule of Routes Orders are not published in the Authorized Loose-leaf Edition of the Laws of Hong Kong; and
- (d) the Orders do not appear to formulate any rule of conduct, just as the franchises do not appear to so formulate.

LegCo's power to amend subsidiary legislation

6. Provided that the Orders are subsidiary legislation, under section 34(2) of Cap. 1, LegCo may, by resolution passed at a LegCo sitting, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation. To determine whether the power to amend the Orders in a particular way is consistent with the CE in Council's power to make the Orders under section 5(1) of the principal Ordinance, it is necessary to consider the Orders, the relevant provisions (including the enabling provision), the franchises and the Schedule of Service. In this connection, the Legal Service Division wrote to the Administration on 29 February 2012 requesting for copies of the franchises and a sample Schedule of Service for each of the bus companies.

Relevant provisions

7. Section 5(1) of the principal Ordinance provides that "the CE in Council may grant to any company registered under the Companies Ordinance (Cap. 32) the right to operate a public bus service on such routes as he specifies by order". The section consists of two limbs. First, the CE in Council may grant to a company the right to operate a public bus service (the franchise).

¹ Under section 3 of Cap. 1, "prescribed" when used in or with reference to any Ordinance, means "prescribed ... by that Ordinance or by subsidiary legislation made under that Ordinance".

Second, the routes applicable in the case of a grantee are specified by the CE in Council by order. The power to specify should be part and parcel of and inalienable from of the power to grant the franchise, without which the latter power is not complete.

8. Section 40(2)(b) of Cap. 1 provides where any Ordinance confers power 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.

9. Section 5(1) of the principal Ordinance confers power on the CE in Council to grant a franchise and for that purpose, power to specify the routes applicable in the case of the grantee. Section 40(2)(b) of Cap. 1 would appear to apply to both such powers so that reasonable conditions may be imposed subject to which the specification of routes is made. As to whether conditions relating to the timetable, frequency and bus allocation could be added, it would depend on whether they are reasonable with regard to the specification of routes.

Proposed amendments

10. If any amendments to be proposed to the Orders relate to any conditions subject to which the specification is made, it may also be necessary to look at the terms of the franchise, anything that has been done arising from the franchise that has binding effect on the Commissioner for Transport and any relevant provision of the principal Ordinance² in order to determine whether the amendments can be made.

Charging effect restrictions

11. LegCo's power to amend subsidiary legislation is also subject to the charging effect restrictions provided under Rule 31(1) of the Rules of Procedure. Even if the amendments to the Orders to be proposed by a member are admissible under section 34(2) of Cap. 1, such amendments must not have charging effect as provided under that Rule.

² For example, section 12 of the principal Ordinance –

"(1) A grantee shall, at all times during the franchise period, maintain to the satisfaction of the Commissioner a proper and efficient public bus service.

(2) Without prejudice to the generality of subsection (1), the grantee shall not be treated for any purpose of this Ordinance as maintaining a proper and efficient public bus service unless it maintains the service and operates the same in accordance with its franchise, this Ordinance, any direction or requirement under its franchise or this Ordinance and any programme or any approval under section 16A."

Conclusion

12. It would appear, subject to what has been set out in paragraphs 9 to 11 above, there may be scope for the Orders to include a "benchmark" as a condition. However, whether any proposal to include such a "benchmark" in the Orders may be made by way of amendment to the Orders under the negative vetting procedure in accordance with section 34(2) of Cap. 1 would depend on whether the Orders are subsidiary legislation or administrative orders –

- (a) if the Orders are subsidiary legislation, the admissibility of any amendment proposed under the said section 34(2) will have to be ruled on by the President of LegCo after considering any submission from the Administration;
- (b) if the Orders are not subsidiary legislation, the inclusion has to be made by the CE in Council by another administrative order.

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