

**President's ruling on Hon LEE Wing-tat's proposed resolutions
to amend the six Orders made under section 5(1) of the
Public Bus Services Ordinance (Cap. 230) and
gazetted on 20 January 2012**

Hon LEE Wing-tat has given notices to move six proposed resolutions at the Legislative Council ("LegCo") meeting of 21 March 2012 to respectively amend the six Orders made under section 5(1) of the Public Bus Services Ordinance (Cap. 230) ("PBSO"), which were gazetted on 20 January 2012 and tabled in LegCo on 1 February 2012. In considering whether the proposed resolutions are in order under the Rules of Procedure, I invited the Administration to comment on the proposed resolutions and Mr LEE to respond to the Administration's comments.

Six Orders made under section 5(1) of the Public Bus Services Ordinance (Cap. 230)

2. Under section 5(1) of PBSO, the Chief Executive in Council ("CE in C") may grant to any registered company the right to operate a public bus service on such routes as he specifies by order. The routes so specified form the franchised bus networks of the relevant bus franchises. According to the LegCo Brief¹, the six Orders were made to formalise changes to bus routes introduced by the five franchised companies² between 1 October 2010 and 30 September 2011.

3. The objectives of the six Orders, according to the relevant Explanatory Notes, are as follows:

- (a) Schedule of Routes (Citybus Limited) Order 2012 (L.N.4): the Order replaces the previous Order made in 2011³ to set out an updated schedule of non-exclusive bus routes (other than for north Lantau and the airport at Chek Lap Kok) operated by the company. In the updated schedule, alterations are made to 16 routes in respect of its franchise for Hong Kong Island and cross-harbour bus services;

¹ LegCo Brief on Public Bus Franchisees' Schedule of Routes Orders issued by the Transport and Housing Bureau in January 2012.

² The five franchised bus companies are Kowloon Motor Bus Company (1933) Limited, Citybus Limited, New World First Bus Services Limited, New Lantao Bus Company (1973) Limited and Long Win Bus Company Limited.

³ The previous Order was the Schedule of Routes (Citybus Limited) Order 2011 (L.N. 12 of 2011).

- (b) Schedule of Routes (Citybus Limited) (North Lantau and Chek Lap Kok Airport) Order 2012 (L.N. 5): the Order replaces the previous Order made in 2011⁴ to set out an updated schedule of non-exclusive bus routes operated by the company for north Lantau and the airport at Chek Lap Kok. In the updated schedule, alterations are made to four routes in respect of its franchise for the bus services for north Lantau and the airport at Chek Lap Kok;
- (c) Schedule of Routes (Kowloon Motor Bus Company (1933) Limited) Order 2012 (L.N. 6): the Order replaces the previous Order made in 2011⁵ to set out an updated schedule of non-exclusive bus routes operated by the company. In the updated schedule, one route is cancelled and alterations are made to 56 routes;
- (d) Schedule of Routes (Long Win Bus Company Limited) Order 2012 (L.N. 7): the Order replaces the previous Order made in 2011⁶ to set out an updated schedule of non-exclusive bus routes operated by the company. In the updated schedule, alterations are made to one route;
- (e) Schedule of Routes (New Lantao Bus Company (1973) Limited) Order 2012 (L.N. 8): the Order replaces the previous Order made in 2011⁷ to set out an updated schedule of non-exclusive bus routes operated by the company. In the updated schedule, alterations are made to two routes; and
- (f) Schedule of Routes (New World First Bus Services Limited) Order 2012 (L.N. 9): the Order replaces the previous Order made in 2011⁸ to set out an updated schedule of non-exclusive bus routes operated by the company. In the updated schedule, one new route is introduced and alterations are made to 18 routes.

⁴ The previous Order was the Schedule of Routes (Citybus Limited) (North Lantau and Chek Lap Kok Airport) Order 2011 (L.N. 13 of 2011).

⁵ The previous Order was the Schedule of Routes (Kowloon Motor Bus Company (1933) Limited) Order 2011 (L.N. 14 of 2011).

⁶ The previous Order was the Schedule of Routes (Long Win Bus Company Limited) Order 2011 (L.N. 15 of 2011).

⁷ The previous Order was the Schedule of Routes (New Lantao Bus Company (1973) Limited) Order 2011 (L.N. 16 of 2011).

⁸ The previous Order was the Schedule of Routes (New World First Bus Services Limited) Order 2011 (L.N. 17 of 2011).

Hon LEE Wing-tat's proposed resolutions

4. Hon LEE Wing-tat's proposed resolutions seek to amend the six Orders respectively and similarly to include, for the routes specified in each Order, a benchmark for deviation from the relevant Schedule of Services ("SoS") or any similar direction made by the Commissioner for Transport ("C for T") as follows:

"If in any quarter commencing on the first day of April, July, October or January of every year, the average quarterly percentage calculated on a basis determined by the Commissioner by which the number of actual bus trips on any specified bus route falls below the number of bus trips on the route calculated from the timetable set out in the Schedule of Service for, or any such other direction made under section 16(1) of the Ordinance applicable to, the route exceeds 3%, the grantee is to be regarded for the purpose of section 24 of the Ordinance as appearing to the Chief Executive in Council as having failed to maintain a proper and efficient public bus service in respect of that specified route, in accordance with section 12."

5. Counsel to the Legislature explains that the effect of Mr LEE's proposed resolutions, if passed by LegCo, is to specify in the relevant Order a benchmark of 3% for deviation in terms of the number of bus trips from SoS for each of the specified bus route. If the proposed benchmark is exceeded, section 24 (Revocation of right to operate a service on a specified route or of franchise) will be triggered, allowing CE in C to set in motion the statutory revocation mechanism, because the grantee will be treated as not maintaining a proper and efficient service in accordance with section 12 of PBSO (Grantee to maintain proper service). The proposed benchmark is therefore effectively a tolerance level requirement, because its breach is treated as not maintaining a proper and efficient public bus service to the satisfaction of C for T (section 12(1)), or not maintaining a proper and efficient service in accordance with a specific requirement of PBSO (section 12(2)).

The Administration's comments

LegCo's powers over the Orders

6. Section 5(1) of PBSO provides that "subject to this Ordinance, CE in C 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”. I notice that the legislative effect of the six Orders was considered in the subcommittee set up to scrutinize these Orders and the question of whether these Orders fall within the definition of subsidiary legislation was raised. In its submission, the Administration requests that the six Orders be proceeded on the basis that these Orders are subsidiary legislation but it is willing to engage in discussion with LegCo in the context of a more appropriate forum or panel on that issue and examine whether the current practice of regarding these orders as subsidiary legislation should be changed.

7. The Administration also submits that by section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) (“IGCO”), LegCo has the power to amend the Orders under that section “in a manner consistent with the power to make such subsidiary legislation”.

The Administration’s views on Hon LEE Wing-tat’s proposed resolutions

Power to amend the Orders

8. In the Administration’s view, Hon LEE Wing-tat’s proposed resolutions are not consistent with the powers of the CE in C under section 5(1) of PBSO for the following reasons:

- (a) a power to make subsidiary legislation is strictly controlled by the terms of the primary legislation creating it. LegCo cannot do what CE in C could not do in the exercise of the power vested in it (section 34(2) of IGCO);
- (b) CE in C made the Orders in exercise of its statutory power to specify routes for the franchised bus companies (section 5(1) of PBSO refers);
- (c) in making the Orders, CE in C was not exercising a power to grant franchises for bus services; the franchise had already existed as a result of CE in C’s grant under a previous exercise of power conferred by section 5(1) of PBSO; and
- (d) by the same token, CE in C was not exercising its power under section 5(3) of PBSO to specify conditions of the franchises; those conditions had been specified earlier and were already incorporated in the franchises.

9. The Administration further submits that in the light of the following reasons, it is unable to agree to the suggestion that when exercising the power to specify the routes, CE in C and hence LegCo are

entitled, pursuant to section 40(2)(b) of IGCO⁹, to impose “reasonable conditions”, and that this could extend to matters such as time-tabling, frequency and bus allocation:

- (a) for the reasons stated in paragraph 8(a) to (d) above, it is incorrect to consider that in making the six Orders, CE in C was granting anything in the nature of a licence;
- (b) franchises had been granted long before, and upon conditions imposed by CE in C by virtue of section 5(1) and (3) of PBSO. By the six Orders, CE in C was merely specifying particular routes on which the grantees could operate bus services;
- (c) having already exercised its power to impose conditions (section 5(3) of PBSO) when making the grants of franchise to last for 10 years, CE in C could not subsequently seek to add further conditions to the grant of franchises without the consent of the grantee or payment of compensation (section 5(4) to (8) of PBSO);
- (d) the franchises are subject to PBSO. It is clear that the grantees must operate proper and efficient public bus services to the satisfaction of C for T (section 12(1)), and that setting standards for the operation of the bus services (frequency, carrying capacity and bus types) is a matter for C for T to give directions, but only after consultation with grantees (section 16);
- (e) it could not be “reasonable” (because it would be contrary to the terms of the primary legislation) for 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 grantees; and
- (f) a public bus franchise is governed by and granted pursuant to a power under PBSO expressly permitting conditions to be imposed upon the grantee (section 5(1) of PBSO). The terms of section 40(2)(b) of IGCO serve no purpose in this context.

⁹ Section 40(2)(b) of IGCO provides that “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”.

10. The Administration also submits that Hon LEE Wing-tat's proposed resolutions purport to bind CE in C to a view that the deviation from the benchmark as proposed of itself establishes a failure to maintain a proper and efficient bus service on specified routes, whereas the principal legislation (section 12 of PBSO) makes C for T in the first instance the judge of whether a proper and efficient public bus service has been maintained, and section 24 of PBSO requires CE in C to consider whether the grantee has failed "without good cause" to maintain a proper and efficient public bus service in the light of all relevant circumstances. In both these respects, the proposed amendments would fall foul of the principle that subsidiary legislation cannot amend or control or override primary legislation, and would create an objectionable form of subsidiary legislation.

Charging effect

11. The Administration is of the view that Hon LEE Wing-tat's proposed amendments have charging effect within the meaning of Rule 31(1) of the Rules of Procedure¹⁰. The Administration submits that Mr LEE's proposals would require very extensive monitoring of some 570 routes individually being operated by the five franchised bus companies against the proposed benchmark. Quite apart from the potentially substantial workload that can be generated by this individual route and automatic mechanism, there is also a real prospect that it may provide a way for individual routes that are in the view of the franchised bus company concerned inefficient and unprofitable to be revoked by CE in C as the company may choose not to show cause to defend the lost trips. If such a situation arises, then public bus service is likely to suffer, resulting in the need to go for public tender for these routes individually without certainty as to their availability in these circumstances. The Administration estimates that the total staffing costs to take on this new statutory responsibility and deal with its consequences will amount to some \$11 million annually¹¹.

¹⁰ Rule 31(1) of the Rules of Procedure provides that a motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by the Chief Executive; a designated public officer; or a Member, if the Chief Executive consents in writing to the proposal.

¹¹ The Administration submits that to implement the proposed resolutions, the Transport Department needs to set up a new branch which will be headed by an Assistant C for T for Transport and supported by three officers. The annual total staff costs are estimated to be \$3.5 million. In addition, two teams, one on monitoring and another on tendering, and each comprising five officers, will have to be created. The annual recurrent staff cost for each team is estimated to be \$3.77 million.

Hon LEE Wing-tat's response

Power to amend the Order

12. Hon LEE Wing-tat submits that:

- (a) according to the relevant LegCo Brief on the six Orders, “the service changes have been made to better serve the travelling public and to improve the efficiency of bus operation”. As ensuring the accuracy of service schedules is an important aspect of enhancing service quality and operation efficiency of public bus services, Mr LEE considers that the scope of the six Orders should not be restricted to amendments to bus routes only. His proposed amendments seek to add a benchmark for deviation from the relevant SoS;
- (b) the Administration has adopted a narrow view of what may be included in the six Orders, and hence it is unable to make use of the Orders to improve public bus services; and
- (c) while CE in C may grant a franchise under section 5(1) of PBSO, the Government has the responsibility to monitor the overall quality of service. As the Government has not set any benchmark for deviation from the SoS, his amendments aim to do so with a view that the overall quality of bus services will be adequately monitored.

Charging effect

13. Mr LEE submits that as the Administration already has the responsibility to monitor the provision of public bus services in accordance with the approved timetable set out in the SoS, additional government expenditure should not result. As regards the additional workload resulting from his proposed amendments, Mr LEE suggests that the Administration should discuss with the bus companies to set up electronic systems to collect real-time information at bus termini for monitoring public bus services and to improve the current mode of operation so as to enhance efficiency of services and deployment of resources.

14. Mr LEE submits that according to the Administration, franchised bus companies should set up their own management systems to ensure the bus services comply with the timetables set out in the SoS. Mr LEE also points out that the Transport Department should encourage franchised bus companies to develop or expand on the use of on-line electronic systems

so as to maintain the regularity and reliability of public bus services, with due regard to the operational needs and the cost-effectiveness of such systems.

My opinion

15. As both the Administration and Mr LEE do not dispute for the present purpose the status of the Orders as subsidiary legislation, it is unnecessary for me to consider the issue.

Scope of amendment

16. In its submission, the Administration has argued that the proposed amendments are inconsistent with the power of CE in C to make the Orders to specify bus routes under section 5(1) of PBSO. The arguments are mainly based on its interpretation of section 5(1) of PBSO and section 40(2)(b) of IGCO. It has also argued that “the proposed amendments would fall foul of the principle that subsidiary legislation cannot amend or control or override primary legislation”.

17. Counsel to the Legislature has advised me that the latter principle is actually reflected in section 28(1)(b) of IGCO, which provides that “no subsidiary legislation shall be inconsistent with the provisions of any Ordinance”.

The relevant regulatory provisions

18. In order to put the proposed amendments in the proper context of the PBSO, it is necessary to first set out the relevant provisions that would help me to understand the regulatory regime:

- (a) *Prohibition of operation of public bus service except under franchise:* a public bus service shall not be operated except under a franchise (section 4(1));
- (b) *Grant of franchises:* CE in C may grant to any registered company the right to operate a public bus service on such routes as he specifies by order (section 5(1)). “Specified route” is defined as a route specified in the Schedule of Routes Order applying in the case of a grantee and any new route on which a public bus service is operated by that grantee in accordance with a requirement under section 15 (section 2);

- (c) *Temporary alteration of routes and provision of additional routes:* C for T may, after consultation with bus companies, require them to introduce new routes and make alterations to specified routes on a temporary basis where appropriate. Such changes may take effect for a period up to only 24 months unless they are specified in the Orders made by CE in C before expiry of the said period (section 15(1)). Before such a direction is given, the C for T shall satisfy himself that the grantee will have available a sufficient number of buses for use on the route and all other routes, and be able to maintain a proper and efficient service on the route and all other routes (section 15(3));
- (d) *Grantee to maintain proper service:* a grantee shall maintain to the satisfaction of C for T a proper and efficient public bus service (section 12(1)). The grantee shall not be treated as maintaining a proper and efficient public bus service unless it maintains the service and operates the same in accordance with its franchise, PBSO, any direction or requirement under its franchise or PBSO (section 12(2));
- (e) *C for T to specify frequency of services and carrying capacity and types of buses:* C for T shall direct¹² by notice in writing to the grantee the frequency at and the period on each day during which a public bus service shall be operated on a specified route; and the carrying capacity and types of the buses to be used on any such route (section 16(1)); and
- (f) *Revocation of right to operate a service on a specified route or of franchise:* if it appears to CE in C that without good cause a grantee has failed, or likely to fail, to maintain a proper and efficient public bus service, either generally or in respect of any specified route in accordance with section 12, CE in C may direct the C for T to serve on the grantee a notice requiring the grantee to show cause in writing within 28 days after the service of the notice why its right to operate a public bus service on the specified routes as are set out in the notice should not be revoked, or why the franchise should not be revoked altogether (section 24(1)).

¹²According to the Administration's letter (LC Paper No. CB(1)1257/11-12(01)), the SoS which sets out the routing, timetable, fares, vehicle allocation, journey distance and journey time of each specified route is an administrative document approved by the Transport Department in accordance with section 16(1).

19. From the provisions set out above, it is plain to me that:
- (a) it is CE in C who grants the franchises, specifies the franchised routes, and to revoke a franchise or one or more of the specified routes; and
 - (b) it is C for T who sets the standards for the operation of the bus services (bus frequency, bus carrying capacity and bus types), oversees that a grantee operates a proper and efficient public bus service to his satisfaction, and for that purpose, makes any necessary administrative direction, and alters a specified route or approves its variation temporarily.

20. In my view, the proposed amendments, if passed, will have the following effects.

- (a) SoS have been issued in respect of the specified routes. The SoS have included a timetable with the precise headways expressed. As they are directions made under section 16(1), they would form an inflexible benchmark, any contravention of which would be treated under section 12(2) as failing to maintain a proper and efficient public bus service and could trigger section 24, i.e. leading CE in C to regard it as a failure to provide such service. The proposed amendment would introduce a relaxed benchmark and as such would be inconsistent with the benchmark already set out in the SoS in that there will be two benchmarks but no provision is made to reconcile them.
- (b) It would impinge on the statutory power of C for T to amend any existing direction such as the SoS, or to withdraw it to be replaced by a new direction, in such a way that may affect the applicability of the proposed benchmark. This in effect would fetter C for T's statutory power because the proposed benchmark is made by way of subsidiary legislation that clearly takes precedence over an administrative direction.
- (c) As the proposed benchmark is to be made by CE in C by order, CE in C will be intervening in the day-to-day matters which by design of PBSO are the purview of C for T.

21. I would therefore conclude that the proposed amendments to the Orders, if passed, are inconsistent with PBSO and hence contrary to section 28(1)(b) of IGCO. For that reason, the proposed resolutions

cannot be moved as they are not consistent with CE in C's power to make the six Orders. In the light of my conclusion on the application of section 28(1)(b) of IGCO, I do not consider it necessary to express an opinion on the other matters raised as to the scope of LegCo's power to amend under section 34(2) of IGCO.

Charging effect

22. As I do not consider that Hon LEE Wing-tat's proposed resolutions are in order, it is not necessary for me to deal with whether the proposed resolutions have charging effect within the meaning of Rule 31(1) of Rules of Procedure.

Ruling

23. I rule that Hon LEE Wing-tat's proposed resolutions are out of order and the notices of the proposed resolutions be returned to Mr LEE under Rule 30(3)(c)¹³ of the Rules of Procedure.

(Jasper TSANG Yok-sing)
President
Legislative Council

20 March 2012

¹³ Rule 30(3)(c) provides that a notice of a motion or an amendment shall be submitted to the President, who shall direct that it be returned to the Member who signed it, as being in his opinion out of order.