

立法會

Legislative Council

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Finance Committee

Relevant legal and procedural issues relating to Finance Committee's consideration of funding proposals

Purpose

This note provides information to address certain issues raised at the meeting of the Finance Committee (FC) on 18 December 2015 when the FC was considering the agenda item FCR(2015-16)42 which sought the FC's approval of the recommendation of the Establishment Subcommittee (ESC) made at its meeting held on 18 November 2015¹ (the Agenda Item). No public officers had been invited to attend the above FC meeting.

Procedure for consideration of agenda items for which no public officers are in attendance

2. Under paragraph 17 of the Finance Committee Procedure (FCP), a member may request that a public officer or other person be invited to attend a FC meeting and such request should reach the Clerk to the FC (the Clerk) by 5:00 pm on the working day before the meeting concerned.

3. In respect of the Agenda Item, the Clerk had not received any request for attendance of public officers by the specified deadline and hence, when the FC considered the Agenda Item at its meeting on 18 December 2015, no public officers attended the meeting. The question as to what procedure is to be adopted by the FC for considering the Agenda Item is more of procedural than legal. According to the Clerk, in past cases where no public officers attended the relevant FC meetings, the FC Chairman allowed members to speak on the agenda items, and if questions were asked, the Chairman usually undertook to refer them to the Administration for written response after the meeting. The duration

¹ The Establishment Subcommittee recommended the creation of three supernumerary posts in the Airport Expansion Project Coordination Office (AEPCO), Transport Branch of Transport and Housing Bureau to head the AEPCO for steering and coordinating the related work in taking forward the Three-Runway System project.

of consideration of the relevant agenda items was usually short, with only a few members speaking².

4. The FCP is silent on the procedure adopted by the FC for considering an agenda item for which no public officers are in attendance. Subject to the views of the Clerk, the following should be relevant:

- (a) While paragraph 17 of the FCP requires a request for attendance of public officers for discussion of an agenda item to be made by a specified deadline, there is no provision in the FCP which prohibits members from speaking on the agenda item at the relevant meeting even though no such request has been made.
- (b) In the absence of specific procedure in the FCP on how members may speak in such circumstances, it may be useful to refer to the relevant rules in the Rules of Procedure (RoP) which can be found in Part H of the RoP. Under Rule 38, a Member may not speak more than once except on the specific occasions set out in that Rule. Rule 36(5) provides for the speaking time of 15 minutes subject to the recommendation of the House Committee as to time of speaking. By virtue of Rule 43 of the RoP, these rules apply to the FC proceedings unless the Chairman orders otherwise.

5. In the light of Rule 43 of the RoP, the application of the rules in Part H (including Rules 36(5) and 38) of the RoP involves the exercise of discretion by the FC Chairman. From the legal point of view, the Chairman does not have an unfettered discretionary decision making power. In exercising his discretion, the Chairman has to take into account all relevant considerations, act reasonably and on reasonable grounds and exercise the discretion independently. In the present case, the relevant grounds and considerations for the exercise of the Chairman's discretion may include the length of discussion of the Agenda Item at the ESC meeting, the speaking time for motions provided in the FCP and that recommended by the House Committee. While the Chairman may seek the advice of the Clerk and the Legal Adviser to the FC in this regard, the decision must be made by him independently.

² For examples of these past cases, members may refer to the minutes of FC meetings on 20 December 2013 (paragraphs 2 to 9) and 24 January 2014 (paragraphs 1 to 4). The consideration of the relevant items at these two meetings lasted for about nine minutes and three minutes respectively.

Number of motions that may be proposed under paragraph 37A of FCP

6. It is clear that under paragraph 37A of the FCP, members may propose motions without notice to express views on an agenda item (37A motions). As to the number of 37A motions that may be allowed for a particular agenda item, this is a matter to be judged and decided by the Chairman having regard to the prevailing circumstances in the exercise of his power to chair meetings under the FCP³.

Application of "Erskine May Parliamentary Practice"

7. While the practices and conventions of the Parliament of the United Kingdom (UK) set out in "Erskine May Parliamentary Practice" may have reference value, they do not have the force of law in Hong Kong. Unlike contravening the law, deviation from a practice or convention would not give rise to legal consequences. Members may recall that the application of the constitutional convention on public financial authorization as described in "Erskine May Parliamentary Practice" was considered at the FC meeting on 16 March 2015. At that meeting, members were advised that the relevant constitutional convention was not applicable to the Legislative Council as the system on the management of public finances in Hong Kong was governed by the Public Finance Ordinance (Cap. 2) and was different from that of UK. Indeed, the UK system does not have a procedure similar to the procedure provided in paragraph 37A of the FCP⁴. As regards the powers of the FC Chairman, it has been established by the courts that the Chairman has the power to control and regulate the process of the FC, including the power to set limits to or terminate a debate⁵. By virtue of Articles 8 and 18 of the Basic Law, Cap. 2 and judicial authorities are the laws in force in Hong Kong.

³ The extent of the FC Chairman's power to chair meetings under paragraph 13 of the FCP was considered by the Court of First Instance (CFI) in *Wong Yuk Man v Ng Leung Sing and Tommy Cheung Yu Yan*, HCAL 78/2014. Applying the Court of Final Appeal's judgment in *Leung Kwok Hung v President of the Legislative Council of the HKSAR* [2015] 1 HKC 195, the CFI held that the FC Chairman has the power to control and regulate the process of the FC meetings under the FCP.

⁴ There was no procedure similar to the 37A procedure in the pre-1997 FCP. The 37A procedure was introduced to the FC in November 2007.

⁵ *Wong Yuk Man v Ng Leung Sing and Tommy Cheung Yu Yan*, HCAL 78/2014.

Role and functions of legal adviser to the Finance Committee

8. In the light of the concerns expressed by some members over the role and functions of the legal adviser to the FC (Legal Adviser), it may be appropriate to set out in this note how legal advice and support is and has been provided to the FC. Under paragraph 9 of the FCP, the Legal Adviser advises the Chairman and the Clerk on legal matters in relation to the business and administration of the Committee. Through advising the Chairman and the Clerk, the Legal Adviser provides legal support to the FC to enable it to conduct its businesses in accordance with the RoP and FCP. Hence, the Legal Adviser is responsible to the FC as a whole. He or she is not the personal legal adviser of the Chairman or individual members of the FC. In considering a question which we are asked to advise, our focus is on the relevant facts and the applicable legal principles. We give our legal opinions according to our professional judgment and will not be swayed by extraneous matters. On this basis, unless there are changes in the facts or circumstances, our advice on a given set of facts will be the same irrespective of who asks for it. We will not change our advice lightly in order to suit or cater to individual members' needs or because of individual members' pressure. This, we consider, is the essence and manifestation of our independence and professionalism. Notwithstanding the possible pressure and challenges ahead, members can rest assured that we will continue to provide independent legal advice and support to the FC in performing our duties.

Prepared by
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