

Reply to the further views of the Secretary for Financial Services in response to the President's ruling

In his letter of 17 November 1998, the Secretary for Financial Affairs disagreed with my ruling that Hon Albert HO's amendments do not have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure. My ruling is based, inter alia, on my views that, under the Ordinance, the Bill and the proposed amendments, the Compensation Fund is not funded by the General Revenue and Government has no statutory obligation to pay money into it; that section 53 of the Securities and Futures Commission Ordinance does not impose a duty on the Government to inject money into the reserves of the Securities and Futures Commission at any level; and that the Commission is only given discretion under the Bill to seek to pay money out of its reserves into the Fund.

2. The Secretary asserts that I have overlooked the point that there is no absolute or unfettered discretion in public law, and statutory power conferred for public purposes must be used in the way in which the legislature "when conferring it is presumed to have intended." (Wade & Forsyth: Administrative Law, 7th Ed. P.391) I have not overlooked and will indeed quote from the same source that "The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act."

3. Let us examine what the Ordinance, the Bill and Hon Albert HO's proposed amendments intend.

4. Section 101 of the Ordinance provides that the Fund shall consist, among others, of all other money lawfully paid into the Fund. Clause 2 of the Bill (new section 99(2)) provides that the Commission may, with the approval of the Financial Secretary, pay into the Fund from its reserves such sum of money as it thinks fit. And clause 5 of the Bill (new section 113(5A)) provides that the committee of the Exchange Company may, with the prior approval of the Commission, allow payment of such sum of compensation as it thinks fit, after taking into account all ascertained and contingent liabilities of the Fund and where it considers that the assets of the Fund so permit.

5. The intent of Hon Albert HO's amendments is as stated in the first paragraph of my ruling.

6. It is clear that the Fund is essentially intended to be a self-financing fund. There is no guarantee within the terms of the Ordinance or the Ordinance as would be amended that any claim for compensation would be satisfied. The Exchange Company and the Commission have to consider whether or not to approve a proposition on the actual amount of compensation to be paid, having regard to the ability of the Fund to make such payments.

7. On the basis of the above analysis, I stand by my ruling.

(Mrs Rita FAN)
President
Legislative Council

18 November 1998