

Legislative Council Panel on Constitutional Affairs

Basic Law Articles 50 & 51

Introduction

This paper provides the Administration's further response to questions from Members of the LegCo Constitutional Affairs Panel to facilitate an exchange of views between the Administration and LegCo on the interpretation of BL50 and BL51.

Background

2. Before addressing Members' specific questions, it may be helpful to recapitulate the events leading to the current discussion. In March 1999, the LegCo Committee on Rules of Procedure sought the Administration's views on the interpretation of the term "budget" in the context of BL50 and BL51. In its letter to the Administration, the LegCo Secretariat explained that the Committee on Rules of Procedure has to examine the procedural arrangements arising from BL51 in relation to the Chief Executive's application to LegCo for provisional appropriations if LegCo refuses to pass the budget introduced by the government. It was stated therein that as BL51 is consequent on BL50, there appears a need to first clarify the scope of the word "budget" in the context of these articles before the Committee on Rules of Procedure could proceed to the deliberation of the procedures involved.

3. Prompted by the above request, the relevant parties within the Administration deliberated on the matter. It should be noted that the term "budget" is not defined in the Basic Law nor in the laws of Hong Kong and the situations in BL50 and BL51 have never occurred to date. Our deliberations on the issue are therefore based on the context in which the term is used in the Basic Law, the purposes of the provisions concerned (including the theme of continuity as identified by the Court of Appeal in the David Ma's Case [1997] HKLRD 761) and the established practice in seeking LegCo approval of expenditure and revenue proposals. As a result, we come to the view that the term "budget" in the context of BL50 and BL51 refers to the expenditure side of the budget (i.e. the Appropriation Bill) but the term as appearing in other

sections of the Basic Law may carry an ordinary and wider meaning of both revenue and expenditure. The Administration's view was apparently shared by the Constitutional Affairs Panel at its meeting in July. In the light of some Members' latest concern, we are happy to continue to exchange views on this important matter with LegCo Members. There is however no question of the Administration adopting an interpretation of the term "budget" with a view to limiting LegCo's power in monitoring government's revenue proposals as suggested by some Members.

Specific Response

The Administration to put forward stronger justifications in support of its interpretation of the term "budget" in BL50 and BL51

4. As explained in paragraph 3 above, the Administration's interpretation of the term "budget" takes account of the context in which the term is used, the purposes of the provisions concerned and the established practice. This is, we believe, in line with the approach taken by SAR courts in the interpretation of the Basic Law. According to the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315, at 339I - 340J, a purposive approach to the interpretation of the Basic Law is appropriate. While the language of the BL text is important, a literal, technical, narrow or rigid approach must be avoided. The relevant provision should be construed in its context, which could be found in the Basic Law itself or relevant extrinsic materials including the Joint Declaration. In this regard, it should be noted that the constitutional purpose of BL50 is to protect the Legislature from arbitrary dissolution. That protection against unjustified dissolution is the purpose of BL50 is shown by the following –

- (a) It is a constitutional fundamental that the term of office of each Legislative Council shall be 4 years (BL69).
- (b) The constitutional imperative of a functioning legislature is underlined by BL70, which requires reconstitution of LegCo within three months of dissolution.

- (c) Dissolution of LegCo cannot be achieved except in very limited circumstances, i.e. LegCo twice passing a bill which the Chief Executive considers incompatible with the SAR's interests (the second passing must be by at least a two-thirds majority) or LegCo defeating a budget or any other important Government bill.

Even then dissolution of LegCo cannot take place until consensus through consultations has been attempted by Government and has failed.

5. As pointed out by the Chairman of the LegCo Constitutional Affairs Panel at the last meeting, it may be helpful to begin by referring to the term "budget" as used twice in BL48(3). In the Chinese text of BL48(3), the first appearing term of "budget" is (財政預算案) which the Chief Executive will sign after it is passed by LegCo. This clearly refers to a bill and as observed below, we consider that it is the Appropriation Bill under the existing arrangement. The second appearing term of "budget" in BL48(3) in the Chinese text is (財政預算) and juxtaposed with the term "final accounts" (決算), should more appropriately refer to the budget estimates including both revenue and expenditure. The final accounts are the audited accounts of the HKSAR Government which includes both revenue and expenditure.

6. In the Chinese text of BL50 and BL51, the term "budget" is (財政預算案). It clearly refers to a bill to be passed by LegCo. The issue is whether it refers to the Appropriation Bill or both the Appropriation Bill and revenue-related bill(s). Adopting a purposive approach to the interpretation of the Basic Law (as outlined in paragraph 4 above), we consider that BL50, BL51 and BL52 are sequential and related. That is to say, in finding an interpretation of the action of LegCo "refuses to pass a budget" in BL50 leading to consultations and possible dissolution of LegCo, we must bear in mind the consequential action that needs to be undertaken to ensure continued operation of the government as provided for under BL51, that is, the CE applying to LegCo for provisional appropriation of public funds. There should be no doubt that appropriations refer to the voting of expenditure, normally through the annual Appropriation Bill.

7. To facilitate deliberation on the matter, we have analysed the issue in

the light of the legal requirements governing the management of public finances and the established practice over the years in seeking the Legislature's approval of expenditure and revenue proposals.

8. Expenditure for government activities for a financial year is voted for annually through the Appropriation Bill. The FS's Budget Speech is delivered in moving the second Reading of the Appropriation Bill. Under Sections 5 and 6 of the Public Finance Ordinance (PFO), FS is required to lay before LegCo the annual estimates of expenditure at the same time as the Appropriation Bill is introduced and "[u]pon the enactment of the Appropriation Ordinance the estimates of expenditure for the financial year to which the Ordinance relates shall be deemed to be approved to the extent that they are provided for in the Ordinance..." Section 5(1) of the PFO requires the FS to lay before LegCo the annual estimates of revenue and expenditure before or as soon as practicable after the commencement of the financial year to which they relate. There is however no provision in PFO which requires the separate approval of the revenue estimates. In practice, the revenue estimates are laid before LegCo on Budget Day. These estimates are not submitted for approval; they reflect the best estimate of revenue yields based on existing statutory basis for collecting revenue and taking account of the proposed revenue measures announced in the Budget. The approval of revenue proposals (not revenue estimates) is subject to a separate legislative procedure as provided for under the relevant legislation to which the particular revenue measure relates.

9. Since what is required to be passed by LegCo in terms of "estimates" (預算) after tabling of these has been the Appropriation Bill, the term "budget" (財政預算案) in the context of BL50 would appear to refer to the Appropriation Bill to the exclusion of any revenue-related legislative proposal. This interpretation is reinforced by BL51, where if LegCo refuses to pass the "budget" introduced by the government, the CE may apply to LegCo for provisional appropriations. The focus of BL51 is hence also on appropriation/expenditure.

10. Until the 1999 budget exercise, implementation of revenue proposals in the Budget may take the form of amendment bills, subsidiary legislation or LegCo resolution as separately provided for under the relevant legislation. To illustrate, a complete list of the legislative instruments to implement the 1998

Budget revenue proposals is provided at the Enclosure. If the term “budget” in BL50 is construed to include revenue bill(s), this implies that the Executive may need to trigger the consultation mechanism (and if this fails to produce a consensus, the Chief Executive may dissolve LegCo) when LegCo refuses to pass one or more of the legislative proposals in the list. A single omnibus Revenue Bill was introduced in the 1999 Budget exercise to allow Members to consider all revenue proposals as one complete package. We do not feel that our current discussion on the interpretation of the BL provisions should be unduly influenced by this new approach to present the legislative amendments. Indeed, under the omnibus bill approach, LegCo still has the power to veto certain revenue proposals as had happened in the Revenue Bill 1999.

11. Moreover, unlike expenditure which is voted on annually through the passage of the Appropriation Bill, and the non-passage of it warrants some transitional arrangements to enable the government service to continue to operate, similar transitional or contingency requirements are not required for the revenue aspect of the budget. The revenue bill(s) are to put into effect revenue proposals in the budget. They do not affect the existing revenue collection arrangements. Regardless of the outcome of the revenue bill(s), the government continues to have the legal power to tax or charge based on previously enacted legislation and this existing revenue base would normally account for the bulk of the government’s income in the year.

12. Against the above, we are of the view that the term “budget” in BL50 and BL51 refers to the Appropriation Bill.

Whether “LegCo refuses to pass a budget” referred to in BL50 covers the situation where the Appropriation Bill is passed as amended by Members

13. Each case would need to be examined on its merits, but it is significant that BL50 refers to a “budget introduced by the government”. Taking a purposive approach to the interpretation of these words it is clear that if, for example, a substantial part of an Appropriation Bill’s head(s) of expenditure were rejected in Committee of the whole Council this could amount in substance to a refusal by the Legislative Council to pass a budget introduced by the Government.

The basis and authority for determining whether a bill falls under “any other important bill” referred to in BL50, and whether the Revenue Bill is considered as an important bill

14. Under BL50, in the event of rejection of a bill by LegCo, and subsequent failure to reach consensus, CE would consider whether the bill was sufficiently important to justify taking the step of dissolution of LegCo. Before exercising his power of dissolution CE must also consult Executive Council. As for the Revenue Bill, whether it will be an important bill will depend on the objective, effect and implications of the Bill. The assessment should not necessarily be confined to the revenue implications but should more broadly take into account its impact on the HKSAR’s economy, public finance, monetary affairs, etc., especially in the light of other Basic Law provisions, for example, BL107 on avoiding fiscal deficits, BL108 on low tax policy and BL109 on the maintenance of Hong Kong as an international financial centre.

The Administration’s interpretation of the term “budget” and its Chinese versions (財政預算 or 財政預算案) referred to in various Articles of the Basic Law

15. We have offered the view above that the term “budget” (財政預算案 in Chinese) in Articles 48(3) (first appearing term), 50, 51 and 52(3) appear to refer to the Appropriation Bill. Elsewhere in Articles 48(3) (second appearing term), 62(4), 73(2) and 107 dealing respectively with CE’s reporting requirement to the CPG, the role of the Executive Authorities and the Legislature and the principles in public finances, the term “budget” (財政預算 in Chinese) would clearly have its ordinary and wider meaning of the government’s annual estimate of revenue and expenditure.

The Administration’s interpretation of Article 73(2) and (3) which appears to cover the same thing. The former refers to “examine and approve budgets introduced by the Government” and the latter refers to “approve taxation and public expenditure”

16. We believe that Article 73(3) reflects the Joint Declaration provision (JD83) that the “systems by which taxation and public expenditure must be approved by the legislature, shall be maintained.” We wish however to

point out that, based on existing legal provisions and practices, the two articles may not cover the same thing. First, the Administration is not prohibited from putting forward taxation proposals outside the context of the annual Budget. Secondly, public expenditure is wider than government expenditure (public expenditure for 1999-2000 amounts to \$290 billion and within it, \$229 billion is government expenditure. See Introduction to the Estimates 1999-2000). While the annual expenditure estimates and the Appropriation Bill seek approval for government expenditure, there are occasions that we seek LegCo's approval of non-government expenditure which falls in the definition of public expenditure. One notable example is spending from the Lotteries Fund under certain prescribed conditions.

Finance Bureau/
Department of Justice/
Administration Wing
December 1999

Enclosure

The revenue legislation giving effect to the Financial Secretary's revenue proposals in the 1998 Budget are –

- (1) Inland Revenue (Amendment) Ordinance 1998 (to implement the salaries tax amendments);
- (2) Inland Revenue (Amendment) (No. 2) Ordinance 1998 (to implement the profits tax amendments);
- (3) Stamp Duty (Amendment) Ordinance 1998 (to implement the reduction in stamp duty on stock transactions);
- (4) Stamp Duty (Amendment) (No. 2) Ordinance 1998 (to implement the amendments to the exemption for regional derivatives and other amendments to improve the operation of the Stamp Duty Ordinance);
- (5) Dutiable Commodities (Amendment) Ordinance 1998 (to implement the increases in duties);^{1 (Note)}
- (6) Estate Duty (Amendment) Ordinance 1998 (to implement the amendments to estate duty);
- (7) Air Passenger Departure Tax (Amendment) Ordinance 1998 (to implement the amendment to air passenger departure tax);
- (8) Specification of Arrangements (Arrangements with the Mainland of China For the Avoidance of Double Taxation on Income) Order (to implement the double taxation relief arrangements with the Mainland);

¹Note: The Financial Secretary proposed duty increases in tobacco, methyl alcohol and hydrocarbon oils (including petrol, diesel oil and aviation spirit). The Provisional Legislative Council did not approve the proposed increases in petrol and diesel oil.

- (9) Companies Ordinance (Amendment of Eighth Schedule) Order 1998 (to implement the amendments to ad valorem fees);
- (10) Shipping and Port Control (Hong Kong - China and Macau Ferry Terminals) (Amendment) Regulation 1998 (to implement the amendment to marine ferry terminal fees);
- (11) Resolution of the Provisional Legislative Council under Section 18(1) of the Rating Ordinance (Cap 116) (to implement the amendments to the rates percentage charge in 1998-99); and
- (12) Resolution of the Provisional Legislative Council under Section 3(2) of the Hotel Accommodation Tax Ordinance (Cap 348) (to implement the amendment to Hotel Accommodation Tax).