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Panel on Constitutional Affairs

Background brief prepared by Legislative Council Secretariat for the special meeting on 1 March 2012

Declaration of interest arrangement by the Chief Executive

Purpose

This paper provides a summary of the issues raised by relevant committees of the Legislative Council ("LegCo") relating to the declaration of interest arrangement by the Chief Executive ("CE"). For relevant issues relating to Principal Officials ("PO") under the Accountability System, members may refer to the background brief entitled "System of declaration of interests by the Chief Executive and POs under the Accountability System" prepared by the LegCo Secretariat for the meeting of the Panel on Constitutional Affairs ("the CA Panel") on 16 November 2009 [LC Paper No. CB(2)244/09-10(04)].

Background

Declaration of assets by CE

2. Under Article 47 of the Basic Law ("BL"), CE, on assuming office, "shall declare his or her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region" ("HKSAR") and the declaration "shall be put on record".

3. During the scrutiny of the Prevention of Bribery (Amendment) Bill 2007, the Administration advised the relevant bills committee that the term "assets" was not specifically defined under BL. Hence, the types of assets to be disclosed should follow the ordinary meaning of "assets". However, the Administration was not in a position to advise the types of assets disclosed in the declaration which was required to be made to the Chief Justice only. Other than that under BL47, there was no legal requirement on the disclosure of CE's assets. While there was no legal requirement for CE to disclose his assets in his capacity as the President of the Executive Council ("ExCo"), he, nonetheless,

furnished a return on his registrable interests, such as remunerated directorships, land and property, in his capacity as ExCo President, like other ExCo Members. A register was available for public inspection through the ExCo's website.

Application of the Prevention of Bribery Ordinance (Cap. 201) ("POBO") to CE

4. The Prevention of Bribery (Amendment) Bill 2007 sought to extend three main provisions of POBO which applied to public servants (including prescribed officers and employees of specified public bodies) or prescribed officers (including POs, judicial officers and civil servants) so as to include CE in their application. The Bill was passed by LegCo on 25 June 2008. According to the Prevention of Bribery (Amendment) Ordinance (Ordinance No. 22 of 2008) -

- (a) CE commits an offence if he, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his acting in his capacity as CE;
- (b) CE commits an offence if he, without lawful authority or reasonable excuse, solicits or accept any advantage as an inducement to or reward for or otherwise on account of his giving assistance in regard to public sector contracts;
- (c) CE or the former CE commits an offence if there is sufficient evidence to prove that he maintains a standard of living above that which is commensurate with his present or past official emoluments; or if he is in control of pecuniary resources or property disproportionate to his present or past emoluments, and he is unable to give a satisfactory explanation to the Court; and
- (d) upon investigation by the Independent Commission Against Corruption ("ICAC"), when there is reason to suspect that CE may have committed an offence under POBO, the Commissioner of ICAC may refer the matter to the Secretary for Justice ("SJ"). Where, as a result of such a referral, SJ has reason to suspect that CE may have committed an offence under POBO, he may refer the case to LegCo for it to consider whether to take any action under BL73(9).

"Advantage" in POBO means –

- (a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;

- (b) any office, employment or contract;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) any other service, or favour (other than entertainment), including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;
- (e) the exercise or forbearance from the exercise of any right or any power or duty; and
- (f) any offer, undertaking or promise, whether conditional or unconditional, of any advantage within the meaning of any of the preceding paragraphs (a), (b), (c), (d) and (e),

but does not include an election donation within the meaning of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554), particulars of which are included in an election return in accordance with that Ordinance.

5. The Official Record of Proceedings of the Council meeting on the Resumption of Second Reading debate on the Prevention of Bribery (Amendment) 2007 is at: <http://www.legco.gov.hk/yr07-08/english/counmtg/hansard/cm0625-translate-e.pdf>.

Issues raised by Members

Declaration of interests by CE

6. Following the CE's announcement in his Policy Address 2009-2010 of the proposed distribution of cash coupons for compact fluorescent lamps to residential electricity account holders, there were media reports that CE's in-law was engaged in light bulb business. In the light of the community's concern about possible potential conflict of interest, the CA Panel discussed with the Administration the system of declaration of interests by CE and POs.

7. Some members were of the view that while it was unreasonable to expect the system of declaration of interests to cover all relatives, CE should declare any potential conflict of interest he was aware of to ExCo for record in order to avoid arousing any suspicion of dishonesty or unfairness. They considered that there was a need to improve the declaration system, and to review the extent to which the declaration should cover. These members stressed that CE

should be alert to the need to declare any potential conflict of interest that a policy might entail notwithstanding the aim of the policy for protecting public interest. Given his position as head of the Government, the public would have a high expectation of his integrity. Some other members, however, considered that while there should be a declaration system to avoid transfer of benefits and to ensure accountability, it would discourage people from pursuing a career in politics if the declaration system was made too stringent.

8. The Administration advised that given their leading roles in the HKSAR Government, CE and POs would adopt a stringent standard for themselves, and were required to observe the highest standards of personal conduct and integrity. CE as the President of ExCo had, similar to other ExCo Members, declared his interests in "The Register of Interests of Members of ExCo" for the purpose of public inspection.

9. Some members stressed that the public had a high expectation of CE. They enquired about the party responsible for monitoring the conduct of CE in respect of declaration of interest. The Administration advised that according to BL 47, CE must be a person of integrity, dedicated to his or her duties. BL 43 provided that CE should be accountable to the Central People's Government and HKSAR and BL 64 provided that the HKSAR Government was accountable to LegCo. The conduct of CE was therefore subject to the monitoring of LegCo, the media and the people of Hong Kong.

Declaration of interests by ExCo Members

10. Pursuant to the media reports and public concern on the omission by an ExCo Member to register certain interests concerning land and property under the "Annual Declaration of Registrable Interests of Members of ExCo", the CA Panel discussed with the Administration the system of declaration of interests by ExCo Members.

11. Some members expressed dissatisfaction that the Administration had concluded the relevant case without any investigation that the ExCo Member concerned did not deliberately cover up or violate the declaration requirements. They considered it unacceptable that an ExCo Member had repeatedly omitted to declare his personal interests and contravened the requirements under the declaration system. These members considered that the existing system of declaration of interest by ExCo Members could not tackle conflict of interest issues or potential conflict of interests perceived by the public.

12. The Administration stressed that no deliberate breach of the declaration system had been found after examination of the case. Under the existing

practice, all official and non-official ExCo Members were required to declare their personal interests according to the established practice and the ExCo Secretariat would check the registered interests against the discussion items of an ExCo meeting in ascertaining the possibility of a conflict of interests in respect of particular ExCo Members. If a Member was considered to have significant pecuniary interest such as directorship and partnership of companies, professional positions and other close or substantial interests, CE might request a Member not to participate in the discussion, or the Secretariat would withhold relevant ExCo papers and minutes from the Member according to the established practice.

13. Some members considered that the Administration should improve the system of declaration of interests by ExCo Members, in particular, on the registrable interest concerning land and property held through a company in order to help ExCo Members declare their interests accurately. They took the view that the declaration requirements of ExCo Members should be more stringent than that of LegCo Members as the former had greater influence on policy formulation. The Administration advised that it would carry out an internal assessment on whether it was necessary to revise the "Annual Declaration of Registrable Interests of Members of ExCo". The CA Panel requested the Administration to inform LegCo and make public any revision made. In his reply to an oral question raised by Hon Emily LAU on "Strict reporting system to ensure fairness" raised at the Council meeting of 22 February 2012, the Secretary for Constitutional and Mainland Affairs ("SCMA") advised that the Administration considered it necessary to make the requirement provisions of the declaration system clearer to avoid any misunderstanding but needed more time to conduct analysis and draft the provisions before consulting ExCo Members. The question raised by Ms LAU and the SCMA's reply are in **Appendix I**.

Permission to accept advantages

14. Section 3 of POBO provides that any prescribed officer, who without the general or special permission of CE, solicits or accepts any advantage shall be guilty of an offence. During the scrutiny of the Prevention of Bribery (Amendment) Bill 2007, some members of the Bills Committee were of the view that the spirit governing the solicitation and acceptance of advantages by prescribed officers under section 3 of POBO should also apply to CE. The Administration was urged to consider the suggestion of the Hong Kong Bar Association to introduce a special section or sub-section applicable to CE in POBO, and to set up an independent body to grant general or special permission for CE to accept advantages.

15. The Administration advised that section 3 of POBO only applied to persons over whom CE had authority. Under section 3, prescribed officers sought CE's permission for the solicitation or acceptance of advantages. However, CE could not grant permission to himself. This posed structural difficulties in fitting CE within the framework of the offence provisions of section 3. In addition, section 3 was premised upon the existence of a principal-agent relationship. CE was not an agent of the HKSAR Government and had no equivalent principal within the HKSAR Government. The Administration had considered the propriety of creating an independent body to monitor or approve requests from CE to accept or solicit advantages, and did not consider this appropriate because CE was the head of HKSAR and the HKSAR Government and there could be no principal-agent relationship between CE and any independent body set up for this purpose. Consideration had also been given to the proposal of creating a new offence provision to deal with the acceptance of advantages by CE for a non-corrupt purpose. The conclusion was that there was not a need to do so. The Bill already provided comprehensive controls and sanctions against the commission of bribery or corruption offences by CE. In addition to the proposed statutory anti-corruption measures, CE was also bound by the common law offence of bribery and those who offered any bribe to CE would be caught by the offence.

Investigation of bribery complaints against CE by ICAC

16. Some members of the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 expressed the concern about the possible public perception that ICAC may not conduct its investigation of corruption complaints against CE independently and impartially, given that BL 57 stipulated that ICAC shall be accountable to CE. This requirement was also transcribed in section 5(2) of the ICAC Ordinance (Cap. 204) which provided that the Commissioner of ICAC shall not be subject to the direction and control of any person other than CE. Section 12(c) of the ICAC Ordinance also provided that the Commissioner of ICAC had the duty, on behalf of CE, to investigate any conduct of a prescribed officer which, in the opinion of the Commissioner of ICAC, was connected with or conducive to corrupt practices and report thereon to CE.

17. The Administration pointed out that both BL 57 and section 5(2) of the ICAC Ordinance actually underpinned the independence of ICAC and that the Commissioner of ICAC was accountable to the office of CE and not to the post holder per se. These provisions did not have the effect of empowering an incumbent CE to interfere with the investigation by ICAC on a corruption complaint against him. If that were not the case, this would go against an important principle that BL does not provide CE with general immunity from

criminal investigation or prosecution. The Administration also pointed out that since CE was not a prescribed officer as defined under section 2 of the ICAC Ordinance, the Commissioner of ICAC's duty to report to CE under section 12(c) of the same did not include any corrupt practice or bribery offence suspected to have been committed by CE.

18. The Law Society of Hong Kong had proposed to the Bills Committee that an independent ad hoc committee chaired by a retired judge and staffed by officers of ICAC should be established to investigate corruption complaints against CE. The Hong Kong Bar Association had proposed the establishment of an office of independent counsel to conduct the investigation or supervise the investigation conducted by ICAC and report on the investigation result and make recommendations including whether or not to prosecute.

19. According to the Administration, the proposals put forward by the two legal professional bodies would give rise to the following issues -

- (a) the establishment of another body to conduct the investigation could duplicate or compromise the role of the investigation committee to be chaired by CJ under BL 73(9);
- (b) given the SJ's constitutional role as the prosecuting agency which must be free from any interference as guaranteed under BL 63; it was wholly inappropriate to empower an office of independent counsel to make recommendations on whether or not to prosecute; and
- (c) ICAC had a mandatory duty under the ICAC Ordinance to investigate any alleged or suspected offence under POBO and establishment of another investigation authority might affect ICAC's discharge of its statutory duties.

Relevant documents

20. A list of the relevant documents is in **Appendix II** for Members' easy reference. These papers/documents are available on LegCo's web site at <http://www.legco.gov.hk>.

Appendix I

Press Releases

LCQ4: Strict reporting system to ensure fairness

Following is a question by the Hon Emily Lau Wai-hing and a reply by the Secretary for Constitutional and Mainland Affairs, Mr Raymond Tam, in the Legislative Council today (February 22):

Question:

It was reported in the press at the end of last year that an Executive Council (ExCo) Member, who is also a Legislative Council Member, and his family members reduced holding of their assets in Hong Kong, including 13 residential units and seven lots, during the period from September to December last year. There were public comments expressing concerns whether the ExCo Member reduced holding of such assets because he had obtained inside information, arousing concerns among members of the public whether the authorities could ensure that ExCo Members would not reap excessive profits because they had access to sensitive inside information. Furthermore, in 2010 when the ExCo Member and his family members gained profits by way of "confirmor sale" prior to the launching of anti-speculation measures for residential properties by the authorities, public comments already suspected whether this was a result of his access to inside information, yet the authorities did not conduct any in-depth investigation into the matter. In this connection, will the Executive Authorities inform this Council:

(a) since the incident of the ExCo Member and his family members gaining profits by way of "confirmor sale" in 2010, whether they have tightened the system of declaration of interests by ExCo Members to enhance transparency and accountability;

(b) whether in the past three years when ExCo discussed sensitive issues such as housing and land, it had on the ground of conflict of interests prohibited any Member holding a large amount of properties and lots from obtaining the papers and participating in the discussions on such issues; if it had, of the details; and

(c) of the number of declarations of interests made by ExCo Members to the Chief Executive and ExCo in the past three years because conflict of interests was involved; of the details of cases in which ExCo Members had to declare their interests in relation to the issues of housing and land, as well as those in which they had withdrawn from the relevant discussions?

Reply:

President,

I shall answer the questions raised by Hon Emily Lau on behalf of the Administration.

The main purpose of the system of declaration of interests for the Executive Council (ExCo) is to ensure that the ExCo Members are fair, disinterested, impartial and unbiased in providing advice to the Chief Executive. Under the current system, the ExCo Members are required to declare their interests at specified intervals, so that members of the public as well as the Administration can monitor whether any ExCo Member has

obtained benefits in his/her official capacity, who has access to undisclosed information.

Specifically, all ExCo Members are required to register their personal interests annually which mainly cover remunerated directorships of companies, remunerated employments, land and property owned in Hong Kong and overseas, ownership of more than one per cent shares in the issued capital of a company etc. Any changes to their registrable interests should be reported within fourteen days. All these information will be uploaded to the ExCo website for public inspection.

The ExCo Members are also required to declare to the Chief Executive in confidence greater details of their financial interests including shareholdings (irrespective of the amount) in companies as well as futures and option contracts held. Any changes to the interests declared as well as any currency transactions exceeding HK\$200,000 should be reported within two trading days after their occurrence.

In addition, under the current system of declaration of interests, in case an ExCo Member has material personal interests in an item to be considered by the ExCo, he/she should withdraw from the discussion. This can effectively prevent him/her from obtaining benefits with the access to undisclosed information.

Hon Emily Lau asked about the so-called benefits from "confirmor sales" by an ExCo Member in 2010. The Administration must make it very clear that after the incident was reported in the media, the Administration immediately launched an in-depth investigation to examine and analyse all details on property transactions declared by the Member, the discussions relating to land or property at the ExCo meetings during the relevant period and the relevant documents. The analysis indicated that the property transactions did not constitute direct conflict of interests in the items discussed by the ExCo and also there was no evidence to suggest that the Member had used the ExCo's confidential information for his personal interests. The Administration's findings were reported to the Legislative Council on November 15, 2010. The Chief Executive's Office wrote to Hon Emily Lau on the same day to explain the ExCo's declaration system and reported on the detailed examination and analysis.

Hon Emily Lau also pointed out that the ExCo Member concerned reduced holding of certain land and property last year. The Administration again conducted an examination and found no evidence to suggest that the reduction of such assets was related to any confidential information obtained from the ExCo meetings.

On the three specific questions raised by Hon Emily Lau, our reply is as follows:

(a) The current reporting system is strict and effective. The Administration has examined the relevant requirements after the incident concerning the omission to declare interests in relation to properties in 2010 and considered it necessary to make the provisions clearer to avoid any misunderstanding. Since the technical issues involved are complicated, we need more time to conduct analysis and draft the provisions before consulting the ExCo Members. The Administration is at the final stage of its work and we plan to finish it before the end of the current-term Government.

(b) I just pointed out in the reply that the main purpose of the system of declaration of interests is to ensure that the ExCo Members can provide impartial advice to the Chief Executive. If a particular Member has direct and material interests in an item to be discussed by the ExCo, he/she is required to withdraw from the discussion and would not be issued with relevant papers. Direct and material interests refer to:

- (i) Significant personal pecuniary interests which might be materially affected by the decision of the ExCo;
- (ii) Directorship, partnership or advisory positions of companies which might be materially affected by the decision of the ExCo;
- (iii) Professional positions held by the ExCo Members in advising or representing any individual or association in connection with the item under discussion; and
- (iv) Other close or substantial interests which, if they are known publicly, might lead members of the public to consider that an ExCo Member's advice might well have been motivated by or associated with his/her personal interest rather than by the duty to give impartial advice.

Based on the above principles, the amount of property or land owned by an ExCo Member is not crucial in determining whether he/she should withdraw from any discussions. In the event that the Member has only one property but that may be materially affected by the ExCo's decision, the Member is required to withdraw from the discussion.

(c) Statistics for the past three years on declaration of interests or withdrawal from discussions by the ExCo Members in respect of specific items for discussion (including those relating to housing or land) at the ExCo meetings are set out in the Annex.

Ends/Wednesday, February 22, 2012
Issued at HKT 15:55

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2009-2011
Declaration of interests or withdrawal from discussions by Executive Council Members in respect of specific items for discussion at the Executive Council Meetings

	<u>No. of Meetings</u>	<u>Items for discussions</u>		<u>Declaration of Interests</u>			
		<u>Related to housing and land</u>		<u>Related to housing and land</u>		<u>Others</u>	
		<u>Others</u>		<u>Withdrawal from discussion not required</u>	<u>Withdrawal from discussion required</u>	<u>Withdrawal from discussion not required</u>	<u>Withdrawal from discussion required</u>
2009	35	74	150	117	21	116	7
2010	37	79	152	135	11	230	13
2011	37	75	172	112	11	318	15

**Relevant documents on Declaration of interest
arrangement by the Chief Executive**

Committee	Date of meeting	Paper
Legislative Council	16.6.2004	Official Record of Proceedings Pages 63 – 64 (Written question)
	25.6.2008	Report of the Bills Committee on Prevention of Bribery (Amendment) Bill 2007
Panel on Constitutional Affairs	16.11.2009 (Item IV)	Agenda Minutes
	15.11.2010 (Item VI)	Agenda Minutes
Legislative Council	22.2.2012	Press release (Oral question raised by Hon Emily LAU and the reply by the Secretary for Constitutional and Mainland Affairs)