

立法會

Legislative Council

LC Paper No. CB(2)1562/16-17

Ref : CB2/BC/3/16

Report of the Bills Committee on Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Bill ("the Bill").

Background

2. The Financial Action Task Force ("FATF"), established in 1989, is an inter-governmental body which sets international standards on anti-money laundering ("AML") and counter-financing of terrorism ("CFT"). FATF has developed 40 Recommendations for compliance by its member jurisdictions.¹ Specifically, Recommendation 32 requires member jurisdictions to establish by statute a declaration or disclosure system², or a mixed system, to detect the physical cross-boundary transportation of currency and bearer negotiable instruments ("CBNIs")³ ("the R32 System"). FATF has also stated that member jurisdictions should implement the R32 System "without restricting either: (i) trade payments between countries for goods and services; or (ii) the freedom of capital movements, in any way".

¹ Hong Kong has been an FATF member since 1991.

² Under a declaration system, persons physically transporting currency and bearer negotiable instruments ("CBNIs") above a designated threshold across the boundary are required to report to the authority concerned. Under a disclosure system, persons so transporting CBNIs are required to make a report upon request by the authority concerned.

³ According to FATF, "currency" refers to banknotes and coins that are in circulation as a medium of exchange, and foreign currency which may be brought into a jurisdiction. "Bearer negotiable instruments" include monetary instruments in bearer form (e.g. travellers cheques); negotiable instruments (e.g. cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or in a form that the title thereto passes upon delivery; and incomplete instruments signed, but with the payee's name omitted. Precious metals and stones are not included.

3. According to the Administration, Hong Kong is the only FATF member jurisdiction which has yet to establish the R32 System, and this is the only area where Hong Kong was still rated as "non-compliant" in the third round of mutual evaluation conducted by FATF in 2008 to assess the level of compliance of Hong Kong's AML/CFT regime with FATF's recommendations.

4. The Administration issued a consultation document setting out the major features of the proposed R32 System for public consultation from 21 July to 20 October 2015. It was proposed, among others, that Hong Kong's R32 System would be a mixed system of declaration and disclosure building upon relevant existing customs clearance systems for passengers and cargoes. According to the Administration, the essential proposals in the consultation document have been incorporated into the Bill.

The Bill

5. The Bill seeks to establish a declaration and disclosure system to detect the cross-boundary movement of a large quantity of CBNIs into or out of Hong Kong; to provide for the powers to restrain the movement of CBNIs suspected to be related to money laundering and terrorist financing; and to provide for related matters.

6. The Bill, if passed, will come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

The Bills Committee

7. At the House Committee meeting on 17 March 2017, members agreed to form a Bills Committee to study the Bill. The membership of the Bills Committee is in the **Appendix**. Under the chairmanship of Dr Hon Elizabeth QUAT, the Bills Committee held two meetings with the Administration. The Bills Committee has posted a notice on the Legislative Council website to invite public views on the Bill, and no submission has been received.

Deliberations of the Bills Committee

Definition of "CBNI"

8. Members note that examples of CBNIs (i.e. bearer cheque, promissory note, bearer bond, traveller's cheque, money order and postal order) are provided in the definition of "CBNI" under clause 2(1). The legal adviser to the Bills Committee and members have enquired whether the list of examples is exhaustive, whether the examples are necessary, and whether they have any

legislative effect.

9. The Administration has advised that the list of examples is non-exhaustive. The Administration has further explained that an example of a provision enacted as part of the law forms part of the context in which the provision is to be interpreted. There are many precedents of using examples in Hong Kong legislation. They are necessary and appropriate in seeking to explain the underlying concept of some abstract or technical terms or the operation of complex provisions in legislation, in order to improve comprehensibility of a provision. The examples set out in the definition of "CBNI" in clause 2(1) serve the same purpose and are based on those as advised by FATF.

10. Some members including Mr James TO and Mr Kenneth LEUNG have enquired why gold is not defined as a type of CBNIs, having regard to the fact that gold bars/coins are transferrable and can be traded at spot price in open market. The Administration has advised that according to FATF, CBNIs do not include precious metals and stones. However, using precious metals for money laundering or terrorist financing purposes would constitute an offence under the Organized and Serious Crimes Ordinance (Cap. 455) or the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).

Import or export of CBNIs in possession of individuals

11. Under clause 4 of the Bill, persons who arrive in Hong Kong via specified control points⁴ and are in possession of a large quantity of CBNIs (i.e. the total value of the CBNIs is more than HK\$120,000 as specified in Schedule 4 to the Bill)⁵ would be required to make written declarations to an authorized officer⁶ to provide the information set out in Schedule 2 (e.g. name, Hong Kong identity card or travel document number, nationality, permanent address and the type and value of the CBNIs in their possession). Under clauses 5 and 6 of the Bill, persons who arrive in Hong Kong other than at specified control points (such as those arriving on cruise vessels at anchorages) and those who are about to leave Hong Kong (via specified control points or otherwise such as leaving on cruise vessels at anchorages) would be required to disclose, upon the request of an authorized officer, whether they are in possession of a large quantity of CBNIs and if so, to provide the information set out in Schedule 2 to an authorized officer. If the person is a young person under the age of 16

⁴ There are 12 specified control points listed in Schedule 1 to the Bill.

⁵ Please see paragraphs 24 to 27 below for details regarding "a large quantity of CBNIs".

⁶ "authorized officer" is defined under clause 2(1) of the Bill to mean a person holding an office specified in Schedule 1 to the Customs and Excise Service Ordinance (Cap.342), or a public officer appointed under clause 29(1).

years and is accompanied by an adult, the declaration or disclosure must be made by the adult on the young person's behalf if the adult knows that the young person is in possession of a large quantity of CBNIs. As stipulated under clause 3, the proposed declaration or disclosure requirements would not apply to persons in transit at the Hong Kong International Airport.

Declaration requirement applicable to persons arriving in Hong Kong

12. Noting that non-compliance with the declaration or disclosure requirements would be an offence under the Bill, some members including Mr YIU Chung-yim have enquired whether a person can avoid having to make a declaration by making multiple entries into Hong Kong on the same day and carrying CBNIs of a total value less than HK\$120,000 on each occasion. These members have also enquired whether a person is required to make a declaration when travelling in a group and who is carrying a large quantity of CBNIs for himself and on behalf of the group. Some members including Mr James TO and Mr Kenneth LEUNG have asked about the circumstances in which a young person is required to make a declaration on his own. These members are particularly interested in the hypothetical situation where an adult is accompanying a young person, and they each own CBNIs of a total value less than HK\$120,000, whether the adult, who is carrying CBNIs of a total value over HK\$120,000 for himself and on behalf of the young person, is required to make a declaration; furthermore, whether an adult in possession of a large quantity of CBNIs can avoid having to make a declaration by placing some CBNIs on a young person, such that each of them is carrying CBNIs of a total value less than HK\$120,000.

13. The Administration has explained that a person is in possession of a thing if any of the conditions under clause 2(2) is met. An adult in possession of a large quantity of CBNIs is required to make a declaration or disclosure in accordance with clauses 4 to 6 on each occasion he arrives in or departs from Hong Kong, irrespective of whether he is the owner of the CBNIs and whether he is travelling alone or accompanying others. Similar arrangement has been adopted in many other member jurisdictions of FATF.

14. As for making a declaration for a young person, the Administration has advised that under clause 4(3), where a traveller is a young person accompanied by an adult who knows the traveller is a young person in possession of a large quantity of CBNIs, the adult must make the declaration for the traveller. Under clause 4(5)(a)(ii), where a young person in possession of a large quantity of CBNIs is not accompanied by any adult, or is accompanied by an adult who does not know that the young person is in such possession, the young person is required to make a declaration for the CBNIs concerned. If the young person fails to make the declaration, he/she may commit an offence.

15. Members have also enquired whether the traveller concerned will be asked to account for the sources of CBNIs in his possession. The Administration has advised that a traveller would in general not be required to explain the source of CBNIs unless the CBNIs are suspected to be crime proceeds or terrorist property. The Administration has stressed that the proposed declaration and disclosure system would not affect the legitimate flow of funds across boundaries.

Arrangements for frequent travellers

16. Some members, including Mr Paul TSE and Mr YIU Si-wing, have pointed out that frequent travellers, for instance tour guides, often carry a large amount of cash while at work and may inadvertently fail to observe the declaration requirement having regard to various needs of tourists during customs clearance. These members have enquired whether consideration can be given to allowing a frequent traveller to make a declaration on the total value of CBNIs in his possession, if it exceeds HK\$120,000, prior to arriving in Hong Kong at a specified control point, or allowing a frequent traveller who often carries CBNIs of a total value more than HK\$120,000 to be exempted from having to make a declaration each time he/she arrives in Hong Kong at a specified control point.

17. The Administration has advised that the purpose of the Bill is to detect the cross-boundary movement of a large quantity of CBNIs; stop and restrain CBNIs that are reasonably suspected to be crime proceeds or terrorist property, or are falsely declared or disclosed, and apply appropriate sanctions for making a false declaration or disclosure, pursuant to the relevant recommendation of FATF. It is therefore important for accurate declarations or disclosures to be made at the time of the actual arrival of travellers in possession of CBNIs in Hong Kong (including frequent travellers), thus enabling the law enforcement agency to take appropriate enforcement actions against false declarations or disclosures, to identify suspected crime proceeds or terrorist property, and to conduct risk assessment. The declaration requirements under the Bill are on par with those implemented in other advanced jurisdictions (e.g. Australia, Canada, the United States of America, Singapore and European countries).

Information to be provided in a declaration

18. Schedule 2 to the Bill sets out the information to be provided in a declaration made for the purposes of clauses 4 and 6 (i.e. import and export of CBNIs in the possession of individuals). Mr Paul TSE has enquired about the need to provide the name and address of the owner of the CBNIs as required under item 7 in Part 2 of Schedule 2, while such information is not required under Schedule 3 which sets out the information to be provided in a declaration made for the purposes of clauses 9 and 11 (i.e. import and export of CBNIs in cargoes).

19. The Administration has advised that according to FATF, it is important to collect the essential information from travellers who make declarations or disclosures, including information on the owners of the CBNIs. Item 7 in Part 2 of Schedule 2 on the provision of the name and address of the owner of CBNIs has taken into account FATF's advice. The requirement is on par with those implemented by other advanced jurisdictions (e.g. the United Kingdom, the United States of America, Australia, New Zealand and European countries). The Administration has further explained that as opposed to the case of travellers, the import and export of CBNIs in cargoes commonly involve a number of parties, including customers, forwarders and carriers as defined under clause 10, and such parties as forwarders and carriers may not readily have information on the owners of the CBNIs. Therefore, the provision of the name and address of the recipient of CBNIs is required instead in Schedule 3.

Inaccurate information contained in a declaration or disclosure

20. Clauses 4(7) and 6(5) provide that if a declaration contains any information that is false in a material particular, the person who makes the declaration commits an offence. Under clause 5(5), making a false disclosure that the person concerned is not in possession of a large quantity of CBNIs is an offence. Some members including Mr James TO and Mr Christopher CHEUNG have enquired about the liability of a traveller who has made a declaration or disclosure to an authorized officer, but the details of such declaration or disclosure are found to be inaccurate, for example, where the total value of CBNIs in his possession is higher than the total value specified in the declaration.

21. According to the Administration, whether any information provided in a declaration is false in a material particular will be considered on the basis of the facts and evidence in individual cases. Statutory defences to the offences of false declarations or disclosures are available under the Bill. For false declarations, clauses 4(10) and 6(7) provide that it is a defence for a person charged if the person establishes that at the time of the alleged offence the person did not know, had no reason to suspect, and could not with reasonable diligence have ascertained, that the information concerned was false in a material particular. As for false disclosures, clause 5(7) provides that it is a defence for a person charged if the person establishes that at the time of the alleged offence the person did not know, had no reason to suspect, and could not with reasonable diligence have ascertained, that the person concerned was in possession of a large quantity of CBNIs.

Use of information obtained from the declaration and disclosure system

22. Some members including Mr Paul TSE and Mr CHAN Chun-ying have enquired about how the personal particulars and information collected pursuant to the declaration and disclosure requirements under the Bill will be handled, whether such information will be used for law enforcement purposes other than those provided under the Bill, and whether and under what circumstances would such information be provided to other member jurisdictions of FATF.

23. The Administration has advised that FATF requires that information obtained through the declaration or disclosure of CBNIs should be made available to relevant domestic law enforcement agencies and allow for international cooperation and assistance, for combating money laundering and terrorist financing. In the context of the Bill, this will be pursued only where the law permits. Strict compliance with the Personal Data (Privacy) Ordinance (Cap. 486) will be observed. Overseas requests for assistance in provision of information collected under the Bill will be handled in accordance with the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) as appropriate.

Declaration/disclosure threshold of "a large quantity of CBNIs"

24. Schedule 4 to the Bill specifies HK\$120,000 as the amount for the purposes of clause 2(3) (i.e. a reference to "a large quantity of CBNIs" is a reference to CBNIs of a total value that is more than HK\$120,000). Import or export of a large quantity of CBNIs in the possession of travellers or in cargoes will require a declaration or disclosure to be made in accordance with the relevant provisions of the Bill.

25. Members take the view that the proposed declaration threshold should not be too stringent for tourists. Some members including Mr James TO, Mr Paul TSE, Mr Christopher CHEUNG and Dr Junius HO have raised whether the amount at HK\$120,000 should be relaxed as many incoming travellers prefer using cash for payment in Hong Kong, particularly those from the Mainland.

26. According to the Administration, the specification of the amount of HK\$120,000 in Schedule 4 is based on the threshold of USD/EUR15,000 as recommended by FATF. Compared with other FATF's member jurisdictions, the threshold of HK\$120,000 is largely comparable and is even more relaxed. For example, the threshold of USD5,000 is adopted by the Mainland for declarations for foreign currencies in the form of currency control. The Government of the Macao Special Administrative Region has introduced the relevant legislation for establishing the R32 System with the threshold set at MOP\$120,000. The Administration has also drawn the attention of members to the expansion of the credit card market and the fact that most popular tourist destinations have already implemented the R32 System. As such, it is believed

that the proposed declaration and disclosure requirements under the Bill would not adversely affect tourists.

27. Members note that under clause 33(2), the Secretary for Security may, by notice published in the Gazette, amend Schedule 4. Given that any amendment to Schedule 4 will be introduced by way of subsidiary legislation subject to negative vetting by the Legislative Council, some members have enquired about the circumstances under which an amendment to Schedule 4 will be made. The Administration has envisaged that should amendments to the amount specified in Schedule 4 be required in future, the amendments would be necessitated by the adjustments made by FATF to the threshold.

Import and export of CBNIs in cargoes

28. In respect of a large quantity of CBNIs in a cargo to be imported to or exported from Hong Kong on a cross-boundary conveyance (including an aircraft, vehicle or vessel), clauses 9 to 11 of the Bill provide that a declaration in electronic form containing the information set out in Schedule 3 must be made by sending the information to an information system designated by the Commissioner of Customs and Excise under the Bill.

Non-inclusion of mails

29. Members note that under clause 8 of the Bill, the proposed declaration requirement does not apply to CBNIs in cargoes in transit, air transshipment cargoes, or contained in postal packets. Mr CHAN Chun-ying has enquired about the non-inclusion of mails under the proposed system. The Administration has explained that there are divergent approaches amongst FATF members regarding whether and how cross-boundary movement of CBNIs via mails should be regulated. FATF also notes that member jurisdictions differ widely in their approaches in implementing control over movement of currency via mails, without a proven global model. As the risk of mails being used to transport illicit cash is thus far not conclusive, more research and study are required to understand the issue and factors behind. In view of the huge volume of international mails posted in and out of Hong Kong, the diversity of the modes of regulation worldwide and the practical implications of any form of control on the operation of Hong Kong's mail system, the Administration does not propose to include mails under the Bill. However, it would closely monitor the international developments.

Imports and exports of CBNIs on cross-boundary conveyances

30. In response to the enquiry of the legal adviser to the Bills Committee regarding who (the customer, the carrier, and/or the forwarder) is/are required to make a declaration for import or export of CBNIs under clause 9(1), the Administration has explained that clause 9(1) does not stipulate the person who

is to make the declaration. For import or export of CBNIs in cargoes, it is not uncommon for a number of parties to be involved, including the customer, forwarder and carrier as provided for under clause 10. The formulation of clause 9(1) allows the declaration to be made by any of such parties.

31. Questions have also been raised on whether a large quantity of CBNIs in the possession of a person arriving in or about to leave Hong Kong on a cross-boundary conveyance should be declared as imported or exported cargoes in accordance with clause 11 of the Bill. The Administration has advised that the declaration or disclosure for such CBNIs should be made according to the requirements for individuals under clauses 4 to 6 of the Bill.

Penalties for non-compliance

32. It is proposed under the Bill that non-compliance with the declaration or disclosure requirements and making false declarations or disclosures would be an offence punishable by a maximum fine of \$500,000 and imprisonment for two years. Most members consider that the penalty for violation of the declaration or disclosure requirements should be kept at a low level for passengers who contravened the relevant requirements inadvertently. Some members including Mr YIU Si-wing have expressed the view that a grace period should be introduced before penalties are imposed for violation of the declaration and disclosure requirements.

33. The Administration has advised that as required by FATF, appropriate sanctions with deterrent effect should apply to non-compliance with the declaration or disclosure requirements. There is not a universal approach adopted by overseas jurisdictions in imposing sanctions. The penalty adopted by other FATF member jurisdictions ranges from an administrative penalty to a maximum fine of USD1,000,000 and 10 years' imprisonment upon conviction. The Administration has further advised that to cater for persons inadvertently failing to observe the declaration or disclosure requirements, Division 3 of Part 2 of the Bill stipulates a procedure for handling such offences by requiring the offender to pay a specified amount of \$2,000, provided that the person is a first-time offender who has not previously committed any money laundering or terrorist financing offences, and the CBNIs concerned are not suspected to be crime proceeds or terrorist property.

34. Regarding members' concern about the liability of a repeated offender whose CBNIs are not suspected to be crime proceeds or terrorist property, the Administration has advised that such a case would be subject to criminal prosecution which may result in fines and/or imprisonment upon conviction. The level of penalty would be determined by the court. The Administration has further advised that comprehensive and extensive publicity of the new declaration and disclosure requirements under the Bill would be launched before it is put into actual operation.

Enforcement

35. Members note that the Customs and Excise Department ("C&ED") will be the major enforcement agency of the proposed declaration and disclosure system which is based on the Red and Green Channel System⁷ for clearance of travellers arriving in Hong Kong at control points, and the existing customs clearance arrangements. Specifically, travellers in possession of a large quantity of CBNI's arriving in Hong Kong via specified control points should use the Red Channel for making a written declaration; and those who are not in such possession can simply go through the Green Channel.

36. Some members including Mr Kenneth LEUNG and Mr CHAN Chun-ying have asked about how the declaration requirements would be enforced, in particular the issue of how to ensure that travellers in possession of a large quantity of CBNI's arriving in Hong Kong would not use the Green Channel. Members have also enquired about the criteria adopted by C&ED in selecting travellers for examination at specified control points.

37. The Administration has explained that under Part 3 of the Bill, C&ED is provided with the necessary enforcement powers, which include examining the things in the possession of the person concerned, to ascertain whether there is any contravention of the declaration or disclosure requirements. Authorized officers are also empowered to seize and detain CBNI's that are reasonably suspected to be crime proceeds or terrorist property, even if the total value of such CBNI's is not more than HK\$120,000. The Administration has also advised that travellers using the Green Channel are not exempt from customs examination. C&ED will adopt a risk-based approach in selecting travellers for examination at specified control points. Green Channel users are liable to prosecution or penalty if they are found to be in possession of a large quantity of CBNI's but have not made any declaration for the CBNI's.

Committee stage amendments

38. The Administration and the Bills Committee will not propose any amendment to the Bill.

⁷ Under the Red and Green Channel System, passengers arriving in Hong Kong with goods to declare (e.g. with dutiable goods in excess of the exempted quantities) should use the "Red Channel" for making a declaration, while those with nothing to declare should use the "Green Channel".

Resumption of Second Reading debate

39. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 14 June 2017.

Consultation with the House Committee

40. The Bills Committee reported its deliberations to the House Committee on 2 June 2017.

Council Business Division 2
Legislative Council Secretariat
5 June 2017

**Bills Committee on Cross-boundary Movement of Physical Currency and
Bearer Negotiable Instruments Bill**

Membership list

Chairman Dr Hon Elizabeth QUAT, JP

Members Hon James TO Kun-sun
Hon WONG Ting-kwong, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon YIU Si-wing, BBS
Hon Kenneth LEUNG (since 28 March 2017)
Hon Dennis KWOK Wing-hang
Hon Christopher CHEUNG Wah-fung, SBS, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon CHAN Chun-ying
Dr Hon YIU Chung-yim

(Total : 11 members)

Clerk Miss Betty MA

Legal Adviser Miss Joyce CHAN

Date 28 March 2017