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**Subcommittee on the Two Proposed Resolutions Relating to the
Establishment of the Innovation and Technology Bureau**

Background brief

Purpose

This paper provides background information on the two proposed Resolutions relating to the Innovation and Technology Bureau ("ITB"). It also gives a brief account of the views and concerns expressed by Members in previous discussion.

Background

2. In preparation for the establishment of the Innovation and Technology Bureau ("ITB"), the Legislative Council ("LegCo") made and passed a resolution under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO") to effect the transfer of statutory functions under the Electronic Transactions Ordinance (Cap. 553) ("ETO") from the Secretary for Commerce and Economic Development ("SCED") and Permanent Secretary for Commerce and Economic Development (Communications and Technology) to the Secretary for Innovation and Technology and Permanent Secretary for Innovation and Technology on 29 October 2014 ("the original Resolution"). The original Resolution was published in the Gazette as Legal Notice No. 132 of 2014 on 31 October 2014.

3. The original Resolution commences on the 14th day after the day on which the Finance Committee ("FC") approves, under section 8 of the Public Finance Ordinance (Cap. 2) ("PFO"), the proposal to make changes to the Estimates of Expenditure 2014-2015 to provide for specified matters arising from the establishment of ITB ("the 2014-2015 funding proposal"); or the

14th day after the day on which the original Resolution is made and passed by LegCo under section 54A of IGCO, whichever is the later.

4. Since the 2014-2015 funding proposal could not be approved by FC in time for the relevant changes to be included into the Draft Estimates of Expenditure for 2015-2016 which was introduced into LegCo on 25 February 2015, the 2014-2015 funding proposal has been temporarily withdrawn. As such, another proposal to make changes to the Estimates of Expenditure for 2015-2016 to provide for matters arising from the establishment of ITB will need to be submitted later. Accordingly, the Administration takes the view that the original Resolution could not commence and considers it necessary to introduce amendments to the original Resolution to provide for new commencement arrangements for the proposed establishment of ITB.

5. For that purpose, SCED gave notice on 24 February 2015 to move a motion under section 54A of IGCO at the LegCo meeting of 18 March 2015 to amend the original Resolution ("the Amending Resolution") by repealing the definition of "commencement date" under paragraph (1) of, and substituting a new definition of "commencement date" in, the original Resolution. The Amending Resolution also adds a new definition of "amending Resolution" to the original Resolution. The intended legal effect is that the original Resolution will commence on the 14th day after the day on which FC approves, under section 8 of PFO, the proposal to make changes to the Estimates of Expenditure 2015-16 to provide for the specified matters arising from the establishment of ITB; or the 14th day after the day on which the Amending Resolution is made and passed by LegCo under section 54A of IGCO, whichever is the later.

6. Upon scrutiny of the legal and drafting aspects of the Amending Resolution, the Legal Service Division ("LSD") of LegCo has raised concern with the Administration that the original Resolution may not be valid and subsist. The proposed amendment to the so-called "commencement provision"¹ may not have legal effect as the original Resolution which is sought to be amended has lapsed².

7. The Administration does not agree to LSD's legal point of view and considers that the original Resolution, similar to an un-commenced Ordinance, is valid and subsisting except that it has yet to come into operation, and thus is capable of being amended by the Amending Resolution. Since the original Resolution has not yet come into operation,

¹ See paragraph 4 of the LegCo Brief on the Amending Resolution (File Ref: CTB/B480-20-6-6/3/C) issued by the Commerce and Economic Development Bureau ("CEDB") on 24 February 2015.

² Details of LSD's legal point of view are set out in paragraphs 10 and 12 of this background brief.

there is not yet any continuing effect and thus no issue of lapse³. Nevertheless, the Administration has decided not to proceed with the Amending Resolution further and subsequently introduced on 31 March 2015 the Repeal Resolution to repeal the original Resolution and the New Resolution for the transfer of the relevant statutory functions under ETO pursuant to the proposed establishment of ITB.

The two proposed Resolutions

8. The Repeal Resolution repeals the original Resolution. The New Resolution is the same as the original Resolution, except that the commencement date is determined by making references to the 14th day after the day on which FC approves, under section 8 of PFO, the proposal to make changes to the Estimates of Expenditure 2015-2016 to provide for the specified matters arising from the establishment of ITB and the 14th day after the day on which the New Resolution is made and passed by LegCo under section 54A of IGCO, whichever is the later.

Previous discussion

9. During the deliberation of the Subcommittee on Proposed Resolution Relating to the Establishment of the Innovation and Technology Bureau on 24 March 2015, members noted that according to the Legal Adviser to the Subcommittee ("the Legal Adviser"), paragraph 10.2.3 of Craies on Legislation, Sweet & Maxwell (10th edition, 2012) ("Craies") stated that while an Act of Parliament did not lapse for mere disuse, it was possible for the effect of an Act to lapse because it depended for its continuing effect on a state of affairs that had permanently ceased to exist. As reflected by the structure and drafting of the original Resolution where a definition was provided for the expression "commencement date" in paragraph (1) thereof, there was an argument that the only substantive provision in the original Resolution was paragraph (2) which effected the transfer of statutory functions. Paragraph (2) had since lapsed because the state of affairs contemplated as condition for its commencement (namely, the approval by FC of the 2014-2015 funding proposal) would not happen as a matter of fact. If such argument was to stand, the proposed amendment to the so-called "commencement provision" might not have legal effect as the original Resolution which was sought to be amended had lapsed.

³ See paragraph 4 of the LegCo Brief on the Resolutions to be made relating to the establishment of the Innovation and Technology Bureau (File Ref: CTB/B480-20-6-6/3/C) issued by CEDB on 31 March 2015. Copies of the correspondence between the Administration and LSD are available at : http://www.legco.gov.hk/yr14-15/english/hc/sub_leg/sc107/papers/sc107_ppr.htm

10. Members also noted that in the opinion of the Administration, under the presumption of permanence, paragraph 10.2.2 of Craies stated that unless the legislature expressly repealed or revoked legislation, or in some other way made express arrangements for it to cease to have effect, it would continue in force indefinitely. The original Resolution was made and passed by LegCo but had not yet come into operation. There was no fixed term nor sunset clause which provided that the original Resolution was to operate until a particular date or the occurrence of a future event. The original Resolution should therefore be presumed to be valid and subsisting. The case of the Agricultural Research Act 1956 as referred to in the statement in paragraph 10.2.3 of Craies was not pertinent to the present case of the original Resolution. The subject matter of the Act, i.e. the Agricultural Research Council, had vanished after the commencement of the Act, while the subject matter of the original Resolution, i.e. the transfer of statutory functions, had not yet come into operation. Since the original Resolution had yet to commence, there was not yet any "continuing effect" and thus no issue of lapse.

11. In the Legal Adviser's opinion, the legal effect of the original Resolution from the time when it was certain that the state of affairs contemplated as condition for its commencement was not going to occur could be subject to different views and arguments thereon. In order to obviate any arguments on the technical propriety of the proposed amendment to the so-called "commencement provision", it seemed that the prudent approach to take in the present case would be for LegCo to make and pass a fresh resolution under section 54A of IGCO for the transfer of the statutory functions in question, with or without a formal repeal of the original Resolution.

12. In view of the Legal Adviser's concern regarding the legal status of the original Resolution, the Administration had advised that it decided not to proceed further with the Amending Resolution to amend the original Resolution. The Administration would introduce another resolution to repeal the original Resolution as well as a fresh resolution for the transfer of the statutory functions in question in due course. This was solely to avoid time being unnecessarily spent on an argument over a technical legal issue, and hence to expedite legislative process. This did not prejudice the Administration's position that the original Resolution was valid and subsisting, and thus could be amended by the Amending Resolution, and should not be regarded as a precedent. The Administration would continue to adopt the same approach to amend commencement provisions in future similar cases such that the un-commenced legislation concerned could be brought into operation.

Latest development

13. At the meeting of the House Committee held on 10 April 2015, Members agreed that a subcommittee should be formed to examine the two proposed Resolutions relating to the establishment of the ITB. At the request of the House Committee, SCED has withdrawn his notices of the two proposed Resolutions pending the deliberation of the Subcommittee.

References

14. A list of relevant papers is given below –

http://www.legco.gov.hk/yr13-14/english/hc/sub_leg/sc106/general/sc106.htm

http://www.legco.gov.hk/yr14-15/english/hc/sub_leg/sc107/general/sc107.htm

http://www.legco.gov.hk/yr14-15/english/hc/sub_leg/sc110/general/sc110.htm

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