

Securities & Futures Bill Parts XIII & XIV

Supplement to the Comparison Table for Parts XIII & XIV (Annex I to LC Paper No. CB(1) 1160/00-01(01))

References to clauses (*cl.*), sub-clauses (*sc.*) or paragraphs (*para.*) in the comments column are to those of the Bill unless otherwise expressly stated.

CFI = the Court of First Instance

Commission = the Securities and Futures Commission

FS = the Financial Secretary

SJ = the Secretary for Justice

Tribunal = the Market Misconduct Tribunal

CTO = Commodities Trading Ordinance (Cap. 250)

LFETO= Leveraged Foreign Exchange Trading Ordinance (Cap. 451)

SO =Securities Ordinance (Cap. 333)

S(ID)O = Securities (Insider Dealing) Ordinance (Cap. 395).

Blue Bill Clause Ref.	S(ID)O section	Other Ordinance section	Comments (Only new provisions & those at variance with the existing legislation are mentioned.)
237	2(1), (2) & (3)	-	The definitions of "market misconduct" & "presenting officer" are added to <i>sc.</i> (1). The definition of "relevant information" is added to <i>sc.</i> (2). New paragraphs (c) & (b) are added to the definition of "derivatives".
238	2(5)	-	The clause follows the existing legislation.
239	4	-	This clause only applies to Division 4.
240	5	-	Ditto. In <i>sc.</i> (2), there are added <i>para.</i> (e) & (f) to include an exchange participant & its officer or employee.
241	6	-	This clause only applies to Division 4. References to "securities" are substituted by "listed securities".

242	-	SO 5 & 135(4)	This clause only applies to Division 5.
243	-	-	New.
244	16	-	FS may institute proceedings before the Tribunal concerning market misconduct not only upon the report of Commission or SJ (<i>sc.</i> (1)). The particulars to be contained in the notice are now prescribed in Schedule 8 (<i>sc.</i> (2)). <i>Sc.</i> (4) specifically provides that the Tribunal may identify the perpetrator of market misconduct as well as all accomplices who has assisted or connived in the perpetration of market misconduct. <i>Sc.</i> (7) stipulates the standard of proof for the issue or question before the Tribunal. <i>Sc.</i> (8) & (9) provide respectively for the report to FS by the Commission or SJ of suspected market misconduct. <i>Sc.</i> (10) makes clear that FS may refer to SJ for prosecution if it appears to FS that an offence under Part XV has been committed.
245(1)	17	-	Para. (e) gives the Tribunal the power to order a witness to provide evidence in a truthful manner.
245(2) & (3)	20	-	The offence under <i>sc.</i> (2) may now be indictable or summary. The penalties imposed for the indictable offence is much heavier than the existing ones (<i>sc.</i> (3)).
246	18	-	Para. (f) is added to <i>sc.</i> (2) to enable the Commission to take statements from persons who are able to provide relevant information. In <i>sc.</i> (6)(d), the existing statutory defence is incorporated to become a constitutive element of the offence. The offence under <i>sc.</i> (6) may now be indictable or summary (<i>sc.</i> (7)). The penalties imposed for the indictable offence is much heavier than the existing penalties..
247	19	-	The legislative intent of <i>sc.</i> (3) is unclear. It may render nugatory the restriction on the use of evidence given at or for the purposes of any proceedings instituted under clause 244 imposed by other provisions of the clause.
248	21	-	The existing provision expressly mentions the legal professional privilege and section 4 of the Inland Revenue Ordinance (Cap.112) but the clause does not do the same.

249	23, 27 & 30	-	<p>The types of orders that the Tribunal may made under <i>sc. (1)</i> have been increased to include: (i) prohibition against dealing in securities without leave of CFI for a period up to 5 years (para. (b)); (ii) prohibition against perpetration of market misconduct specified in the order (para. (c)); (iii) payment of the expenses incurred by the Commission in relation or incidental to any investigation carried out before the matter was referred to the Tribunal by FS or in relation or incidental to the proceedings (para. (f)); & (iv) recommendation to the relevant body to take disciplinary action (para. (g)). However, the Tribunal no longer has power to order payment of pecuniary penalty. <i>Sc. (2)</i> expressly permits the Tribunal to take into account a person's previous market misconduct & conviction when making an order under this clause. <i>Sc. (5)</i> makes clear that an order prohibiting specified misconduct may be made whether or not there is likelihood that the person would perpetuate such conduct. Non-compliance with an order made under this clause is itself an offence (<i>sc. (9)</i>). Please note that under the existing legislation only contravention of an order is a criminal offence. Such offence may be indictable or summary with penalties at the same level as other offences under this Part. Member may wish to consider the fact that inability to pay the amount ordered by the Tribunal not only would subject the defaulting person to possible bankruptcy proceedings but also serious criminal liabilities.</p>
250	24	-	<p>The types of orders that the Tribunal may make against an officer of a corporation that has been identified as having engaged in market misconduct are the same as under clause 249 (<i>sc.(1)</i>). <i>Sc. (2), (4) to (9)</i> are new and are added to provide for the giving of notice & the time when an order is to take effect , & to make this clause consistent with clause 249.</p>
251	-	-	<p>New. The clause prescribes payment of compound interest on payment of money ordered under clause 249 or 250. This departs from the general rule that no compound interest is payable on judgement debts. The inability of a person to pay would mean payment of much more by way of compound interest at judgement rate.</p>
252	26A	-	<p>The Tribunal's power to award costs is extended to favouring a person whose attendance, whether as witness or otherwise, has been necessary or required for the purposes of the proceedings (<i>sc. (1)(a)</i>). This seems to suggest that if the attendance of the Commission is required, it may be awarded costs.</p>

253	-	-	New. It is unclear why the conduct mentioned in <i>cl.</i> 246(6) should be made conduct of contempt under <i>sc.</i> (2)(b).
254	22	-	<i>Sc.</i> (2)(b)(iii) requires the Tribunal to issue a copy of its report to SJ.
256	29	-	The registration of an order of the Tribunal is now expressly stated to be initiated by the giving of notice by the Tribunal. The rules of the Commission would only prescribe the manner of giving of such notice.
257	31	-	An order of costs under <i>cl.</i> 252 would by itself be appealable under <i>sc.</i> (2).
260	36	-	Instead of making rules regulating the registration of orders of the Tribunal, CJ would only prescribe the manner in which the Tribunal is to give notice to CFI in respect of orders of the Tribunal.
262	10	-	<i>Sc.</i> (3) makes explicit that no market misconduct would be committed if a person could show that he has entered into an insider dealing transaction for more than one purpose and none of which was for profit or avoiding or reducing loss.
263	11	-	Slight modification to bring the clause within the market misconduct concept.
264	12	-	Ditto. To each reference to "securities" is added a reference to "their derivatives". No other substantive change.
265	-	CTO 62 SO 135 (1) & (2)	Express references to "false market" have been removed. <i>Sc.</i> (2) would extend the prohibition to securities & futures contracts traded on overseas markets. <i>Sc.</i> (3) prohibits as false trading transactions creating an artificial price or maintaining price at an artificial level of locally traded securities or futures contracts. <i>Sc.</i> (4) makes the same prohibition in respect of overseas traded securities or futures contracts. <i>Sc.</i> (5) specify circumstances which would be regarded as false trading for the purposes of <i>sc.</i> (1) & (2). <i>Sc.</i> (6) would allow exoneration if it could be proved that the purpose of the act was not false trading. <i>Sc.</i> (7) is an interpretation provision extending reference to transaction of sale or purchase to offer or invitation to offer the same.

266	-	SO 135(3) & (4)	<p>The misconduct of price rigging applies (a) globally to all transactions involving securities traded on locally recognized exchanges or authorised automatic trading services (<i>sc.</i> (1)); and (b) to transactions effected locally involving securities traded overseas (<i>sc.</i> (2)). In respect of transactions which do not involve any change of beneficial ownership, the prosecution would need only to prove the objective facts of the transaction & its effects (<i>sc.</i> (1)(a) & (2)(a)). Where fictitious or artificial transaction or device is in question, the burden of proving an intention that, or recklessness as to whether, it has the specified effect on the price of the securities or futures contracts, would be on the prosecution (<i>sc.</i> (1)(b) & (2)(b)). <i>Sc.</i> (3) expressly states that whether a transaction is fictitious or artificial is not to be determined alone on the fact whether it is intended to have effect according to its terms. Where price rigging is established objectively, a person would not be regarded as having engaged in market misconduct if he could show that his purpose was not to create a false or misleading appearance of the price of securities. <i>Sc.</i> (5) is an interpretation provision extending reference to transaction of sale or purchase to offer or invitation to offer the same.</p>
267	-	SO 135(5)	<p>The misconduct is described narrower than existing legislation in two aspects: (i) it applies only securities or futures contract traded on local recognized markets; & (ii) the offender, or his associate, must have either personally directly or indirectly involved in the prohibited transaction the information of which he has disseminated, circulated or disclosed, or received or expected to receive directly or indirectly a benefit as a result of such disclosure, circulation or dissemination (<i>sc.</i> (1)). The scope of the misconduct is enlarged to the extent that (a) prohibited transaction is broader than merely false market and trading, and (b) the effect of the prohibited transaction would not be limited to a likely fall or rise in price of the securities or futures contracts but would also include the maintenance or stabilization of such price. <i>Sc.</i> (2) would allow exoneration if (a) the benefit received or expected was not from the person perpetuated the prohibited conduct or his associate; or (b) the person could establish that up to the time of disclosure he has acted in good faith. <i>Sc.</i> (3) explains the meaning of prohibited transaction.</p>

268	-	SO 138	The misconduct is now restricted to information that is likely to induce another person to subscribe for securities or deal in futures contracts <i>in Hong Kong</i> ; or to induce sale or purchase <i>in Hong Kong</i> of securities; or to maintain, increase, reduce or stabilize the price of securities or futures contracts <i>in Hong Kong</i> (<i>sc.</i> (1)). It therefore differs from clauses 265, 266 & 269 which also cover acts done in Hong Kong but affecting overseas markets. The subjective purpose of making the disclosure is no longer a constituting element of the offence. What is relevant is only whether the person making the disclosure knows, or is negligent or reckless as to the truthfulness or omission of a material fact. Exception is made for three categories of persons if they do no more than their ordinary business: (a) those who provide the service of issuing or reproducing materials supplied by others (<i>sc.</i> (2)); (b) those who provide the service of re-transmitting of information to other persons within an information system or from system to system (<i>sc.</i> (3)); and (c) a broadcaster (<i>sc.</i> (4)). <i>Sc.</i> (4) defines the meaning of "issue".
269	-	-	New.
270	13	-	The duty is extended to all market misconduct.
271	14	-	The clause applies to all market misconduct.
272	-	SO 141	The scope of compensation is broader as loss could arise from causes other than entering into a transaction or dealing at a price affected by market misconduct (<i>sc.</i> (1)). Liability would only attach if the court is of the view that it is fair, just and reasonable in all the circumstances of the case that the defendant should be liable (<i>sc.</i> (2)). The court would have jurisdiction to grant injunction in addition to or in substitution for damages (<i>sc.</i> (6)). <i>Sc.</i> (7) & (8) provide for the use of the determination of the Tribunal in the civil action. <i>Sc.</i> (9) empowers a court to call for an unpublished report of the Tribunal and confirms the admissibility of the contents of such report.
273	-	-	New. It seems that <i>sc.</i> (5) borders on enforcing overseas criminal law by civil means.

277(1) "controller"	2(1) "controller"	-	The definition now includes also a person in accordance with whose instructions the directors of a corporation or its holding corporation are obliged to act.
277(1)	2(1)	-	The definitions of "relevant overseas market" & "relevant recognized market" are added.
277(2) "derivatives"	2(1) "derivatives"	-	The definition is expanded by adding provisions of para. (c) & (d).
277(2) "listed securities"	2(1) "listed securities"	-	The definition is expanded to include (a) shares issued by a corporation but not listed and (b) shares not yet issued by a corporation and not listed; but in each case the listing is reasonably foreseeable and the shares are subsequently listed.
277(2) "securities"	2(1) "securities"	-	The definition is slightly expanded to include (i) interest, right or property commonly known as securities but not in form of instrument; and (ii) interest, right or property prescribed as being regarded as securities by notice under clause 379.
277(2)	2(1)	-	The definitions of "relevant contravention" and "relevant information" are added.
277(3)	2(2)	-	No change.
277(4)	2(3)	-	No substantive change.
278	2(5)	-	The clause would only apply to <i>cl.</i> 277(2), 279 to 281 & Division 2 of this part.
280	5	-	This clause applies to Division 2 only. In <i>sc.</i> (2), there are added para. (e) & (f) to include an exchange participant & its officer or employee.
281	6	-	This clause applies to <i>cl.</i> 277 (2) & Division 2 only. References to "securities" are substituted by "listed securities".
282	-	SO 5(1), (2) to (4), (6) & (7)(c) & 135(4)	<i>Sc.</i> (6) is added to enable the Commission to make rules to prescribe an interest of a person or a class of persons to be disregarded for the purposes of Division 3 in this Part. <i>Sc.</i> (7) explains the meaning of a sale or purchase of securities not involving a change in their beneficial ownership for the purposes of Division 3.
283	9	-	<i>Sc.</i> (8) makes the contravention of each of the preceding subclauses an offence.

284	10	-	To each reference to "listed securities" is added a reference to "their derivatives". In <i>sc.</i> (4), two further conditions, i.e. stipulated in para. (c) & (d), have to be proved before a defence to a charge of insider dealing may be established. In <i>sc.</i> (5), an additional condition is imposed to require the transaction in question to be <i>directly</i> entered into by the parties. A change has been made to the existing legislation in <i>sc.</i> (5)(b)(ii), so that instead of requiring proving that the transaction in question was not recorded on the stock market, one has to prove that the transaction was not required to be recorded on a stock market under its rules. <i>Sc.</i> (7) would afford a defence to a person who has counselled or procured another person to deal in listed securities or their derivatives if it could be proved (i) that other person has not counselled or procure the other party to enter into the transaction in question and (ii) that other party knew that he was a connected person.
286	12	-	To each reference to "securities" is added a reference to "their derivatives". No other substantive change.
287	-	SO 135(1) & (2)	The clause is the same as clause 265 except <i>sc.</i> (6) is added to create the offence and the consequential modification in <i>sc.</i> (7). Please refer to comments on clause 265. False market is no longer mentioned. The expression "doing anything that is likely to create" seems to suggest that an offence of false trading could be established even if no false trading in fact took place, so long as it was possible that false trading could materialize.
288	-	SO 135(3) & (4)	The clause is the same as clause 266 except <i>sc.</i> (4) is added to create the offence and the consequential modification in <i>sc.</i> (5). Please refer to comments on clause 266.
289	-	SO 135(5)	The clause is the same as clause 267 except <i>sc.</i> (2) is added to create the offence and the consequential modification in <i>sc.</i> (3). Please refer to comments on clause 267.
290	-	SO 138	The clause is the same as clause 268 except <i>sc.</i> (2) is added to create the offence and the consequential modification in <i>sc.</i> (3), (4) and (5). Please refer to comments on clause 268.
291	-	-	This clause is the same as clause 269 except <i>sc.</i> (3) is added to create the offence.
292	-	SO 136 CTO 63 LEFTO 40	No substantive change. <i>Sc.</i> (3) makes clear that references to transaction includes an offer and an invitation.

293	-	-	New.
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