

Bill will override SFC independence



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IT IS HARD TO overrate the importance of the Securities and Futures Bill currently being scrutinised in the Legislative Council. It embodies Hong Kong's determination to modernise its regulatory system and meet the demand of new world standards. The world is fast becoming one marketplace, and to be effective, a regulatory system has to go global. It must measure up to world standards, share world values pertinent to regulation, know the concerns of its global neighbours, and be able to participate in international co-operation. This bill is the vessel to launch Hong Kong's regulatory system into the 21st century. It deserves everyone's best efforts.

It is accepted from the start that the Securities and Futures Commission (SFC) needs to be given wider powers to do an effective job. Its powers to require disclosure, monitor, investigate, discipline or punish, make rules and provide guidelines must be updated and strengthened to protect the investing public and maintain an orderly and efficient marketplace. These powers must be clearly prescribed. Safeguards must be built in against abuse and arbitrariness. In keeping with modern values, severe penalties must be coupled with full regard for human rights. Discretion must be linked with consultation, transparency and accountability. These are basic requirements of the rule of law.

The SFC is fundamental to this regulatory system. Only by being completely independent, and seen to be so, can the commission command respect and confidence. Yet here the bill contains a fatal flaw. The proposed section 11 reserves for the Chief Executive an overriding power to direct the SFC to follow his written order. The only conditions are that he must first consult the SFC chairman, and that he is satisfied that it is "in the public interest" to do so. The SFC is then obliged to comply with the order.

Such power of direction is incompatible with an independent authority. It also offends the basic requirements of the rule of law, no matter how rarely this power is used. It is enough that the power exists, since it would always remain a threat. It will be assumed by the public that the SFC will refrain from doing anything of which the Chief Executive might not approve.

The power to direct, reserved to the executive, is not found in the British or United States systems, in which the independence of the regulator and his ability to act without reference to the executive is implicitly held to be vital.

In April, Sir Howard Davies - the chairman of Britain's "super" regulator, the Financial Services Authority - told a visiting delegation from Legco there was little support in the British Parliament for the Treasury to have a power of direction. It was accepted an independent authority free from interference and accountable to Parliament would be better for the market. If the Treasury were to have a power of direction, then it would inevitably be drawn into controversies. Sir Howard told the delegation he would consider any direction of the Treasury "a resignation issue".

Similar views were expressed to the Legco delegation to the US from the regulating authorities and Congress. Provision for a "reserve power" to direct was greeted with bemusement. Accountability is achieved through reports and parliamentary questions. The chairman and

other members of the governing body of the British authority are appointed, and are liable to be removed, by the Treasury. The chairman and chief officers of the US authority are appointed by the US president, with confirmation by the Senate.

Under the bill before Legco, the chairman and members of the SFC are appointed and may be removed by the Chief Executive. Having the same ultimate control in his own hands, the Chief Executive would have to have extraordinary reason indeed for an additional power of direction, which would undermine the authority of his own appointees. Such a power would undoubtedly lower the status of the SFC and Hong Kong's system in the perception of its international counterparts.

The explanation given by the administration is the Government has the responsibility to provide the appropriate economic environment and regulation of the securities and futures industry in Hong Kong. It must ensure the SFC does its duty properly. This reserve power is necessary as a "check and balance" against the power of the SFC, to put a speedy stop to a misuse of its powers as a "last resort".

The appropriate way for the Government to meet its responsibility is by setting up healthy institutions to do the job. As in Britain and the US, the Government can appoint independent commissions of inquiry should the SFC fail to discharge its duty. British and US regulatory Authorities have even greater powers than the SFC and presumably could also misuse them. Yet this has not given rise to a need for a similar reserve power.

More importantly, safeguards against misuse of power should be met in the legislation and supporting institutions. This is the rule of law. It should not be placed in the hands of one person. That is the rule of man. The proposed section 11 puts the vast edifice of the bill upon fragile footing.

The provision as drafted shows this power does not only allow the Chief Executive to override the Commission. It also allows him to override the checks and balances provided by law. Under the proposed section 11(3), the Chief Executive's written direction overrides any provision in any ordinance which requires the commission to form its own just and fair opinion or consult any person before taking action.

In other words, the law requires the SFC to come to a reasonable conclusion on cogent evidence, or to consult certain bodies or individuals before acting, but all this will be ignored when the Chief Executive directs the commission to do anything. This can only be seen as the view of one man being given priority over all the safeguards of law.

It is also argued by the administration that a power to direct already exists in the current SFC Ordinance. But this is no reason for its continuation into the new law. Moreover, whereas the old provision is vague and general, the proposed section 11 in this Bill is much more specific. The provision about overriding other statutory provisions is new, and the end result is not more transparent but more absolute.

The new bill bears traces of fierce internal opposition and debate. There is no doubt that a scandal could explode at any time when the proposed provision, if passed, is invoked - and the scandal could be capable of destroying the international reputation of the SFC as regulator, as well as the SAR as a free market. For this reason, the provision is a contradiction in terms: it is not in the public interest for any Chief Executive to issue such a direction. The risk is far too devastating.

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