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**Paper for the House Committee meeting
on 22 June 2001**

**Report of the Panel on Financial Affairs
on the discussion relating to
the Bank of China (Hong Kong) Limited (Merger) Bill and
The Bank of East Asia, Limited Bill**

Purpose

This paper reports on the deliberations of the Panel on the Bank of China (Hong Kong) Limited (Merger) Bill (BOC(HK) Bill) and The Bank of East Asia, Limited Bill (BEA Bill).

Background

2. The BOC(HK) Bill and the BEA Bill were introduced into the Council on 13 June 2001 by Dr Hon David LI Kwok-po and Hon NG Leung-sing respectively. At the House Committee's meeting on 15 June 2001, members decided that the Panel on Financial Affairs should convene a special meeting at the earliest time slot available for members to receive a briefing on the two Bills, and report on its deliberations to the House Committee. The meeting was held on 19 June 2001. The sponsors of the Bills, representatives of the Administration, the two banking groups and their legal advisers were invited to attend the meeting to assist members in the deliberations.

Discussion of the Panel

3. The Panel notes that the BOC(HK) Bill seeks to provide for the merger of the Hong Kong branches of eight mainland incorporated banks, a locally incorporated bank, the Shenzhen branches of two mainland incorporated banks with Po Sang Bank Limited (Po Sang), a locally incorporated bank. It also provides for the transfer of shares held by Bank of China (BOC) in two locally incorporated banks and a locally incorporated credit card subsidiary company to

Po Sang. At the appointed time, Po Sang will change its name to Bank of China (Hong Kong) Limited (BOC(HK)).

4. The BEA Bill seeks to transfer the undertaking of United Chinese Bank Limited (UCB) to the Bank of East Asia, Limited (BEA), effecting a merger between the two banks.

5. The discussion of the Panel on the two Bills is summarized in the following paragraphs.

Note Issuing Bank

6. The Panel notes that under the BOC(HK) Bill, BOC(HK) may be authorized by the Financial Secretary to be a note-issuing bank in place of BOC at the appointed time. In response to members' enquiry about the proposed arrangements, the Executive Director (Banking Supervision) of Hong Kong Monetary Authority (HKMA) points out that subject to the approval of the Chief Executive in Council, the Financial Secretary will exercise his powers under the Legal Tender Notes Issue Ordinance (Cap. 65) to appoint BOC(HK) as a note-issuing bank in place of BOC. Clause 6(2) of the Bill sets out the rights and obligations that Po Sang will assume upon authorization. He also points out that all BOC bank notes already issued will continue to be legal tender notes, and that BOC(HK), from the appointed time, will have the power to produce, store, distribute and issue bank notes in the name of BOC bank notes using the same designs and in the same denominations as BOC is authorized to issue. In the present case, HKMA is satisfied that the proposed arrangements will be seamless and will maintain the public's confidence in the BOC bank notes.

Taxation

7. The Panel notes that under clause 10 of the BOC(HK) Bill, BOC(HK) would be able to qualify under section 19C(4) of the Inland Revenue Ordinance (Cap. 112) to claim set-off of loss which may have been incurred by the merging banks against the profits of BOC(HK). There is a provision in the BEA Bill to the same effect, allowing any profits and losses of UCB to be treated as the profits and losses of BEA from the beginning of the financial year of the merger. Members have expressed concern as to whether this provision is consistent with existing policy. The Administration confirms that the Government's policy has been consistently applied. Section 19C(4) of the Inland Revenue Ordinance, which governs the set-off of losses incurred by a corporation, provides that where a corporation in any year of assessment sustains a loss in a trade, profession or business, the amount of that loss shall be set off against the assessable profits of the same corporation for that year of assessment, and to the extent not so set off, shall be carried forward and set off against the same corporation's assessable profits for subsequent years of assessment. Under the proposed Bills, BOC(HK)

would be treated as if it were the continuation of and the same person in law as the merging banks and BEA would be deemed to be the same person in law as UCB, hence such set-off will be permissible following their respective mergers. The same policy will apply to other mergers, if the surviving entity is deemed to be one and the same as the merging entities. Having regard to members' concern, the Administration has undertaken to reiterate this policy on taxation arrangements during resumption of the second reading debate on the Bills.

Personal Data (Privacy) Ordinance

8. The Panel has examined in detail the implications of clause 8(1) of the BOC(HK) Bill. This subclause provides that any transfer to or vesting in BOC(HK) of the branches of the merging banks and any disclosure to BOC(HK) of any information of these branches shall not amount to a breach of the common law duty of confidentiality between a banker and its customers (including corporate customers), or a contravention of the Personal Data (Privacy) Ordinance (Cap. 486) or the data protection principles. There is also a similar clause in the BEA Bill. Members note the advice given by the Assistant Legal Adviser that this is an unprecedented provision since there are no ordinances for merger of banks enacted after the commencement of the relevant provisions of the Personal Data (Privacy) Ordinance in December 1996. Members question the need for inclusion of the provision in the Bills and the consequence of deleting it from the Bills. In particular, members are concerned whether the transfer and disclosure of information in contemplation or as a result of the merger would amount to a contravention of Data Protection Principle 3 under the Personal Data (Privacy) Ordinance, and whether exemption should be made in that Ordinance for mergers in general in future.

9. Data Protection Principle 3 provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than (a) the purpose for which the data were to be used at the time of the collection of the data; or (b) a purpose directly related to the above purpose. Since the term "use" in relation to personal data, includes disclose or transfer the data, members wish to know whether the transfer or disclosure of information for the purpose of merger without the prescribed consent of the data subject would constitute a contravention of Data Protection Principle 3. A member also asks the Banks whether they are prepared to obtain prescribed consent from the data subjects.

10. In this respect, the Administration confirms that the Privacy Commissioner for Personal Data has been consulted on the relevant provision of the Bill. The Administration has no objection to the proposed clause 8(1). At members' request, the Administration agrees to seek the views of the Privacy Commissioner for Personal Data on the interpretation of Data Protection Principle 3. As to whether exemption should be made in the Personal Data (Privacy) Ordinance to cover other mergers to be effected in future, the Administration

considers that this would constitute a matter of policy and undertakes to give the matter further consideration.

11. Responding to members' concern about prescribed consent, the solicitors acting for BOC have advised members that all customers who have accounts with the merging banks have been issued with, and are dealing with the relevant banks on the basis of the Bank of China Group's General Terms and Conditions for Banking Services. These Terms and Conditions contain a clause authorizing the relevant merging bank to provide and divulge information in respect of the customer or in connection with the bank account or any service or transaction to any other member of the BOC Group. Hence, the transfer of data between companies in the same group would not constitute a breach of the Personal Data (Privacy) Ordinance.

12. However, the Assistant Legal Adviser has pointed out that it is unclear whether customers' agreement to accept the General Terms and Conditions would amount to prescribed consent under the Personal Data (Privacy) Ordinance. According to the solicitors acting for BOC, clause 8(1) is intended to deal with those cases where there may be some doubt as to whether prescribed consent should be obtained and such prescribed consent has not been obtained at the appointed time for the merger.

13. Hon NG Leung-sing, as a representative of the BOC Group, has also pointed out that there are over one million customers in the BOC Group. It would therefore be impractical to seek the personal and explicit consent of all customers. Moreover, the customers should have confidence in the bank's system of protecting personal data. At the request of the Panel, the solicitors acting for BOC have undertaken to provide members with a copy of the Bank of China Group's General Terms and Conditions for Banking Services.

14. The Panel notes that the Human Rights Unit of the Department of Justice has advised that the Bills are in order. At members' request, the Administration would seek the Department of Justice's view as to whether the advice given could be made available to the Panel.

Security Interest

15. A member has pointed out that after the merger, a mortgagor of an "all-monies mortgage" granted by a merging bank might be liable for repayment of loans extended by all merging entities. Representatives of the two banks assure the Panel that the liability of the mortgagor under the security for the repayment of loans would not be increased by virtue of the merger.

16. The Panel notes that a Committee Stage Amendment would be proposed to the BOC(HK) Bill to clarify the intent. A similar Committee Stage Amendment would be introduced for the BEA Bill. The drafts are attached at the **Appendix**.

Terms of Mortgages

17. A member has pointed out that some banks would not allow property owners to take advantage of favourable mortgage terms unless re-financing is carried out. He asks whether BOC(HK) and BEA would offer more favourable terms to mortgagors in view of the merger. Representatives of the two banks confirm that the original terms and conditions of the mortgage would continue to apply.

Conclusion

18. Members generally find the briefing useful in clarifying the issues raised in relation to the Bills. They also note the position of the Administration that the proposed mergers will help promote cost-effectiveness and enhance internal controls of the banks concerned and that the merged entities will be more effectively supervised by HKMA after the mergers.

19. Members also take note of the views expressed by representatives of BOC and BEA that an early passage of the Bills is important because the proposed mergers will enhance the competitiveness of the banks concerned and will provide a clear direction for their staff members in tackling the imminent restructuring of the banks' operations.

20. The Panel notes the view of a member expressed at the end of the meeting that the Bills are acceptable and that there is no need to set up Bills Committees to scrutinize the Bills. The House Committee is invited to take note of the discussions at the Panel and the additional information obtained.

Council Business Division 1
Legislative Council Secretariat
21 June 2001

Appendix

Draft: 18 June 2001

New proviso to clause 8(g)

Provided that nothing in this Ordinance shall result in a security interest which is vested in Po Sang, held by Po Sang or held by a nominee or agent of or trustee for Po Sang as a result of the provisions of this Ordinance securing payment or discharge of a debt or liability the payment or discharge of which was not, prior to the appointed time, secured by a security interest or intended or contemplated to be so secured unless:

- (i) the terms of the security interest expressly provide otherwise; or
- (ii) the provider of the security interest and Po Sang expressly agree otherwise at or after the appointed time.

BANK OF EAST ASIA, LIMITED BILL

COMMITTEE STAGE

Amendments to be moved by the Hon.

Clause

Amendment proposed

7(g)

By adding:

- "(v) Notwithstanding subparagraph (i), where immediately before the appointed day any security interest would not be available to United Chinese Bank as security for the payment or discharge of any liability owing to it, or to Bank of East Asia as security for the payment or discharge of any liability owing to it, such security interest shall not become available to Bank of East Asia as security for such liability after the appointed day solely by virtue of this Ordinance, unless Bank of East Asia obtains the written consent of the person or persons whose rights are thereby affected.

- (vi) Notwithstanding subparagraph (ii), where immediately before the appointed day United Chinese Bank would not, in respect of any liability owing to it, be entitled to the rights and priorities in relation to any security interest then in existence, or Bank of East Asia would not, in respect of any liability owing to it, be entitled to the rights and priorities in relation to any security interest then in existence, Bank of East Asia shall not, in respect of such liability, be entitled to such rights and priorities after the appointed day solely by virtue of this Ordinance, unless Bank of East Asia obtains the written consent of the person or persons whose rights are thereby affected."