



However, subsequent to our latest enquiries with the DTI, our attention have been drawn to a number of observations. According to the observations, it is generally considered that paragraph 10 of Schedule 10A of the UK Companies Act 1985 should be read as applying to voting rights in an undertaking held by the same undertaking itself, and that the paragraph should not be taken as applying to a cross-holding of rights in a structure depicted in Diagram 2 above.’

‘12. Having regard to the latest clarification from the DTI of the UK, it is now apparent that section 3(3) of the proposed Twenty-third Schedule would not apply as an off-setting rule in a scenario of cross-holding of rights between the parent and subsidiary undertakings. We are now doing further research into the intent and application of paragraph 10 of Schedule 10A to the UK Companies Act 1985 on which section 3(3) of the proposed Twenty-third Schedule is modeled. We would revert to Members on this later.’

Your above interpretation appears to be inconsistent with your following interpretation as set out in paragraph 5 of the Letter:

“‘Any rights held by the undertaking itself”, referred to in section 3(3) of the 23<sup>rd</sup> Schedule, arise when the subsidiary undertaking, vis-à-vis other rights holders, acquire such voting rights in itself. This can be the case when the subsidiary undertaking holds certain voting rights in the parent undertaking (e.g. through owning shares of the parent undertaking or a control contract), hence indirectly holding voting rights in itself. In this connection, the “rights held by the undertaking itself” are of the same type as “the voting rights” referred to in section 3(1) of the same Schedule in order for them to be reducible under section 3(3).’

Please clarify.

- (ii) whether distinction has to be drawn between a subsidiary undertaking which is a body corporate and a subsidiary undertaking which is not a body corporate as proposed in sections 2(1)(a) and 2(1)(b) of the 23<sup>rd</sup> Schedule when applying section 3(3) of the 23<sup>rd</sup> Schedule?

You mentioned that section 3(3) of the proposed Twenty-third Schedule is modeled on paragraph 10 of Schedule 10A to the UK Companies Act 1985. As I have pointed in the previous meeting of the Bills Committee, no distinction is drawn between a subsidiary undertaking which is a body corporate and a subsidiary undertaking which is not a body corporate in the definition of “subsidiary” under the UK Companies Act 1985. However, in the light of the distinction as proposed in sections 2(1)(a) and 2(1)(b) of the 23<sup>rd</sup> Schedule and the change of the scope of application of section 3 in the Companies (Amendment) Bill 2004 as compared to that in the Companies (Amendment) Bill 2003, it appears that the reduction of rights as stipulated in section 3(3) will only be applied to the situation when the subsidiary undertaking is not a body corporate. Please clarify.

- (b) I have the following observations on the scenario as set out in your Diagram 2:
- (i) Section 7(b) of the 23<sup>rd</sup> Schedule provides that “rights held by a person as nominee for another shall be treated as held by the other”.
- Section 7(c) of the 23<sup>rd</sup> Schedule provides that “rights shall be treated as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence”.
- (ii) If the 20% of the voting rights in E held by Partnership F (a subsidiary undertaking of E) (“the Rights”) are exercisable only on E’s instructions or with its consent or concurrence, it appears that the Rights shall be treated as held by F as E’s nominee under section 7(c). Applying section 7(b) of the 23<sup>rd</sup> Schedule to Diagram 2, it appears that the Rights held by F as E’s nominee shall be treated as held by E.
  - (iii) Unless the contrary intention is expressly provided in the Bill, in determining the relationship of parent undertaking and subsidiary undertaking between E and other undertakings, the voting rights of E shall be reduced by the 20% held by itself in accordance with section 3(3) if the 20% of voting rights in E held by F are treated as being held by E in itself in accordance with sections 7(b) and 7(c). The majority of voting rights in E should be calculated on the basis of the remaining 80% voting rights i.e.

any party holding more than 40% of E's voting rights shall be E's parent undertaking.

Section 128(3)

Paragraph 17 of your Paper mentioned that 'Section 128(3) of the CO was enacted in 1974. So far, we are not able to trace the legislative intent then, but are aware that it was modelled on the previous paragraph 3 of the Schedule 5 to the Companies Act 1985 (before it was amended under the Companies Act 1989).'

Please clarify how can the 1974 CO be modelled on the 1985 Companies Act.

It is appreciated that your reply in both Chinese and English could reach us as soon as possible.

Yours sincerely

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c.c. DoJ (Attn: Mr K F CHENG, SALD)