

**Bills Committee on
Companies (Amendment) Bill 2004**

**Follow-up Actions Arising from the Discussion
At the Meeting on 26 April 2005**

Purpose

At the Bills Committee meeting held on 26 April 2005, Members requested the Administration to provide some additional information and consider refining the drafting of a few provisions. Having consulted the Department of Justice and the Hong Kong Institute of Certified Public Accountants, we set out the Administration's responses.

**Section 2(5) of the Companies Ordinance
Sections 2(4), 4(c) and 7(c) of the proposed Twenty-third Schedule**

2. An up-dated mark-up version (as at 11 May 2005) of the relevant provisions to which we would like to propose Committee Stage Amendments (CSA), taking into account views expressed at previous Bills Committee meetings, is at **Annex**. In response to Members' suggestions at the meeting held on 26 April 2005, four additional CSA are proposed and the reasons therefor are set out in footnotes 1A, 20A, 23A and 25A respectively. The wording is not final and is subject to the further consideration by the Law Draftsman. As the Bills Committee continues its clause-by-clause examination of the Bill, further CSA may be proposed.

Section 8 of the proposed Twenty-third Schedule

- (a) The purpose of section 8, and the reasons for the different treatments of rights under subsections (a) and (b);*
- (b) The drafting of section 8;*

(c) *The provisions in UK Companies Act 1985 on which section 8 are modelled.*

3. Section 8 of the proposed Twenty-third Schedule is modelled on paragraph 8 of Schedule 10A of the UK Companies Act 1985¹. The purpose of the provision is to set out a rule to determine the right holder for the purpose of determining the parent of an undertaking, in respect of rights attached to the undertaking's shares which are provided as security.

4. Section 8(a) deems rights attached to shares held by way of security (i.e. by a mortgagee) as held by the person providing the security (i.e. the mortgagor), **if** the rights (apart from the right to exercise them for the purpose of preserving the value of the security or of realising it) are exercisable **only in accordance with the mortgagor's instructions**. Notwithstanding that the title of such shares may have been transferred to the mortgagee, it remains logical and reasonable to regard such rights as being held by the mortgagor so long as such rights are exercisable only in accordance with the mortgagor's instructions.

5. Section 8(b) caters for a mortgagee (e.g. a bank), part of whose normal business activities being the granting of loans. In such lending activities, the mortgagee's objective is generally not to obtain the control of the undertaking the shares of which being mortgaged to the mortgagee. Therefore, **so long as** the rights (apart from the right to exercise them for the purpose of preserving the value of the security or of realising it) are exercisable by that mortgagee **in the mortgagor's interests**, it would be reasonable to treat such rights as held by the mortgagor. This rule also makes sense as banks would unlikely enter into transactions requiring themselves (as mortgagee) to exercise rights in accordance with the mortgagor's instructions.

¹ Paragraph 8 of the Schedule 10A to the UK Companies Act 1985 reads –
“Rights attached to shares held by way of security shall be treated as held by the person providing the security –
(a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions, and
(b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests.”

6. Regarding the drafting, the Law Draftsman considers that the proposed CSA, as discussed at the meeting held on 26 April 2005, is appropriate to reflect the intent.

Financial Services and the Treasury Bureau
May 2005

A BILL

To

Amend the Companies Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Companies (Amendment) Ordinance 2004.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

1A. Interpretation

Section 2(5) of the Companies Ordinance (Cap. 32) is amended by repealing "or concurrence"^{1A}.

2. Section added

The following is added~~Companies Ordinance (Cap. 32) is~~
~~amended by adding -~~

^{1A} In response to Members' suggestion at the meeting held on 26 April 2005, we propose a technical amendment by deleting the word "concurrency" to align the drafting with the Chinese version of the Ordinance. Please refer to footnote 25A at page 26.

"2B. Construction of references to parent company, etc.

(1) A reference in this Ordinance to parent company, parent undertaking or subsidiary undertaking shall be construed in accordance with the Twenty-third Schedule.

(2) A reference in a provision specified under subsection (3) for the purposes of this subsection -

(a) to a holding company shall be deemed to include a parent company;

(b) to a subsidiary or subsidiary company¹ shall be deemed to include a subsidiary undertaking; and

(c) to shares or an undertaking shall be construed in accordance with the Twenty-third Schedule.

(3) The provisions specified for the purposes of subsection (2) are sections 123, 124, 125, 126, 127, 128, 129², 129A, 129D, 133, 140, 141, 161, 161B, 161BA³, 163B and

¹ Like the references to "subsidiary", the references to "subsidiary company" shall also be deemed to include a "subsidiary undertaking", which shall be construed in accordance with the proposed Twenty-third Schedule (Clause 18). The Tenth Schedule, as one of the provisions specified under subsection (3), contains references to "subsidiary company".

² Section 128 requires that, where a company has a subsidiary, certain particulars of the subsidiary should be shown in the company's accounts. Section 129 requires that, where a company holds shares in another body corporate (not being its subsidiary), certain particulars of that body corporate should be shown in the company's accounts. The interpretation of "subsidiary" in sections 128 and 129 should be consistent, for the purpose of preparing accounts. Accordingly, we propose that the references to "subsidiary" in section 129 should also be construed in accordance with the the proposed section 2B (Clause 2) and the proposed Twenty-third Schedule (Clause 18).

³ Section 161B requires that where a loan is made by a company or a subsidiary of the company to an officer of the company, certain particulars of the loan should be shown in the company's accounts. Section 161BA contains further provisions relating to such loans. For consistency with other provisions relating to the preparation of accounts and group accounts, the references to "holding company" and "subsidiary" in sections 161B and 161BA should also be construed in accordance with the proposed section 2B (Clause 2) and the proposed Twenty-third Schedule (Clause 18).

163D and the Second Schedule, the Third Schedule, the Fourth Schedule and the Tenth Schedule.

(4) The Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend subsection (3).".

3. General provisions as to contents and form of accounts

Section 123 is amended -

(a) in subsection (3), by repealing "in the following provisions of this section or"⁴;

(b) by repealing subsection (4) and substituting -

~~Section 123(4) is repealed and the following substituted—~~

"(4) Without affecting the generality of subsections (1),⁵ (2) and (3), where compliance with the requirements of the Tenth Schedule and other requirements of this Ordinance as to the matters to be included in a company's balance sheet and profit and loss account or

⁴ As set out in paragraphs 16 to 21 of the paper entitled "Follow-up Actions Arising from the Discussion at the Meeting on 15 March 2005 (LC Paper No. CB(1)1207/04-05(04)), discussed at the Bills Committee meeting on 7 April 2005, the Administration considers that no provisions in the existing sections 123(4) to (7) and proposed sections 123(4) to (4A) can be regarded as an exception to the existing section 123(3). We thus propose a CSA to remove the words "in the following provisions of this section or" in section 123(3).

⁵ The CSA addresses Members' concern that the proposed subsection (4) may overlap with the existing subsection (1). The Administration's view is set out in paragraph 17 of the paper entitled "Follow-up Actions Arising from the Discussion at the Meeting on 15 March 2005 (LC Paper No. CB(1)1207/04-05(04)), discussed at the Bills Committee meeting on 7 April 2005. In brief, although subsection (1) may, to a certain extent, overlap with the proposed subsection (4) as both require the accounts to give a true and fair view, the proposed subsection (4) is not redundant as it imposes a specific duty to give additional information in the accounts to fulfill the general requirement of subsection (1). That said, in response to Members' concerns, we propose a CSA to expressly provide that the proposed subsection (4) should not affect the generality of subsection (1).

in a statement annexed to those accounts would not be sufficient to give a true and fair view of the state of affairs or the profit or loss of the company, additional information as may be necessary to give a true and fair view thereof shall be given in the accounts or statement, as the case may require.

(4A) Where compliance with any of the ~~requirements~~provisions referred to in subsections ~~(2), (3) and~~ (4) ("the relevant requirement") is inconsistent with the requirement to give a true and fair view of the state of affairs or the profit or loss of a company, the directors of the company shall depart from the relevant requirement~~these provisions~~⁶ to the extent as may be necessary for the purposes of subsection (1) with the reasons for and particulars and effects of such departure to be given in the company's balance sheet and profit and loss account or in a statement annexed to those accounts."

~~4. Obligation to lay group account
before holding company~~

~~Section 124 is amended by adding~~

⁶ The CSA in the proposed subsection (4A) is a technical amendment for greater clarity.

~~“(2A) Without prejudice to subsection (2) but subject to subsection (2B), a subsidiary may be excluded from the group accounts if—~~

~~(a) severe long-term restrictions substantially hinder the exercise of the rights of the holding company over the assets or management of the subsidiary; or~~

~~(b) the interest of the holding company is held exclusively with a view to subsequent resale and the subsidiary has not been previously included in the group accounts prepared by the holding company.~~

~~(2B) The references in subsection (2A) to the rights of the holding company and the interest of the holding company shall be construed as a references to, respectively, the rights and interest held by or attributed to the company for the purposes of section 2 of the Twenty third Schedule in the absence of which the company would not be a parent company.”⁷~~

5. Contents of group accounts

Section 126 is amended –

- (a) in subsection (3), by repealing everything after "information" and substituting a full stop;
- (b) by adding –

⁷ In response to the comments made by the Association of Chartered Certified Accountants (Hong Kong) and W. H. Lam & Co., we propose a CSA to remove the entire clause 4 as the latest IAS 27 “Consolidated and Separate Financial Statements” no longer permits exclusion from the group accounts under the two conditions set out in the clause. HKICPA has been consulted and supports the CSA.

"(4) Without affecting the generality of subsections (1) and⁸ (3), where compliance with the requirements of the Tenth Schedule and other requirements of this Ordinance as to the matters to be included in a company's group accounts or in a statement annexed to the group accounts would not be sufficient to give a true and fair view of the state of affairs or the profit or loss of the holding company and its subsidiaries, additional information as may be necessary to give a true and fair view thereof shall be given in the group accounts or statement, as the case may require.

(5) Where compliance with any of the requirements~~provisions~~ referred to in subsections (3) ("the relevant requirement") ~~and (4)~~ is inconsistent with the requirement to give a true and fair view of the state of affairs or the profit or loss of a holding company and its subsidiaries, the directors of the company shall depart from the relevant requirement~~those provisions~~⁹ to the extent as may be necessary for the purposes of

⁸ Please refer to footnote 5. The CSA expressly provides that the proposed subsection (4) would not affect the generality of subsection (1).

⁹ Please see footnote 6. The CSA in the proposed subsection (5) is a technical amendment for greater clarity.

subsection (1) with the reasons for and particulars and effects of such departure to be given in a statement annexed to the company's group accounts."

6. Financial year of holding company and subsidiary

Section 127(2) is amended by adding "which is a company for the purposes of this Ordinance" after "a holding company's subsidiary".

7. Particulars to be shown in company's accounts in relation to subsidiaries

Section 128 is amended -

(a) in subsection (1)(b) by adding "where the subsidiary is a body corporate," before "the";

(ab) by adding -

"(ba) where the subsidiary is not a body corporate, the address of its principal place of business;"¹⁰;

~~in subsection (1)(b), by adding "or established" after "incorporated";~~

(b) by repealing subsection (2)(a) and substituting -

¹⁰ This is intended to be an amendment consequential to the proposed definition of "undertaking" in the proposed Twenty-third Schedule (Clause 18). In response to Law Society's suggestion that there may be difficulties to identify the place where the undertaking is established, we propose a CSA to preserve the *status quo* in relation to the disclosure of "place of incorporation" for a subsidiary undertaking which is incorporated. For a subsidiary undertaking which is unincorporated, we propose to require disclosure of the "address of its principal place of business".

"(a) shares of an undertaking which is a body corporate shall be treated as being held, or as not being held, by another undertaking if they would, by virtue of section 2(4), (5), (6) and (7), be treated as being held or, as the case may be, as not being held by that other undertaking for the purpose of determining whether the first-mentioned undertaking is its subsidiary; and";

(c) by repealing subsection (3) and substituting -

"(3) Subsection (1) shall not require the disclosure of information with respect to an undertaking which -

(a) is the subsidiary of another undertaking; and

(b) is established under the laws of a place outside Hong Kong or carries on business outside Hong Kong,

if -

(c) the disclosure would, in the opinion of the directors of that other undertaking, be harmful to the business of that

other undertaking or of any of its subsidiaries; and

- (d) the Financial Secretary agrees that the information need not be disclosed."

8. Section substituted

Section 129A is repealed and the following substituted -

"129A. Particulars to be shown in subsidiary company's accounts in relation to its ultimate parent undertaking

(1) Subject to subsection (2), where, at the end of its financial year, a company is the subsidiary of another undertaking, there shall be stated in, or in a note on, or statement annexed to, the company's accounts laid before it in general meeting -

(a) the name of the undertaking regarded by the directors as being the company's ultimate parent undertaking; and

(b) if known to them -

(i) where the undertaking is a body corporate, the country in which it is incorporated ~~or established;~~ and

(ii) where the undertaking is not a body corporate, the address of its principal place of business¹¹.

(2) Subsection (1) shall not require the disclosure by a company which carries on business outside Hong Kong of information with respect to the undertaking regarded by the directors as being the company's ultimate parent undertaking if -

- (a) the disclosure would, in their opinion, be harmful to the business of that parent undertaking or of the company or any other of that parent undertaking's subsidiaries; and
- (b) the Financial Secretary agrees that the information need not be disclosed."

9. Directors' report to be attached to balance sheet

Section 129D is amended -

- (a) in subsection (3)(h), by repealing ", if" and substituting ", the company";
- (b) in subsection (6) -
 - (i) by repealing "body corporate" and substituting "undertaking";
 - (ii) by repealing "body" and substituting "undertaking".

¹¹ Please refer to footnote 10.

10. Disqualifications for appointment as auditor

Section 140(2)(d) is repealed and the following substituted -

"(d) a person who is, by virtue of paragraph (a) or (b), disqualified for appointment as auditor of any other undertaking which is -

- (i) the subsidiary of the company;
- (ii) the parent undertaking of the company; or
- (iii) a subsidiary of the company's parent undertaking,

or would be so disqualified if the undertaking were a company,".

11. Particulars in accounts of directors' emoluments, pensions, etc.

Section 161(9)(a) is amended by repealing "body corporate" where it twice appears and substituting "undertaking".

12. Duty of director or past director to disclose payment for loss of office, etc., made in connexion with transfer of shares in company

Section 163B(1)(b) is repealed and the following substituted -

"(b) an offer made by or on behalf of some other undertaking with a view to the company becoming its subsidiary or a subsidiary of its parent undertaking;".

**13. Power to amend requirements as to accounts,
Schedules, tables, forms and fees**

Section 360(5) is amended by adding "or Twenty-third" after "Sixteenth".

**14. Form of Statement in lieu of Prospectus
to be delivered to Registrar by a
Private Company on becoming a
Public Company and Reports
to be set out therein**

The Second Schedule is amended -

(a) by repealing "[s. 30]" and substituting "[ss. 2B & 30]";

(b) in Part II, in paragraph 2 -

(i) in sub-paragraph (1), by repealing

"shares in a body corporate" and
substituting "shares in an undertaking";

(ii) by repealing "body corporate" wherever it
appears and substituting "undertaking";

(iii) in sub-paragraph (3), by repealing "body
corporate's" wherever it appears and
substituting "undertaking's";

(c) in Part III -

(i) in paragraph 4 -

(A) by repealing "a body corporate" and
substituting "an undertaking";

(B) by repealing "body corporate" and substituting "undertaking";

(ii) in paragraph 6, by repealing "holding company or of a subsidiary of the company's holding company" and substituting "parent undertaking or of a subsidiary of the company's parent undertaking".

15. Matters to be Specified in Prospectus and Reports to be set out therein

The Third Schedule is amended -

(a) by repealing "[ss. 38 & 342]" and substituting "[ss. 2B, 38, 38A, 38D, 42, 342, 342A, 342C & 360 & 2nd, 4th, 20th & 21st Schs.]";

(b) in Part II, in paragraph 33, by repealing "body corporate" wherever it appears and substituting "undertaking";

(c) in Part III -

(i) in paragraph 43, by repealing "holding company or of a subsidiary of the company's holding company" and substituting "parent undertaking or of a subsidiary of the company's parent undertaking";

(ii) in paragraph 46 -

- (A) in sub-paragraph (b), by repealing "holding company or of a subsidiary of the company's holding company" and substituting "parent undertaking or of a subsidiary of the company's parent undertaking";
- (B) in sub-paragraph (c)(i), by repealing "holding company or a subsidiary of the company's holding company" and substituting "parent undertaking or a subsidiary of the company's parent undertaking".

16. Form of Statement in lieu of Prospectus to be delivered to Registrar by a Company which does not issue a Prospectus or which does not go to Allotment on a Prospectus Issued, and Reports to be set out therein

The Fourth Schedule is amended -

- (a) by repealing "[s. 43]" and substituting "[ss. 2B & 43]";
- (b) in Part II, in paragraph 2 -
 - (i) in sub-paragraph (1), by repealing "a body corporate" and substituting "an undertaking";

- (ii) by repealing "body corporate" wherever it appears and substituting "undertaking";
 - (iii) in sub-paragraph (3), by repealing "body corporate's" wherever it appears and substituting "undertaking's";
- (c) in Part III -
- (i) in paragraph 4 -
 - (A) by repealing "a body corporate" and substituting "an undertaking";
 - (B) by repealing "body corporate" and substituting "undertaking";
 - (ii) in paragraph 6, by repealing "holding company or of a subsidiary of the company's holding company" and substituting "parent undertaking or of a subsidiary of the company's parent undertaking".

17. Accounts

The Tenth Schedule is amended -

- (a) in the square brackets, by adding "2B," before "48B";
- (b) in Part II -
 - (i) in paragraph 18(1) and (5), by repealing "body corporate" wherever it appears and substituting "undertaking";

- (ii) in paragraph 19 -
 - (A) by repealing "body corporate" wherever it appears and substituting "undertaking";
 - (B) by repealing "bodies corporate" where it twice appears and substituting "undertakings".

18. Twenty-third Schedule added

The following is added -

"TWENTY-THIRD SCHEDULE [ss. 2B, 124
& 360]

PARENT AND SUBSIDIARY UNDERTAKINGS

1. Interpretation

(1) For the purposes of the provisions specified under section 2B(3) of this Ordinance and this Schedule -

"parent company" (母公司) means a parent undertaking which is a company;

"parent undertaking" (母企業) shall be construed in accordance with section 2;

"shares" (股、股份) shall be construed, ~~for the purposes of the provisions specified under section 2B(3) of this Ordinance,~~¹² as a reference to -

- (a) in relation to an undertaking with a share capital, the allotted shares;
- (b) in relation to an undertaking with capital in the form other than share capital, the rights to share in the capital of the undertaking;
and
- (c) in relation to an undertaking without any capital, the interest -
 - (i) conferring any right to share in the profits or liability to contribute to the losses of the undertaking; or
 - (ii) giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up;

¹² In response to the comment of Assistant Legal Adviser in her letter dated 1 November 2004 to the Administration, a technical amendment is proposed to clarify the intent that the interpretation of the term should not only be confined to the provisions specified under the proposed section 2B(3) (Clause 2) but also the proposed Twenty-third Schedule (Clause 18). We have explained the purpose of this CSA in the Administration's reply, dated 23 November 2004, to the Assistant Legal Adviser (LC Paper No. CB(1)453/04-05(17)).

"undertaking" (企業), ~~in relation to the provisions specified under section 2B(3) of this Ordinance, includes~~¹³ means¹⁴—

- (a) a body corporate ~~or corporation~~;
- (b) a partnership; or¹⁵
- (c) an unincorporated ~~body~~ association¹⁶ carrying on a trade or business, whether for profit or not.

(2) In construing any references to an undertaking which is not a company for the purposes of this Ordinance, other expressions appropriate to companies shall be construed, in relation to that undertaking, as references to the corresponding persons, officers, documents or organs, as the case may be, appropriate to undertakings of that description.

2. Parent undertaking and subsidiary undertaking

(1) An undertaking is a parent undertaking ("parent undertaking") in relation to another undertaking ("subsidiary undertaking") if –

¹³ The reason for the amendment is the same as that contained in footnote 12.

¹⁴ This is a technical amendment to qualify the scope of the definition. We have explained the purpose of this CSA in the Administration's paper entitled "Follow-up Actions Arising from the Discussion at the Meeting on 13 January 2005" (LC Paper No. CB(1)825/04-05(02)), discussed at the Bills Committee meeting on 3 February 2005.

¹⁵ A technical amendment to improve the drafting.

¹⁶ In response to Members' concerns of whether the definition of "undertaking" is intended to cover "an individual", the HKICPA has clarified that the entities subject to consolidation under IAS 27 should not be interpreted to include "an individual". To put the provision beyond doubt, we propose changing the term "unincorporated body" to "unincorporated association". We have explained the purpose of this CSA in the Administration's paper entitled "Follow-up Actions Arising from the Discussion at the Meeting on 13 January 2005" (LC Paper No. CB(1)825/04-05(02)), discussed at the Bills Committee meeting on 3 February 2005.

- (a) (i) in the case where both the parent undertaking and the subsidiary undertaking are bodies corporate, the subsidiary undertaking¹⁷the subsidiary undertaking is a body corporate and is a subsidiary of the parent undertaking by virtue of section 2(4), (5), (6) and (7) of this Ordinance; or
- (iib) in any other case,¹⁸the subsidiary undertaking is not a body corporate and the parent undertaking -
- (Aii) holds a majority of the voting rights in the subsidiary undertaking;
- (Bii) is a member of the subsidiary undertaking and has the right to appoint or remove a majority of its board of directors; or

¹⁷ A technical amendment to put beyond doubt that the existing tests to determine a “parent and subsidiary” relationship in sections 2(4) to (7) of the Ordinance would be preserved where both undertakings are bodies corporate.

¹⁸ Please refer to footnote 17. As the existing tests in sections 2(4) to (7) of the Ordinance can only cover a scenario whereby *both* the parent undertaking and the subsidiary undertaking are bodies corporate, section 2(1)(a)(ii) of the Twenty-third Schedule is intended to cover any other cases (for example, where the parent undertaking is a body corporate and the subsidiary undertaking is not a body corporate, or *vice versa*).

(~~Ciii~~) is a member of the subsidiary undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the subsidiary undertaking; or

(~~be~~) the parent undertaking has the right to exercise a dominant influence over the subsidiary undertaking by virtue of -

- (i) the provisions contained in the subsidiary undertaking's memorandum or articles or equivalent constitutional documents; or
- (ii) a control contract.

(2) For the purposes of subsection (1)(~~ab~~)(~~ii~~)¹⁹, an undertaking shall be treated as a member of another undertaking ("the relevant undertaking"), if -

- (a) any of its subsidiary undertakings is a member of the relevant undertaking; or
- (b) any shares in the relevant undertaking are held by a person acting on behalf of the

¹⁹ A renumbering consequent upon the CSA to section 2(1) of the proposed Twenty-third Schedule.

first-mentioned undertaking or any of its subsidiary undertakings.

~~(3) A parent undertaking shall be treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings; and references to its subsidiary undertakings shall be construed accordingly.~~

(3) An undertaking shall be treated as the parent undertaking of another undertaking if a subsidiary undertaking of the first-mentioned undertaking is, or is to be treated as, the parent undertaking of that other undertaking; and references to a subsidiary undertaking of the first-mentioned undertaking shall be construed accordingly.²⁰

(4) Sections 3 to 10 contain provisions explaining expressions used in this section and otherwise supplementing this section.^{20A}

²⁰ In response to Members' concerns at the Bills Committee's meeting held on 13 January 2005, a technical amendment is proposed to recast section 2(3) of the proposed Twenty-third Schedule to clarify any doubt regarding the policy intent. This provision caters for a "grandparent-parent-subsidiary" situation whereby the "grandparent" shall also be deemed to be the "parent undertaking" of the "subsidiary undertaking". We have explained the purpose of this CSA in the Administration's paper entitled "Follow-up Actions Arising from the Discussion at the Meeting on 13 January 2005" (LC Paper No. CB(1)825/04-05(02)), discussed at the Bills Committee meeting on 3 February 2005.

^{20A} This provision is proposed in response to Members' suggestion at the meeting held on 26 April 2005 to facilitate comprehension.

3. Voting rights in undertaking

(1) For the purposes of section 2(1)(~~ab~~)(ii)(A) and (~~iiiC~~)²¹, the references to the voting rights in an undertaking shall be construed as references to the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters.

(2) For the purposes of subsection (1), where an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, the references to holding a majority of the voting rights in the undertaking shall be construed as references to having the right under the constitution of the undertaking to direct the overall policy of the undertaking or to alter the terms of its constitution.

~~(3) The voting rights in an undertaking referred to in subsection (1) shall be reduced by any rights held by the undertaking itself.~~²²

4. Right to appoint or remove majority of directors

²¹ A renumbering consequent upon the CSA to section 2(1) of the proposed Twenty-third Schedule.

²² We have summed up the reasons for removing section 3(3) of the proposed Twenty-third Schedule in paragraphs 3 to 7 of the Administration's paper entitled "Follow-up Actions Arising from the Discussion at the Meeting on 15 March 2005" (LC Paper No. CB(1)1207/04-05(04)), discussed at the Bills Committee meeting held on 7 April 2005.

For the purposes of section 2(1)(~~ab~~)(ii) (B)²³ -

- (a) the reference to the right to appoint or remove a majority of the board of directors shall be construed as a reference to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters;
- (b) an undertaking shall be treated as having the right to appoint to a directorship if -
 - (i) a person's appointment to it follows necessarily from his appointment as a director of the undertaking; or
 - (ii) the directorship is held by the undertaking itself; and
- (c) a right to appoint or remove a directorship which is exercisable only with the consent ~~or~~ ~~concurrence~~^{23A} of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

5. Right to exercise dominant influence

²³ A renumbering consequent upon the CSA to section 2(1) of the proposed Twenty-third Schedule.

^{23A} In response to Members' suggestion at the meeting held on 26 April 2005, we propose a technical amendment to align the drafting with the consequential amendment to the Chinese version of the Bill. Please refer to footnote 25A at page 26.

For the purposes of section 2(1) (~~be~~)²⁴ -

- (a) an undertaking shall not be regarded as having the right to exercise a dominant influence over another undertaking unless it has a right to give directions with respect to the operating and financial policies of that other undertaking which the directors are, or a majority of the directors is, obliged to comply with whether or not they are for the benefit of that other undertaking; and
- (b) a "control contract" (控制合約) means a contract in writing ~~conferring a right~~ conferring such a right²⁵ which is -
 - (i) of a kind authorized by the memorandum or articles, or equivalent constitutional documents, of the undertaking in relation to which the right is exercisable; and
 - (ii) permitted by the law under which that undertaking is established.

²⁴ A renumbering consequent upon the CSA to section 2(1) of the proposed Twenty-third Schedule.

²⁵ A technical amendment to improve the drafting.

6. **Rights exercisable only in certain circumstances**

(1) For the purposes of this Schedule but without prejudice to subsection (2), rights which are exercisable only in certain circumstances shall be taken into account only -

- (a) when the circumstances have arisen, and for so long as they continue to obtain; or
- (b) when the circumstances are within the control of the person having the rights.

(2) Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

7. **Rights held by one person on behalf of another**

For the purposes of this Schedule -

- (a) rights held by a person in a fiduciary capacity shall be treated as not held by him;
- (b) rights held by a person as nominee for another shall be treated as held by the other; and

- (c) rights shall be treated as held as nominee for another if they are exercisable only on his instructions or with his consent~~or~~ ~~concurrence~~^{25A}.

8. Rights attached to shares by way of security

Where any rights referred to in this Schedule are attached to shares held by way of security, the rights shall be treated as held by the person providing the security, if -

- (a) apart from the right to exercise them for the purpose of preserving the value of the security, or of realizing it, the rights are exercisable only in accordance with his instructions; ~~and~~or²⁶
- (b) the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realizing it,

^{25A} The Assistant Legal Adviser invited the Administration to clarify the meaning of the word “concurrence” vide her letter of dated 1 November 2004. We clarified that the word “concurrence” shall convey the meaning of “agreement” in the Administration’s reply dated 23 November 2004. Members considered the CSA to the Chinese version of the Bill at the meeting held on 26 April 2005, and suggested that the word “concurrence” in the English version of the Bill should also be deleted with a view to aligning the drafting with the Chinese version.

²⁶ The intent is that rights should be treated as held by the person providing the security if the condition specified in paragraph (a) or (b) exists. The use of the word “or” is to clarify the intent.

the rights are exercisable only in his interests.

9. Rights attributed to parent undertaking

(1) For the purposes of section 2, rights shall be treated as held by a parent undertaking if they are held by any of its subsidiary undertakings.

(2) Nothing in section 7 or 8 shall be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings.

(3) For the purposes of section 8, rights shall be treated as being exercisable in accordance with the instructions of or in the interests of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking.

(4) In this section, "group undertaking" (企業集團), in relation to an undertaking ("relevant undertaking"), means an undertaking which is -

- (a) a parent undertaking or subsidiary undertaking of the relevant undertaking; or
- (b) a subsidiary undertaking of any parent undertaking of the relevant undertaking.

10. Supplementary

References in any provision of sections 7, 8 and 9 to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those sections but not rights which by virtue of any such provision are to be treated as not held by him."

19. Transitional provisions

(1) The amendments made by this Ordinance shall not apply to a company (including a company which is an insurer within the meaning of section 2(1) of the Insurance Companies Ordinance (Cap. 41)) until the start of the company's first financial year beginning after the expiration of the 30 days immediately following the commencement of this section.

(2) For the avoidance of doubt, it is hereby declared that any provision of the principal Ordinance amended by this Ordinance shall, as it is in force from time to time apart from that amendment, apply to and in relation to a company until subsection (1) applies to the company.

Consequential Amendments

Specification of Public Offices

20. Schedule amended

The Specification of Public Offices (Cap. 1 sub. leg. C) is amended, in the Schedule where the Financial Secretary is the

specified public office, by repealing "Companies Ordinance (Chapter 32), sections 123(4), 124(2), 126(2) and (3)" and substituting "Companies Ordinance (Chapter 32), sections 124(2), ~~126(2)~~²⁷".

Insurance Companies Ordinance

21. Accounts and Statements

The Third Schedule to the Insurance Companies Ordinance (Cap. 41) is amended by adding -

"1A. (1) A reference in Part 1, 2, 3 or 4 of this Schedule to parent company or subsidiary undertaking shall be construed in accordance with section 2B of the Companies Ordinance (Cap. 32) as read with the Twenty-third Schedule to that Ordinance.

(2) A reference in a provision specified under subparagraph (3) for the purposes of this subparagraph -

(a) to a holding company shall be deemed to include a parent company; and

(b) to a subsidiary or subsidiary company shall be deemed to include a subsidiary undertaking.

(3) The provisions specified for the purposes of subparagraph (2) are -

²⁷ We agree with the Assistant Legal Adviser's observation as set out in her letter dated 1 November 2004 that the reference to section 126(2) of the Ordinance should be repealed because "Financial Secretary" is not mentioned in section 126(2). We have explained the purpose of the CSA in our reply, dated 23 November 2004, to the Assistant Legal Adviser (LC Paper No. CB(1)453/04-05(17)).

- (a) paragraph 4(1)(d) and (e)(iii) and (1AD)(f) and (g)(iii) of Part 1 of this Schedule;
- (b) paragraph 9(a), (d), (e), (f), (j) and (l) of Part 2 of this Schedule;
- (c) the heading, and paragraphs 10, 11 and 12, of Part 3 of this Schedule;
- (d) paragraph 16(b)(ii), (d)(i), (e) and (g) of Part 4 of this Schedule."

Explanatory Memorandum

The principal purpose of this Bill is to modify the meaning of the term "subsidiary" in the Companies Ordinance (Cap. 32) ("the principal Ordinance") in order to make the meaning of the term more closely in alignment with the meaning attached to the term in the International Accounting Standards. However, the new meaning will only apply for the purposes of the group accounts of a company. For other purposes, the present meaning of the term "subsidiary" in the principal Ordinance will apply.

2. Clause 2 adds a new section 2B which, as read with the new Twenty-third Schedule at clause 18, specifies the meaning to be attached to the terms "parent company", "parent undertaking" and "subsidiary undertaking" as used in the amendments made to the principal Ordinance by the Bill. It should be noted that new section 2B(3) specifies the provisions of the principal Ordinance to which the new terms are applicable.

3. Clause 3 repeals section 123(4) of the principal Ordinance

and substitutes new section 123(4) and (4A). The new section 123(4) and (4A) permits information to be given which is additional to the requirements of the principal Ordinance, or which diverges from those requirements, for the purpose of giving a true and fair view of the state of affairs or the profit or loss of a company. Clause 5 makes a similar amendment to section 126 of the principal Ordinance.

4. Clause 4 adds new section 124(2A) to specify the basis on which a subsidiary may be excluded from the group accounts of a company.

5. Clause 6 amends section 127(2) of the principal Ordinance to restrict the meaning of a subsidiary to a company because only a company is required to hold a general meeting in compliance with section 111(1) of the principal Ordinance.

6. Clauses 7, 9, 11 and 17 amend the references to a body corporate in sections 128, 129D(6) and 161(9)(a) of and the Tenth Schedule to the principal Ordinance consequent upon the amendment to the meaning of the term "subsidiary".

7. Clause 8 repeals and replaces section 129A of the principal Ordinance to amend the references to a body corporate and holding company to read respectively "undertaking" and "parent undertaking".

8. Clauses 10, 12, 14, 15 and 16 similarly amend the references to a body corporate and holding company in sections 140(2)(d) and 163B(1)(b) of and the Second, Third and Fourth Schedules to the principal Ordinance.

9. Clause 13 is a consequential amendment as a result of the addition of the new Twenty-third Schedule.

10. Clause 18 adds the new Twenty-third Schedule to specify the meaning to be attached to the terms "parent company", "parent undertaking" and "subsidiary undertaking".

11. Clause 19 contains a transitional provision.

12. Clauses 20 and 21 specify the consequential amendments to the Specification of Public Offices (Cap. 1 sub. leg. C) and the Insurance Companies Ordinance (Cap. 41) necessitated by the amendments to the principal Ordinance.