



Ms Connie Szeto
Clerk to Bills Committee on Companies Bill
Legislative Council Secretariat
Legislative Council

20 March 2012

Dear Ms Szeto,

Headcount test for members' schemes

General position

At the time of writing I have had the benefit of reading the submissions of the commentators responding to this consultation. Without repeating their arguments generally based on the "one share, one vote" policy and the reality of shareholding under the CCASS system, I agree that the headcount test may not fairly reflect the wishes of "true" minority shareholders. And the test is vulnerable to abuse by those trying to create a majority in number of shareholders to approve a scheme at the court-ordered meeting, or those trying to do the same but to disapprove a scheme.

Headcount test for non-listed companies

The case for abolishing the headcount test for members' schemes proposed by listed companies is strong as minority shareholders can enjoy the extra protection provided under Rule 2.10(b) of the Takeovers Code. However, given that the Takeovers Code has no application to non-listed companies and that vote manipulation is much more difficult to achieve in those companies, the test should be retained for schemes proposed to shareholders of non-listed companies.

Costs order in favour of shareholders acting in good faith

No matter the headcount test is to be retained or not, I am of the view that minority shareholders should be more proactive in protecting their own interests by raising well-founded objections to a scheme which they think is unfair in the court hearing. However, legal costs could be an issue for them.





As a general rule, “the courts do not, as a rule, make costs order against objecting shareholders or creditors (in, respectively, shareholders and creditors schemes) when their objections are not frivolous and have been of assistance to the court. Sometimes, no order for costs is made, sometimes an order is made in favour of the objector.” (*Re PCCW Limited*, unrep., Miscellaneous Proceedings No 2382 of 2008 (Court of First Instance, 6 April 2009))

To encourage minority shareholders, we may consider a proposal in line with section 168BI of the Companies Ordinance that the court may require a company proposing a scheme to indemnify out of its assets against the costs incurred or to be incurred by the shareholder in raising an objection to the scheme if it is satisfied that the objecting shareholder is acting in good faith, and has reasonable grounds for doing so.

Yours sincerely,

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