

立法會
Legislative Council

LC Paper No. CB(1)1568/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/11/10/2

Bills Committee on Securities and Futures (Amendment) Bill 2011

**Seventh meeting on
Tuesday, 3 January 2012, at 10:45 am
in Conference Room 2 of the Legislative Council Complex**

Members present : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Paul CHAN Mo-po, MH, JP

Members absent : Hon Albert HO Chun-yan
Hon Ronny TONG Ka-wah, SC
Hon Starry LEE Wai-king, JP

**Public officers
Attending** : Miss Salina YAN
Deputy Secretary for Financial Services and
the Treasury (Financial Services) 1

Miss Belinda KWAN
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)1

Mr Anthony LI
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 2

Mr Jerry CHEUNG
Assistant Secretary for Financial Services and the
Treasury (Financial Services)(2) 1

Ms Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Ms Karmen KWOK
Senior Government Counsel
Department of Justice

Ms Beverly YAN
Senior Assistant Law Officer (Civil Law)
Department of Justice

Mr David LEUNG
Senior Assistant Director of Public Prosecutions
Department of Justice

Attendance by invitation : Mr Ashley ALDER
Chief Executive Officer
Securities and Futures Commission

Mr Mark STEWARD
Executive Director, Enforcement Division
Securities and Futures Commission

Mr Brian HO
Executive Director, Corporate Finance Division
Securities and Futures Commission

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Miss Winnie LO
Assistant Legal Adviser 7

Mr Noel SUNG
Senior Council Secretary (1)5

I Information paper issued since the last meeting on 6 December 2011

(LC Paper No. CB(1)700/11-12(01) — Submission dated 21 December 2011 from the Hong Kong Institute of Certified Public Accountants (English version only))

Members noted the submission from the Hong Kong Institute of Certified Public Accountants (HKICPA).

II Meeting with the Administration

Follow-up to issues arising from previous meetings

(LC Paper No. CB(1)687/11-12(01) — List of follow-up actions arising from the discussion at the meeting on 6 December 2011

LC Paper No. CB(1)687/11-12(02) — Administration's response to issues raised at the meetings on 6 December 2011 and 24 November 2011

LC Paper No. CB(1)527/11-12(02) — Administration's response to issues raised at the meeting on 24 November 2011

LC Paper No. CB(1)433/11-12(02) — Administration's paper on "Proposed scope of persons covered and liability of 'officers' under the PSI regulatory regime"

LC Paper No. CB(1)261/11-12(02) — Administration's paper on "Definition of Price Sensitive Information"

LC Paper No. CB(1)135/11-12(01) — Administration's paper on "Draft Guidelines on Disclosure of Inside Information")

Clauses-by-clause examination of the Bill (starting with clause 15)

(LC Paper No. CB(3)952/10-11 — The Bill

LC Paper No. CB(1)17/11-12(01) — Marked-up copy of the Bill prepared by the Legal Service Division)

Discussion

2. The Committee deliberated (Index of proceedings attached at **Appendix**).

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Follow-up actions to be taken by the Administration

3. The Administration was requested to provide the following information:

- (a) a written response to the submission from the HKICPA dated 21 December 2011;
- (b) the justifications for the proposals to empower the Securities and Futures Commission (SFC) to institute proceedings before the Market Misconduct Tribunal (MMT) direct and to provide for the SFC to be responsible for appointing the Presenting Officer in MMT proceedings; and the relevant arrangements of other comparable jurisdictions; and
- (c) the arrangements for high-level oversight of the SFC and the relevant arrangements in other developed economies.

Committee Stage amendment

4. Members noted that in order to maintain consistency with the English version, the Administration would propose a Committee Stage amendment to the Chinese version of proposed section 251(8).

III Any other business

Date of next meeting

5. The Chairman informed members that the next meeting would be held on 19 January 2012, at 4:30 pm.

6. There being no other business, the meeting ended at 12:30 pm.

Council Business Division 1
Legislative Council Secretariat
12 April 2012

**Proceedings of the
Bills Committee on Securities and Futures (Amendment) Bill 2011
Seventh meeting on Tuesday, 3 January 2012, at 10:45 am
in Conference Room 2 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000419 – 000634	Chairman	Introductory remarks	
000635 – 001209	Administration	Briefing by the Administration on the paper LC Paper No. CB(1)687/11-12(02)	
001210 – 001945	Chairman Administration Securities and Futures Commission (SFC)	<p>The Administration remarked that the Bills committee had previously discussed the issues raised in the Hong Kong Institute of Certified Public Accountants (HKICPA)'s submission (LC Paper No. CB(1)700/11-12(01)) and it would give a written response to the issues raised by the HKICPA.</p> <p>Regarding the concern raised in the submission in relation to reports in the media and by financial analysts revealing certain price sensitive information (PSI), SFC remarked that the contents of the draft "Guidelines on Disclosure of Inside Information" would be re-arranged to clarify the situations. In the case of media reports and/or financial analysts' reports revealing partially a piece of PSI, a listed corporation should make a clarification and full disclosure of the PSI, as required under the Bill. If a report or rumour was false or not related to PSI, the listed corporation was not required to make a clarification. If the reports of some financial analysts touched upon some PSI which was not in the public domain, the listed corporation(s) concerned should make a disclosure. If the information in some financial analysts' reports was untrue, the listed corporation concerned was not obliged to clarify. While the four scenarios mentioned above had already been covered in the draft Guidelines, SFC would put the relevant paragraphs under a specific topic in order to facilitate understanding of market participants. SFC pointed out that the re-arrangement of the contents of the draft Guidelines would help listed corporations to deal with market rumours and financial analysts' reports which might or might not be related to PSI.</p>	

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001946 – 002909	Ms Audrey EU Administration Department of Justice (DoJ)	<p>Ms Audrey EU was concerned that under the common law, a person might not normally be held liable to make pecuniary compensation due to negligence. Taking into consideration the possible large amount of money involved in securities transactions, Ms EU enquired, apart from the test of being "fair, just and reasonable", whether there were other principles, e.g. the principles adopted in overseas jurisdictions, and previous court cases which might be used for determining whether a person should be held liable to compensate another person/other people for pecuniary losses suffered due to the former's negligence.</p> <p>DoJ concurred with Ms EU that under the common law it was difficult to hold a person liable to make pecuniary compensation for pure economic losses incurred due to the person's negligence, and so far there was no case in Hong Kong or the UK where an investor had taken legal action to seek pecuniary compensation from a listed corporation for pure economic losses suffered as a result of the failure of the listed corporation to disclose PSI in a timely manner. DoJ pointed out that the "fair, just and reasonable" principle was based on case law and was adopted by the courts in Hong Kong and the House of Lords in the United Kingdom (UK) for dealing with cases relating to negligence which resulted in pure economic losses. Lawyers and auditors had been liable in the past for their negligence which resulted in pure economic losses suffered by persons who were not their clients.</p> <p>The Administration supplemented that proposed section 307Z mirrored the existing section 281 of the Securities and Futures Ordinance (SFO) (Cap. 571), which enabled a person to seek compensation, based on the "fair, just and reasonable" principle, from a person who was found by the Market Misconduct Tribunal (MMT) for having committed a market misconduct offence, without having to prove to the court once again that the defendant had committed the offence.</p>	

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002910 – 003412	Mr Andrew LEUNG Mr Jeffrey LAM Mr Paul CHAN	Mr Andrew LEUNG requested that the Administration should provide the Bills Committee with a copy of its response to HKICPA's submission so that the Bills Committee could further discuss the areas of concern such as the definition of "officers" and "price sensitive information (PSI)", and the safe harbours. Mr Jeffrey LAM and Mr Paul CHAN echoed Mr LEUNG's request.	The Administration to take action as per paragraph 3(a) of the minutes
003413 – 003918	Administration	<p><u>Clause-by-clause examination of the Bill</u></p> <p>Division 2 – Amendment to Securities and Futures (Fees) Rules</p> <p><u>Clause 15 – Securities and Futures (Fees) Rules amended</u></p> <p><u>Clause 16 – Schedule 1 amended (Fees prescribed for purposes of section 395(1)(a)(i), (iii) and (iv) of Ordinance)</u></p> <p>Part 3</p> <p>Direct Access to Market Misconduct Tribunal</p> <p><u>Clause 17 – Securities and Futures Ordinance amended</u></p> <p><u>Clause 18 – Section 214 amended (Remedies in cases of unfair prejudice, etc. to interests of members of listed corporations, etc.)</u></p> <p>Members raised no question on clauses 15 to 18.</p>	
003919 – 004842	Mr Andrew LEUNG Mr Paul CHAN	<p><u>Clause 19 – Section 251 amended (Market Misconduct Tribunal)</u></p> <p><u>Clause 20 – Section 252 amended (Market misconduct proceedings)</u></p> <p>Mr Andrew LEUNG opined that, in order to ensure the impartiality and independence of the appointment system, the existing mechanism where the DoJ was responsible for briefing out and appointment of Presenting Officers for MMT proceedings should continue. Mr LEUNG requested that the Administration should provide justifications for the proposals to empower the SFC to institute proceedings</p>	The Administration to take action as per paragraph 3(b) of the minutes

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		<p>before the MMT direct and to provide for SFC to be responsible for appointing the Presenting Officers in MMT proceedings; and the relevant arrangements of other comparable jurisdictions.</p> <p>Mr Paul CHAN shared Mr LEUNG's concern and remarked that the information to be provided by the Administration should include the mechanism for prevention of conflict of interest/role in the appointment of Presenting Officers for MMT proceedings.</p>	
004843 – 005100	ALA7 DoJ	<p>ALA7 pointed out that there was inconsistency between the Chinese and English versions of the proposed section 251(8) in that the Financial Secretary (FS) was mentioned in the Chinese version while FS was not mentioned in the phrase "There may be paid to a member of the Tribunal" in the English version.</p> <p>DoJ responded that for the sake of consistency, a Committee Stage amendment would be made to amend the Chinese version to align with the English version.</p>	The Administration to take action as per paragraph 4 of the minutes
005101 – 005801	Ms Audrey EU SFC	<p>Noting from SFC that SFC might appoint its staff as the Presenting Officers for MMT proceedings, Ms Audrey EU enquired about the estimated number of lawyers to be engaged by SFC if SFC was empowered to appoint the Presenting Officers for MMT proceedings. She also enquired about the relevant arrangements in overseas jurisdictions.</p> <p>SFC responded that there was currently no plan to form a dedicated team of lawyers in SFC specifically for MMT proceedings, as the majority of the MMT cases would continue to be briefed out. SFC pointed out that the proposal to enable SFC to institute civil proceedings with the MMT direct for market misconduct cases was in line with the practice in other jurisdictions such as the United Kingdom (UK), Australia and the United States (US) in that their relevant regulators were allowed direct access to the proceedings equivalent to MMT proceedings.</p>	

Time Marker	Speaker	Subject(s)	Action Required
005802 – 010238	Mr Abraham SHEK Administration	<p>Mr Abraham SHEK enquired about the justifications for the proposal to change the existing arrangement and empower the SFC to institute proceedings before the MMT direct, given that the market situations in Hong Kong and other places were different. Mr SHEK pointed out that the securities regulatory bodies in countries such as the US , UK and Australia were subject to the oversight of an elected government. In the absence of an elected government in Hong Kong, it was doubtful whether it was appropriate to empower the SFC to institute MMT proceedings direct, without seeking FS's prior consent.</p> <p>The Administration responded that when the SFO was amended about 10 years ago, there was a discussion regarding whether SFC should be empowered to institute proceedings with the MMT direct. At the time it was considered that a review of the operation of the MMT and the related procedures should be conducted after the system had been implemented for some time. As the MMT had operated for about six to seven years, and given the experience of past cases, the Government, SFC, and DoJ had reviewed the situation and considered it appropriate to empower SFC to institute MMT proceedings direct.</p>	
010239 – 011734	Mr Andrew LEUNG Mr CHIM Pui-chung Mr Paul CHAN Administration SFC	<p>Given that the existing system for appointment of Presenting Officers at MMT proceedings had operated well in the past years, Mr Andrew LEUNG opined that the existing arrangement where DoJ was responsible for the appointment of Presenting Officers should not be changed, so that the Government could continue to monitor the appointment of Presenting Officers at MMT proceedings.</p> <p>Given that SFC was a statutory body independent from the Government and its budget was not subject to approval by the Legislative Council, Mr CHIM Pui-chung expressed grave concern on the proposal to empower SFC to institute proceedings before the MMT direct, without the prior consent of FS, and to provide for SFC, instead of the DoJ, to be responsible for appointing the Presenting Officers in MMT proceedings. He was of the</p>	

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		<p>view that the transfer of the authority relating to MMT proceedings to the SFC would lead to excessive expansion of the SFC and over zealous enforcement actions against listed and licensed corporations and their officers. Mr CHIM seriously doubted the suitability of transferring the authorities relating to MMT proceedings from the Government to SFC, which, in his opinion, would undermine the existing regulatory regime for the securities market. Mr CHIM pointed out that in the developed countries such as the UK and US, the securities market was overseen by an elected government which might fall as a result of the mismanagement of the securities market, and Hong Kong's situation was different. Mr CHIM requested that the Government should provide full justifications if it proposed to change the existing regulatory arrangements for the securities market.</p> <p>Mr Paul CHAN remarked that the Administration should provide information regarding the arrangements for high-level oversight of SFC and the relevant arrangements in other developed economies such as the US, UK and Australia.</p> <p>The Administration responded that the Chief Executive had the authority in appointing the Chairman and the other two members of the MMT, who were prominent members from the business and professional sector conversant with the operation of the stock market. While civil proceedings might be instituted against persons breaching the PSI disclosure requirements, the SFC might institute criminal proceedings against any person in relation to the six types of market misconduct stipulated in SFO. The Government and SFC would continue to regulate the stock market based on the legal provisions in the relevant ordinances.</p> <p>SFC supplemented that in the past there were occasions where a relatively long time had been taken in processing market misconduct cases to be heard by the MMT. The current proposal would enhance the efficiency of the procedures which in turn would help ensure fairness to all parties concerned including investors and the</p>	

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		<p>accused. As an international financial centre, Hong Kong's procedures for hearing of market misconduct cases should be on par with the practices in other major markets, such as the UK and US. SFC would examine the evidence of each and every market misconduct case very carefully, and the Board of Directors of SFC, a majority of which comprised independent professionals and persons acting as non-executive directors, would decide whether a case should be brought to the MMT. The number of cases heard by the MMT would not dramatically increase as a result of the proposed change of procedure, as SFC would put its credibility and reputation at risk if it lost in the majority of the cases brought to the MMT. While it was difficult to estimate any change of the manpower requirement in the Legal Services Division of SFC as a result of the legislative proposal, the increase in legal staff was envisaged to be minimal.</p>	
011735 – 012027	Mr Andrew LEUNG DoJ	<p>Mr Andrew LEUNG remarked that despite SFC's pledge to ensure fairness in the procedures of dealing with MMT cases, suitable checks and balances should be built into the system to ensure that the interests of all parties concerned would be protected. In view of the small number of cases heard by the MMT, Mr LEUNG opined that the existing arrangement of appointing Presenting Officers through DoJ should not adversely affect the efficiency for processing MMT cases.</p> <p>DoJ said that the authority to appoint Presenting Officers should also be vested in SFC as part and parcel of the direct access proposal.</p>	
012028 – 012622	Mr Paul CHAN SFC	<p>Mr Paul CHAN sought information about the high level oversight of SFC and the arrangements for dealing with market misconduct cases in overseas countries. SFC responded that a 3-tier regulatory regime was adopted in Hong Kong for regulation of the securities market, where the Government oversaw the policy matters relating to the security market, SFC was responsible for the overall regulation of the market, and the Hong Kong Exchanges and Clearing Limited was the frontline operator and regulator of the stock</p>	

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		<p>market. In all major overseas stock markets, the securities regulators (i.e. the equivalent of SFC) were directly responsible for enforcement against market misconduct cases. The current proposal aimed to empower SFC to institute MMT proceedings direct, similar to the arrangement in overseas countries.</p> <p>Mr Paul CHAN remarked that he supported SFC's proposal in principle. At the request of Mr Paul CHAN, the Administration agreed to provide information on the arrangements for high level oversight of SFC and the relevant arrangements in other developed economies.</p>	<p>The Administration to take action as per paragraph 3(c) of the minutes.</p>
<p>012623 – 012713</p>	<p>Mr CHIM Pui-chung Mr Andrew LEUNG Chairman Administration</p>	<p>Discussion on whether the Bills Committee should proceed further in scrutinizing the Bill before the Government's response to members' comments and requests for information was available.</p> <p>Members agreed to continue the scrutiny of the Bill, and would revisit the relevant clauses in light of the response from the Administration if necessary.</p>	
<p>012714 – 014413</p>	<p>Mr Jeffrey LAM Mr CHIM Pui-chung DoJ Chairman</p>	<p><u>Clause 20 – Section 252 amended (Market misconduct proceedings)</u></p> <p><u>Clause 21 – Section 252A added</u></p> <p><i>252A. Consent of Secretary for Justice for market misconduct proceedings</i></p> <p>Mr Jeffrey LAM enquired about the role of DoJ in market misconduct cases. DoJ responded that under the current proposal, DoJ would, in exercising its authority under Article 63 of the Basic Law, assess the market misconduct cases and consider whether criminal proceedings should be instituted against the parties concerned. Based on proposed section 252A, SFC should not institute civil proceedings at the MMT unless it had obtained the consent of the Secretary of Justice to do so.</p> <p>Mr CHIM Pui-chung was concerned that under the proposed arrangement, DoJ had to give consent to SFC for institution of MMT proceedings, unless criminal proceedings were</p>	

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		<p>contemplated in respect of the same market misconduct. Mr CHIM Pui-chung opined that DoJ should not be obliged to give an explanation if it declined to give consent to SFC to institute MMT proceedings. Otherwise, DoJ's powers in prosecution matters would be derogated.</p> <p>DoJ explained that based on Article 63 of the Basic Law, the Secretary for Justice was the authority for instituting criminal prosecutions. All cases relating to the six types of market misconduct stipulated in SFO might be subject to criminal or civil proceedings. Based on sections 283 and 307 of SFO, either criminal or civil proceedings might be instituted against parties involved in the six types of market misconduct, but not both. Hence, the Prosecutions Division of DoJ had to assess the market misconduct cases to consider whether criminal proceedings should be instituted against any parties concerned, including cases relating not only to SFO but also other ordinances such as the Prevention of Bribery Ordinance (Cap. 201), before it gave consent to SFC for institution of MMT proceedings.</p> <p>The Chairman remarked that to enable SFC to decide whether and how it should proceed with the case concerned, DoJ should advise SFC of the reasons if it declined to give consent to SFC to institute MMT proceedings.</p>	
014414 – 014455	Chairman	Date of next meeting	