

Bills Committee on Financial Institutions (Resolution) Bill

**Clause-by-clause Examination
Draft Committee Stage Amendments – First Batch**

Following members' deliberation of the Financial Institutions (Resolution) Bill (the Bill) at the Bills Committee meetings, the Government will propose some Committee Stage Amendments (CSAs) to amend the Bill. This paper sets out the first batch of the proposed draft CSAs at **Annex**.

2. Members are invited to examine the Bill with the draft CSAs marked on the relevant clauses in the **Annex**. The rationale behind each of these draft CSAs is provided in the footnotes. These draft CSAs are subject to revisions if necessary.

**Financial Services and the Treasury Bureau (Financial Services
Branch)
Hong Kong Monetary Authority
Securities and Futures Commission
Office of the Commissioner of Insurance
May 2016**

Financial Institutions (Resolution) Bill

Draft Committee Stage Amendments – First Batch

Amendment Proposed

(1) Clause 2(1)

bail-in instrument (內部財務調整重整文書) means an instrument made under section 58;¹

(2) Clause 2(1)

chief executive officer (行政總裁), in relation to an entity, means (except in Part 9) a person (by whatever name called) who is responsible (alone or jointly with others) under the immediate authority of the directors for the ~~management of the whole of the business of the entity and implementation of the general strategy of the entity and for the general management of the business of the entity and~~ includes, if the entity is established or incorporated in a non-Hong Kong jurisdiction, the person who is responsible (alone or jointly with others) for the ~~management of the whole of the business of the entity in~~ general management of the business of the entity in Hong Kong;

deputy chief executive officer (副行政總裁), in relation to an entity, means a person (by whatever name called) who is responsible (alone or jointly with others) under the immediate authority of the chief executive officer of the entity for the ~~management of the whole of the business of the entity and implementation of the general strategy of the entity and for the general management of the business of the entity and~~ includes, if the entity is established or incorporated in a non-Hong Kong jurisdiction, the person who is responsible (alone or jointly with others) under the immediate authority of the chief executive officer of the entity for the ~~management of the whole of the business of the entity in~~ general management of the business of the entity in Hong Kong;²

¹ This draft CSA seeks to improve the Chinese expression for “bail-in”. The background of this CSA has been explained at paragraph 15 of the Government’s response to issues raised at the meeting on 31 March 2016 (Paper No. CB(1)799/15-16(02)). Similar CSAs will be introduced to the definitions of “Part 5 instrument” and “winding up hierarchy principles” at clause 2(1), clauses 5(1)(b), 19(3)(h), 32, 33(2)(d), 35(1)(c)(ii), the title of Part 5, Division 1, Subdivision 5, clauses 57- 64, 65(1), 74, 75(2)(e), 91(1)(b), 103(4)(a), 151(1), 191(1)(a), Schedule 5, section 1; title of Schedule 6; Schedule 6, sections 2-5, Schedule 6, section 6(1); Schedule 6, section 7; Schedule 6, section 8; title of Schedule 6, Part 2; Schedule 6, section 9. No CSA to the English text is necessary for these provisions.

² This draft CSA seeks to cover the scenario when part of the business of an entity is not under the management of a chief executive officer (CEO) or deputy CEO (DCEO) but is directly managed by the board of directors (or by another person appointed by the board) and thus the relevant CEO or DCEO does not actually manage the whole of the business

(3) Clause 2(1)

TPO company (暫時公有公司)—see means a temporary public ownership company referred to in section 69;³

(4) Clause 5(1)(b) – Chinese text

(1) 就本條例而言，任何受涵蓋金融機構如處於以下狀況，即屬不再可持續經營 —

(a) 該機構須獲得根據某條例給予的授權，方能夠經營其業務的全部或任何部分 —

(i) 但該機構已違反某條件，或已不符合某準則，或沒有履行某責任，而它要繼續獲得該授權，是必須遵守該條件、符合該準則或履行該責任的；及

(ii) 因此，有充分理由撤銷該授權；或

(b) (在任何其他個案中)該機構不能解除履行某些義務，而它要有效地經營其業務，是必須解除履行該等義務的。⁴

(5) Clause 19

(4) An entity that, without reasonable excuse, fails to comply with a requirement applicable to it under the loss-absorbing capacity requirement rules ~~in relation to~~ to notify, or to provide particulars to, the resolution authority about a notifiable matter, commits an offence and is liable—

(a) on conviction on indictment to a fine of \$2,000,000 and, in the case of a continuing offence, to a further fine at level 6 for every day during which the offence continues; or

(b) on summary conviction to a fine at level 6 and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.

(4A)An entity that, without reasonable excuse, fails to comply with a requirement applicable to it under the loss-absorbing capacity

of the entity. The background of this CSA has been explained at paragraphs 48-49 of the Government's response to the letter from the Legal Service Division dated 4 January 2016 (Paper No. CB(1)545/15-16(01)).

³ This draft CSA seeks to spell out the full name of the acronym for greater clarity. The background of this CSA has been explained at paragraph 10 of the Government's response to issues raised at the meeting on 15 March 2016 (Paper No. CB(1)724/15-16(02)). A similar CSA will be introduced to the English text of clause 69.

⁴ This draft CSA seeks to better reflect the meaning of "discharge the obligations" in the context of clause 5(1)(b). The background of this CSA has been explained at paragraph 16 of the Government's response to issues raised at the meeting on 15 February 2016 (Paper No. CB(1)609/15-16(02)). Similar CSAs will be introduced to the Chinese text of the definition of "title transfer arrangement" at clause 74 and of the definition of "collateral arrangements" at Schedule 5, section 1.

requirement rules to take remedial action in the event of the entity contravening the rules, commits an offence and is liable—

- (a) on conviction on indictment to a fine of \$2,000,000 and, in the case of a continuing offence, to a further fine at level 6 for every day during which the offence continues; or
 - (b) on summary conviction to a fine at level 6 and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.”.
- (5) If an entity commits an offence under subsection (4) or (4A), an officer of the entity also commits an offence under that subsection if the officer—
- (a) authorized or permitted the commission of the offence by the entity; or
 - (b) was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the entity.
- (6) An officer who commits an offence under subsection (4) or (4A) is liable—
- (a) on conviction on indictment to a fine of \$2,000,000 and to imprisonment for 5 years and, in the case of a continuing offence, to a further fine at level 6 for every day during which the offence continues; or
 - (b) on summary conviction to a fine at level 6 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine at level 3 for every day during which the offence continues.
- (7) An officer of an entity may commit an offence under subsection (4) or (4A) whether or not the entity has been prosecuted for, or found guilty of, an offence under that subsection.⁵

(6) Clause 24(8)

The giving of a notice under subsection (1) or (2) does not ~~of itself terminate, or~~ affect the rights of any party to, a contract of employment or services under which a director, chief executive officer or deputy chief executive officer is employed by, or acts for or on behalf of or under an arrangement with, a financial institution or a holding company of a

⁵ This draft CSA seeks to state explicitly that our policy intention regarding the loss-absorbing capacity requirement rules is to provide for an offence for (i) an entity’s failure to comply with a requirement applicable to it under the rules to notify, or to provide particulars to, a resolution authority about a “notifiable matter” under the rules (which will include a failure to comply with loss absorbency requirements – as the rules will specify this as a “notifiable matter”); and (ii) an entity’s failure to take remedial action for a contravention of the rules.

financial institution.⁶

(7) Clause 28(2) – Chinese text

- (2) 在不局限第(1)款的原則下，有關處置機制當局可對有關控權公司施行穩定措施的方式及程度、程度及範圍，或就該公司行使本條例下其他權力的方式及程度、程度及範圍，是假若該公司屬正被該當局處置的受涵蓋金融機構，則該當局便能對它施行該措施或就它行使該權力的同一方式及程度、程度及範圍。⁷

(8) Clause 29(5)(c)

- (5)(c) an orderly resolution of the financial institution, or of a holding company of that institution, that meets the resolution objectives cannot be achieved by any means (including the giving of a direction under section ~~79(3)~~81(3)) other than by resolving the affiliated operational entity.⁸

(9) Clause 33(3)

- (3) Consideration that is fair and reasonable in the circumstances, **the determination of which is informed by a valuation made under section 35(1)**, is due to the transferor in respect of any transfer under a Part 5 instrument.⁹

(10) Clause 37(2)(b)

does not have an actual or material interest in common or in conflict with **any either** of the following that could influence, or be reasonably perceived to influence, the entity's judgement in assisting in the making of a valuation under section 35(1) in relation to the entity concerned—

- (i) the entity concerned;
- (ii) an entity that is a member of the same group of companies as the entity concerned.

⁶ This draft CSA seeks to clarify that any revocation of a person's appointment to a post as a director, chief executive officer or deputy chief executive officer of a financial institution (FI) by a resolution authority would not of itself affect the person's rights under their employment contract, the Employment Ordinance (Cap. 57), and other applicable legislation. The background of this CSA has been explained at paragraph 5 of the Government's second response to issues raised at the meeting on 31 March 2016 (Paper No. CB(1)860/15-16(01)). Similar CSAs will be introduced to section 7(2) of Schedule 3; section 9(2) of Schedule 4 and section 6(2) of Schedule 6.

⁷ This draft CSA seeks to reflect that the word "extent" in the particular context of clause 28(2) should be construed to cover both scope and regime. The background of this CSA has been explained at paragraph 8 of the Government's response to the issues raised at the meeting 29 February 2016 (Paper No. CB(1)679(15-16)(02)). A similar CSA will be introduced to clause 29(2).

⁸ This draft CSA seeks to rectify the cross-referencing in the clause.

⁹ This draft CSA seeks to make explicit reference in clause 33(3) that the "fair and reasonable" consideration is closely connected to the valuation pursuant to clause 35(1). The background of this CSA has been explained at paragraphs 2-3 of the Government's response to issues raised at the meeting on 15 March 2016 (Paper No. CB(1)724/15-16(02)).

~~(iii) a person who is a creditor or shareholder of the entity concerned.¹⁰~~

(11) Clause 58

~~(6) When exercising a power to make a bail-in provision, a resolution authority must—~~

~~(a) with a view to assessing the extent to which, through the use of a bail-in instrument, any of the things mentioned in subparagraph (i) or (ii) should be done for the purpose mentioned in subsection (7), have regard to the valuation made under section 35(1)—~~

~~(i) liabilities eligible to be the subject of a bail-in provision are cancelled, modified or changed in form;~~

~~(ii) securities are transferred, cancelled, modified or converted from one form or class into another; and~~

~~(b) have regard to the winding-up hierarchy principles.~~

(6) When exercising a power to make a bail-in provision, a resolution authority—

(a) must have regard to the winding up hierarchy principles; and

(b) must have regard to the valuation made under section 35(1) for assessing the extent to which any of the following things should be done for the purpose mentioned in subsection (7)—

(i) liabilities eligible to be the subject of a bail-in provision are cancelled, modified or changed in form;

(ii) securities are transferred, cancelled, modified or converted from one form or class into another.¹¹

¹⁰ This draft CSA seeks to reduce the potential of a situation arising in which it is simply not possible to appoint a section 10 entity, in light of the significant practical difficulties of identifying fully, and on an *ex ante* basis, each and every current and former shareholder and creditor of an FI. A similar CSA will be introduced to section 4 of Schedule 2 to address the same point in the context of the appointment criteria for an independent valuer.

¹¹ This draft CSA seeks to improve the drafting. The background of this CSA has been explained at paragraph 13 of the Government's response to issues raised at the meeting on 15 March 2016 (Paper No. CB(1)724/15-16(02)).

(12) Clause 63(3)

If ~~a person~~ a director of the financial institution has submitted a business reorganization plan to a resolution authority under subsection (1) (or has re-submitted a plan under paragraph (b)), the resolution authority may—

- (a) approve the plan; or
- (b) require the ~~person~~ director to amend it in a specified manner and re-submit the amended plan within a specified period.¹²

(13) Clause 74

In this Subdivision—

arrangement (安排) includes an arrangement that—

- (a) is formed wholly or partly by one or more contracts or trusts;
- (b) arises under, or is wholly or partly governed by, a non-Hong Kong law;
- (c) arises, wholly or partly, automatically as a matter of law;
- (d) involves any number of parties; ~~and or~~
- (e) operates partly by reference to another arrangement between parties;¹³

(14) Clause 91

- (1) A counterparty to a qualifying contract may exercise a termination right under the contract during the period of a suspension under section 90(2) if the counterparty is notified in writing by the resolution authority that—
 - (a) the ~~assets—rights~~ and liabilities of the qualifying entity covered by the contract will not be transferred through the application of a stabilization option; and
 - (b) a bail-in stabilization option will not be applied to the qualifying entity.
- (2) A counterparty to a qualifying contract may exercise a termination right under the contract at any time on or after the expiry of the period of a suspension under section 90(2) if the termination right has been triggered otherwise than by a crisis prevention measure taken in relation to the qualifying entity, or the occurrence of an event directly linked to the taking of such a

¹² This draft CSA seeks to clarify that, as per the requirement in clause 63(1), a business reorganization plan is to be submitted by a director of the FI. The background of this CSA has been explained at paragraph 4 of the Government's response to issues raised at the meeting on 15 March 2016 (Paper No. CB(1)724/15-16(02)).

¹³ This draft CSA seeks to make clear that the sub-definitions are not intended to be cumulative.

measure.

- (3) However, if the rights and liabilities of the qualifying entity covered by the qualifying contract have been transferred to another entity, subsection (2) only applies if that other entity has caused the event triggering the termination right to occur.¹⁴

(15) Clause 102

Eligibility for compensation

Any pre-resolution creditor or pre-resolution shareholder of the affected entity who has received, is receiving or is likely to receive, as a result of the resolution of that entity, less favourable treatment than would have been the case had ~~the entity been wound up~~ winding up of the entity commenced immediately before its resolution was initiated is eligible for a payment of compensation.¹⁵

(16) Clause 104

- (1) This section applies if the assessment of the independent valuer is that the resolution treatment is less favourable to a pre-resolution creditor or pre-resolution shareholder than the winding up treatment.
- (2) The independent valuer must make a decision that the pre-resolution creditor or pre-resolution shareholder is entitled to a payment of compensation of an amount equal to the amount of the difference as assessed by the independent valuer under section 103(1)(c).
- (3) The independent valuer may, at any time before a decision under this section takes effect, correct a clerical mistake in the decision or ~~an error in it~~ the assessment on which the decision is made, or an error in that decision or assessment arising from any accidental slip or omission.
- (4) However, subsection (3) does not empower the independent valuer to correct a clerical mistake or error if the amount of compensation mentioned in subsection (2) would be changed because of the correction.¹⁶

¹⁴ This draft CSA seeks to make it clear that following any transfer of contracts subject to a temporary stay, the early termination rights of the counterparty may only be exercised if the event giving rise to the termination right has been triggered by the acquirer.

¹⁵ This draft CSA seeks to, consistent with the wording in clause 103, clarify the position that pre-resolution shareholders and creditors' treatment is to be assessed against the hypothetical scenario that the winding-up of the entity in question would have commenced, and not that it would have completed, immediately before the initiation of resolution.

¹⁶ This draft CSA seeks to clarify the policy intent that the correction of a clerical mistake, or error arising from an accidental slip or omission, should not be capable of affecting the valuation decision or the level of compensation payable as a result of the decision. The background of this CSA has been explained at paragraphs 2-3 of the Government's third response to the letter from the Legal Service Division dated 4 January 2016 (Paper No. CB(1)724/15-16(03)).

(17) Clause 114(4)

Despite any other provision of this Ordinance, the requirement or order as well as the evidence, the question and answer or the information (as the case requires) is not admissible in evidence against the person in criminal proceedings in a court of law other than those in which the person is charged in respect of the evidence, answer or information **with an offence under section 112(3)(a) or under Part V of the Crimes Ordinance (Cap. 200)—**

~~—(a) with an offence under section 112(3)(a) or under Part V of the Crimes Ordinance (Cap. 200); or~~

~~—(b) for perjury.¹⁷~~

(18) Clause 121

The Chief Justice may make rules—

- (a) with respect to the joinder as parties to a proceeding before the Tribunal of entities that—
 - (i) have a common interest in the matter;
 - (ii) have claims arising out of the same, similar or related circumstances; or
 - (iii) for some other reason it is desirable to join as parties;
- (b) providing for the award of costs under section 116 and the taxation of those costs;
- (ba) regulating—**
 - (i) the procedure for applications for leave to appeal under section 122, and for the hearing of the applications; and**
 - (ii) the procedure for the hearing of appeals under section 122;**
- (c) requiring the payment of the fees specified in the rules for any matter relating to applications to the Tribunal;
- (d) providing for matters of procedure or other matters relating to applications to the Tribunal, that are not provided for in this Part or Schedule 8;
- (e) providing for the issue or service of any document (however described) for the purposes of this Part or Schedule 8; or
- (f) prescribing any matter that this Part provides is, or may be, prescribed by rules made by the Chief Justice.¹⁸

¹⁷ This draft CSA seeks to clarify that the prosecution for perjury will be based on the Crimes Ordinance (Cap. 200). Similar CSAs will be introduced to clauses 130(4) and 163(2).

(19) Clause 190(1)

A petition for the winding up by the Court of a within scope financial institution or a holding company of a within scope financial institution may not be presented to the Court unless—

~~(a) the petitioner has given notice in writing of the intention to present the petition to the relevant resolution authority or, if the financial institution or holding company is within a cross-sectoral group, the lead resolution authority of the group; and~~

(a) the petitioner—

(i) has given notice in writing of the intention to present the petition to the relevant resolution authority or, if the financial institution or holding company is within a cross-sectoral group, the lead resolution authority of the group; and

(ii) has caused a copy of the draft petition to be attached to the notice;

(b) either—

(i) the period of 7 days, beginning on the day on which the notice is received, has ended without the relevant resolution authority or lead resolution authority initiating the resolution of the financial institution or holding company; or

(ii) the relevant resolution authority or lead resolution authority has informed the petitioner within that period of 7 days that it does not intend to initiate the resolution of the financial institution or holding company; and

(c) the following period has not ended—

(i) in the case of paragraph (b)(i), the period of 14 days beginning on the day next following the expiry of the period mentioned in that paragraph; or

(ii) in the case of paragraph (b)(ii), the period of 14 days beginning on the day on which the petitioner is informed

¹⁸ This draft CSA seeks to achieve consistency with clause 138(e) and provides that the rules may include provision for regulating the hearing of appeals. The same change is proposed to be made to clause 138.

under that paragraph.¹⁹

(20) Schedule 3, section 4(3)

- (3) A transfer takes effect despite any restriction ~~(including a restriction requiring the sanction of the Court, or the approval of a regulatory body, for a transfer)~~ arising under contract or legislation or in any other way.²⁰

¹⁹ This draft CSA seeks to ensure that a “potential petitioner” is in fact ready to proceed with their petition by requiring them to attach a draft petition to a notice given to the resolution authority under clause 190(1)(a)(i). Thereafter, the petitioner must file a petition with the Court within 14 days after either: (a) the resolution authority has notified the petitioner of its intention not to initiate resolution (under clause 190(1)(b)(ii)); or (b) the elapse of 7 days without initiation of resolution (under clause 190(1)(b)(i)). The 14-day requirement is to ensure that the presentation of a winding up petition against the FI will be made within a reasonable period.

²⁰ This draft CSA seeks to clarify that we do not intend to exclude the ability of any persons affected by acts of a resolution authority to seek judicial review of those acts. The background of this CSA has been explained in paragraphs 4-8 of the Government’s response to the matters raised by Members at the meeting on 31 March 2016 (Paper No. CB(1)799/15-16(02)). A similar CSA will be introduced to section 4(3) of Schedule 4 and section 3(2) of Schedule 6.