

立法會
Legislative Council

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by the Administration and
cleared by the Chairman)

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**Bills Committee on
Exchanges and Clearing Houses (Merger) Bill**

**Minutes of meeting
held on Wednesday, 1 December 1999, at 8:30 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Ronald ARCULLI, JP (Chairman)
Hon Jasper TSANG Yok-sing, JP
Dr Hon Philip WONG Yu-hong
Hon FUNG Chi-kin
- Members absent** : Hon LEE Kai-ming, SBS, JP
Hon CHAN Kam-lam
Hon SIN Chung-kai
- Public officers attending** : Mr Bryan P K CHAN
Principal Assistant Secretary for Financial Services

Ms Gloria LO
Assistant Secretary for Financial Services

Ms Mabel CHEUNG
Government Counsel
Department of Justice
- Attendance by invitation** : Mr David STANNARD
Executive Director, Corporate Finance
Securities and Futures Commission

Mr Gerald D GREINER
Senior Director of Supervision of Markets
Securities and Futures Commission

Clerk in attendance : Ms LEUNG Siu-kum
Chief Assistant Secretary (1)4

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Connie SEZTO
Senior Assistant Secretary (1)1

I. Meeting with the Administration

Clause-by-clause examination on the Bill

Clause 2

Members noted that the notice under subclauses (2) and (3) would be subject to negative vetting of the Legislative Council.

2. On whether the wordings of subclause (5) were standard provisions, the Senior Director of Supervision of Markets, Securities and Futures Commission (SDSM/SFC) replied that he believed the provision was the first time appear in the legislation. He added that subclause (5) provided that where under this Ordinance, an act could not be done or an omission could not be made, except with, or unless with, the approval in writing of SFC. Moreover, the approval might be subject to such conditions, if any, as SFC saw fit and specified in the approval.

3. As regards the Chairman's concern about possible arguments between SFC and the Exchange Controller on the totality of compliance. SDSM/SFC said that any argument arose could be brought up to the court for judgment.

4. SDSM/SFC further explained that subclause (5)(ii) spelled out that whatever punishment imposed under this Ordinance in relation to any act done or omission made without approval would be similarly applied to the person failing to comply with the conditions specified in the approval. In other words, if a person failed to comply with the conditions specified in the approval given by SFC, that person would be subject to the same punishments in accordance with the relevant provisions as if no approval had been granted to him.

Clause 3

5. Responding to members' enquiry about the definition of "recognized exchange controller" (REC), the Principal Assistant Secretary for Financial Services (PAS/FS) explained that subclauses (1) and (2) provided that no person could be the controller of an Exchange Company or clearing house unless the person was a REC. A REC had to be approved by SFC with the consent in writing of the Financial Secretary.

6. PAS/FS added that subclause (4) stipulated the penalties for contravention of subclause (1). Subclause (6) provided that SFC could by notice in writing direct the person to take certain steps to cease from being the controller, whether or not the person was charged with an offence under subclause (4). Subclause (12) provided that where a person served with a notice under subclause (6) contravened the notice, the provisions of Schedule 1 would apply immediately.

7. SDSM/SFC supplemented that Schedule 1 set out the provisions applicable where there was contravention of notice under subclause (6). These provisions were basically borrowed from the Banking Ordinance (BO) (Cap. 155).

8. Responding to the Chairman's concern over the definition of "company", SDSM/SFC replied that under clause 2, "company" referred to a company within the meaning of section 2(1) of the Companies Ordinance (CO) (Cap. 32) or any other body incorporate. It was the intention of the Administration to exclude individual, individual parties, unincorporated or any company not within the meaning of CO from becoming REC. PAS/FS supplemented that a REC was not just an owner of the exchange and clearing house. It had to perform important public functions of maintaining a fair and orderly market and ensuring prudent risk management. The Administration was of the view that it would be appropriate and effective to require a REC to be a body corporate or a company under the regulation of CO.

9. Members noted that under the proposed definition, an overseas company would be prohibited from becoming a REC. SDSM/SFC advised that a local company set up by an overseas company and registered under CO could be eligible for becoming a REC. Nevertheless, he undertook to check against CO to clarify whether an overseas company was also a company within the meaning of section 2(1) of CO.

SFC

10. Members noted that there was no provision stipulating the application procedure for becoming a REC. SDSM/SFC explained that there would be no need to provide such procedure as few applications were expected. He added that upon implementation of the merger, the Hong Kong Exchanges and Clearing Limited (HKEC) would deem to be a REC in Hong Kong.

Nevertheless, he did not rule out the possibility that there might be other RECs in the future. PAS/FS supplemented that the Administration was of the view that HKEC would be the only REC for Hong Kong in the foreseeable future. However, there was no limit on the number of RECs under the Bill.

Clause 4

11. SDSM/SFC briefed members that clause 4 contained provisions relating to the withdrawal of recognition of exchange controller. SFC could withdraw a company's recognition as an exchange controller if it considered that was in the interest of the investing public or in the public interest, or for the proper regulation of the securities and futures market.

12. The Chairman asked whether the Administration had any step or plan to ensure the smooth operation of the securities and futures market should the approval for a REC be withdrawn. PAS/FS replied that a withdrawal of recognition of exchange controller would be a very serious matter. The Administration would need to make available a number of options to remedy the situation. For instance, the Administration might arrange for the transfer of the ownership of exchanges and clearing houses to another company approved as the REC. All in all, the Administration would adopt every means to ensure the normal operation of the securities and futures market.

13. Members noted that with regard to subclause (6), the Law Society of Hong Kong (LSHK) had made comments on the reference to individuals, rather than a company, committing the offence in the provision. SDSM/SFC concurred with LSHK that the offence concerned could be committed by a company. The reference to an individual committing the offence referred to directors and other officers of the company who were individuals and were guilty of the like offence by virtue of section 101E of the Criminal Procedure Ordinance (CPO) (Cap. 101). Responding to the Chairman's concern about the responsibility of the directors and officers, SDSM/SFC explained that the company concerned had to be found guilty before any further action could be taken against its directors and officers. In view of members' concern about the issue, he would check the relevant provisions under CPO to clarify the matter.

SFC

14. Pointing out that under subclause (6) on conviction upon indictment, a company would be liable to a fine of \$1,000,000 and, in the case of an individual, to imprisonment for two years, vis-à-vis that of \$ 100,000 and imprisonment for six months upon summary conviction, the Chairman opined that the level of penalty was inconsistent. In response, SDSM/SFC undertook to re-consider the level of penalty and inform members of the outcome in due course.

SFC

SFC 15. Dr Philip WONG opined that the usage of "all due diligence" in subclause (7) for providing a defence to the accused might not be adequate. SDSM/SFC agreed that "all due diligence" should be replaced by "reasonable diligence" throughout the Bill.

Clause 5

16. PAS/FS explained that under clause 5, any changes in the corporate structure involving changes in the equity ownership of HKEC's subsidiaries by a REC would require the approval of SFC. It was the intention of the Administration that upon implementation of the merger, the existing Exchanges and clearing houses in Hong Kong would become wholly-owned subsidiaries of HKEC.

Admin 17. The Chairman asked about the criteria for SFC to approve the transfer of ownership. PAS/FS replied that SFC would approve the transfer when it could be demonstrated that it was in the interest of the public and the market, such as under an equity alliance with an overseas exchange. On the provision for appeal hearing, the Administration would consider the issue and inform the Bills Committee in due course.

18. Members took note that clause 5 would prevail notwithstanding any other enactment or rule of law.

Clause 6

19. In response to the submission of LSHK regarding clause 6, SDSM/SFC said that clause 6 prohibited a person to be a minority controller of, inter alia, a REC unless approved by SFC. As pointed out by LSHK, Article 55 of the new Articles of Association of HKEC also set out limitations over shareholdings on HKEC. The purpose of the two provisions was similar, which was to prevent HKEC or for that matter any REC from falling into the control of any person or group of persons. The Bill envisaged that the constitution of a REC might contain rules on shareholding imposing additional requirements beyond those provided in the Bill. The Executive Director, Corporate Finance, SFC (EDCF/SFC) supplemented that subclause (14) was an extended provision for clause 6.

20. Regarding LSHK's suggestion of providing a time limit for processing an application for becoming a minority controller, SDSM/SFC explained that it would be difficult to specify a time limit for SFC to reach such decision. In any event, when considering an application to become a minority controller, SFC would act within a reasonable time frame for reaching a decision, taking into account the complexity of the application.

21. Members noted that under this Ordinance, upon becoming a minority controller, the person concerned should not further increase the interest in HKEC without further approval of SFC in each and every case. Dr Philip WONG supported the provision.

22. The Chairman raised concern that there might be occasions when a person would become a minority controller beyond his own control. For instance, the Board of HKEC might decide to buy back 50 % of HKEC shares on commercial grounds. Consequently, a person originally holding 2.5% HKEC shares would become a minority controller as the person was now holding 5% HKEC shares. It would be unfair to require the person to dispose of any such interest for the sake of avoiding being a minority controller.

23. In response, PAS/ES reiterated the Administration's policy that the ownership of HKEC should become diversified through listing and trading of its shares on the market to prevent control of HKEC by any individual parties or parties acting in concert. Since each case might be different, it would be difficult to lay down provisions catering for all circumstances.

24. SDSM/SFC supplemented that under subclause (12), SFC could make rules to exempt a person or a class of persons from the requirement of subclause (2) in relation to becoming a minority controller. He assured members that SFC would act reasonably in considering every application for approval or exemption to become a minority controller. He added that a minority controller, on the other hand, could always reduce its shareholding without prior approval of SFC.

25. On granting exemptions, PAS/ES explained that the 5% limit would be waived only when SFC was satisfied that an exemption was in the interest of the public and the market, such as under an equity alliance with an overseas exchange.

26. The Chairman raised concern that some trustees or banks might get control of 5% or more of the voting power of HKEC through their normal business activities. He considered that under such circumstances, the shareholding limit should be waived. EDCF/SFC, assured members that the approval of exemption by SFC would be given when appropriate justifications could be provided.

27. Responding to members' concern over the offence of becoming a minority controller without approval, SDSM/SFC explained that subclause (4) (a) provided a defence for the person where he did not know that the acts or circumstances by virtue of which he became a minority controller. Clause (10) provided that it would be a defence for a person charged with an offence under subclause (9) to prove that he had exercised all due diligence to comply with the notice concerned under subclause (5) served on the person. He

supplemented that SFC would direct the person to take steps to cease himself to be a minority controller, whether or not the person was charged with an offence.

28. On the Chairman's enquiry about whether other ordinances also had similar provisions on shareholding limit, SDSM/SFC replied that it was his understanding that BO, the Insurance Companies Ordinance (Cap. 41) as well as the Television Ordinance (Cap. 52) had similar provisions.

Clause 7

29. Members examined the comments of LSHK on this clause and accepted the Administration's explanation that although at present there were no situation justifying an exemption from clause 3 regarding recognition of exchange controller, it was desirable to provide such an exemption power in the legislation for the completeness of the regulatory regime. Such exemption power had a prospective and general application which was different from the transitional provisions contained in Part VI of the Bill, which applied to existing exchanges and HKEC only.

Clause 8

30. Responding to members' concern over the scope of securities or futures contracts mentioned in subclause (1) (a), EDCF/SFC said that it included all kinds of shares, securities and futures contracts which were traded on or through the Exchange Company.

31. Members noted that a REC should ensure that where the interests of the public conflicted with any other interests that it was required to serve under any other law, the former should prevail. PAS/FS explained that it was consistent with the Administration's policy that the public and commercial interests vested in a REC should be properly balanced and sufficiently maintained. Dr Philip WONG, however, remarked that the shareholders' interests of a REC might not be consistent with the public interests as a whole.

II. Any other business

Date of future meetings

32. Members agreed to hold the following meetings in addition to the two meetings already scheduled for 6 December 1999 and 6 January 2000:-

- (i) Wednesday, 8 December 1999 at 8:30 am;
- (ii) Thursday, 17 December 1999 at 10:45 am; and

(iii) Monday, 20 December 1999 at 10:45 am.

33. There being no other business, the meeting ended at 10:30 am.

Legislative Council Secretariat

18 September 2000