Paper No. 3H/01

Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000

Part III – Statutory immunity for recognized exchange companies, clearing houses and exchange controllers

Introduction

At the Bills Committee meeting on 12 January 2001, we undertook to consider whether there was any need for amending the threshold for statutory immunity for a recognized exchange company, clearing house and exchange controller under the Securities and Futures Bill (SF Bill). This paper submits that the threshold as proposed under the Bill is appropriate.

Statutory immunity

2. Clause 22 of the SF Bill provides that no civil liability, whether arising in contract, tort, defamation, equity or otherwise, shall be incurred by a recognized exchange company or any person acting on behalf of a recognized exchange company or any person acting on behalf of a recognized exchange company in respect of anything done or omitted to be done in good faith in the discharge or purported discharge of the statutory duties of the exchange company or under the rules of it. The same immunity is to be given to a recognized clearing house and a recognized exchange controller (and related persons) under clauses 39 and 64 respectively.

3. Some Members asked whether the immunity threshold under the above clauses should be raised such that the immunity should be in respect of anything done or omitted to be done "with due diligence", in addition to "in good faith". We have carefully considered the subject matter and come to the view that it is not necessary. The following paragraphs set out the rationale.

Performance of public duties

4. The SF Bill already lays down duties for a recognized exchange company, recognized clearing house and recognized exchange controller which have adequately addressed the issue of a person acting with gross negligence but claiming immunity on the ground of having acted "in good faith". These entities are under a statutory duty to not only act in the interests of the public, having particular regard to the interests of the investing public but (except for a recognized exchange controller which does not operate shared financial systems or facilities) shall also at all times provide and maintain competent personnel as well as automated systems with adequate capacity, facilities to meet contingencies or emergencies, security arrangements and technical support. Clauses 21(6) and 38(5) are relevant. Also, the immunity threshold proposed in the SF Bill is the same as that under section 8(3) of the Exchange and Clearing Houses (Merger) Ordinance (the "Merger Ordinance") which was enacted as recently as February 2000. The current immunity has been an accepted part of the market and has not drawn any adverse comments from the investing public or market participants. Therefore, there is no compelling reason to alter the existing immunity threshold under the SF Bill.

A consistent approach

5. We have indeed proposed to apply the "in good faith" threshold for all statutory immunity under the SF Bill where performance of public duties or functions is concerned. This includes the general immunity under clause 368 to persons acting in the performance or purported performance of any function under any of the relevant provisions. We consider it appropriate to adopt a consistent approach in this respect.

Securities and Futures Commission
Financial Services Bureau
31 May 2001