

# 立法會 *Legislative Council*

LC Paper No. LS134/02-03

## **Paper for the House Committee Meeting on 27 June 2003**

### **Legal Service Division Report on Companies (Amendment) Bill 2003**

#### **I. SUMMARY**

1. **Objects of the Bill** To amend provisions in the Companies Ordinance (Cap. 32) ("the Ordinance") which relate to (i) prospectuses; (ii) group accounts; (iii) overseas companies and incorporation procedures; and (iv) shareholders' remedies.
2. **Comments** The Bill proposes to amend the Ordinance in various areas, including:
  - (a) the regulation of the scope, application, contents, registration, amendment, construction and the advertisements of prospectus;
  - (b) the requirements for the contents and form of a company's balance sheet and profit and loss account and the contents of group accounts;
  - (c) the regulation of the management, registration of charges, publication of accounts and filing of annual return etc. of a non-Hong Kong company and provisions relating to the incorporation procedures of a company; and
  - (d) the rights of a member of a specified corporation to bring or intervene in proceedings before the court on behalf of the specified corporation and inspect the records of a specified corporation.
3. **Public Consultation** According to the LegCo Brief, Administration has carried out public consultations on the respective proposals and indicated that comments from the public were incorporated in the bill or would be dealt with at the later stage(s) of other amendments to the Ordinance.
4. **Consultation with LegCo Panel** The LegCo Panel on Financial Affairs (FA Panel) was briefed on the legislative proposals to be included in the Bill at its meeting on 7 April 2003. At the Panel meeting, Members raised concerns on the checks and balances to prevent abuse of shareholders' access to company records; protection of investors against misleading or false information disclosed by companies on their business and performance in its marketing materials and propriety of the approach of making reference to company laws of different overseas jurisdictions. To facilitate Members' scrutiny of the Bill, the Administration was urged to provide comparison between overseas legislation and the present proposals.
5. **Conclusion** The Legal Service Division is still scrutinizing the legal and drafting aspects of the Bill. In view of Members' concerns and the wide range of interest affected, Members may wish to form a bills committee to study the Bill in detail.

## **II. REPORT**

### **Objects of the Bill**

To amend provisions in the Companies Ordinance (Cap. 32) ("the Ordinance") which relate to (i) prospectuses; (ii) group accounts; (iii) overseas companies and incorporation procedures; and (iv) shareholders' remedies.

### **LegCo Brief Reference**

2. Members may refer to the LegCo Brief issued by the Financial Services and Treasury Bureau on 12 June 2003 (File Ref.: L/M to C2/1/57(03) Pt 2) for background information.

### **Date of First Reading**

3. 25 June 2003.

### **Comments**

4. The Bill proposes to amend various parts of the Ordinance:

(a) Schedule 1 of the Bill - Amendments relating to prospectuses

The amendments are measures under the second phase of a three-phase approach proposed by the Financial Secretary to overhaul the existing regulatory framework for offers of shares and debentures. They:

- (i) define the scope, application and contents of prospectuses;
- (ii) provide for the registration, amendment and construction of prospectuses;
- (iii) regulate the advertisements concerning prospectuses;
- (iv) provide for the civil and criminal liability for misstatements in prospectuses; and
- (v) expand the power of the Securities and Futures Commission ("SFC") to exempt certain persons and prospectuses from compliance with the requirements of relevant provisions if SFC considers that the exemption will not prejudice the interest of the investing public.

(b) Schedule 2 of the Bill - Amendments relating to group accounts

The proposed amendments:

- (i) define "parent company", "subsidiary undertaking" and "parent undertaking". "The right to exercise a dominant influence over another undertaking i.e. a right to give directions with respect to the operating and financial policies of that other undertaking" is introduced as a test of the parent/subsidiary undertaking relationship;
- (ii) define "undertaking" to include body corporates, partnerships and other unincorporated bodies;
- (iii) make provisions for the contents and form of a company's balance sheet and profit and loss account if compliance with the requirements of the Ordinance as to the matters to be included in a company's balance sheet and profit and loss account or in a statement annexed to the account will not be sufficient to give a true and fair view of the state of affairs or the profit or loss of the company; and
- (iv) provide for the contents of group accounts and the circumstances in which a subsidiary may be excluded from the group accounts.

(c) Schedule 3 of the Bill - Amendments relating to overseas companies and incorporation procedures

The Registrar of Companies has chaired a Sub-Committee under the Standing Committee on Company Law Reform ("SCCLR") to undertake a comprehensive review of Part XI of the Ordinance and all the other provisions of the Ordinance which apply to overseas companies, with a view to simplifying the filing requirements ("the Sub-Committee").  
The proposed amendments:

- (i) replace the existing term "oversea company" by "non-Hong Kong company" and amend the provisions in Part XI of the Ordinance relating to the management, registration of charges, publication of accounts and filing of annual return etc. of a non-Hong Kong company; and
- (ii) amend the provisions in the Ordinance relating to the incorporation procedures of a company.

(d) Schedule 4 of the Bill - Amendments relating to shareholders' remedies

The amendments are to implement proposals contained in the Consultation Paper on Proposals made in Phase I of the Corporate Governance Review published by the SCCLR in July 2001 ("the Consultation Paper"). They:

- (i) provide for the right of a member of a specified corporation (a company or a non-Hong Kong company) to bring or intervene in proceedings before the court on behalf of the specified corporation;
- (ii) provide for the right of a member to inspect the records of a specified corporation; and
- (iii) empower the court to grant an injunction restraining any person from engaging in conducts which constitute contravention of the Ordinance or a breach of his fiduciary duties or other duties owed to a company. The court may also order him to do any act or thing.

5. The Bill shall come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

**Public consultation**

6. According to the LegCo Brief, the following public consultations have been conducted:

(a) Schedule 1 - Amendments relating to Prospectuses

The Administration conducted a three-week joint public consultation with the SFC on the amendments in Schedule 1 in March 2003. A total of 16 submissions were received from industry associations, professional bodies, the Consumer Council and other interested parties. There is broad public support for the initiative to update the regulatory framework and the legislative amendment proposals covered under the Bill. These are considered to be facilitative for offers of shares and debentures. The Consumer Council welcomes the safeguards introduced for ensuring that investor protection will not be compromised by such proposals. The Administration indicates that comments on relevant proposals under the Bill have been incorporated to the extent that investor protection will not be compromised and policy considerations have been addressed. Certain comments which the Administration considers to require more detailed consideration will be dealt with in phase III of the three-phase approach or, where appropriate,

through amending the relevant schedules to the Ordinance by way of subsidiary legislation in the interim. Comments relating to implementation will be pursued by the SFC as appropriate.

(b) Schedule 2 - Amendments relating to group accounts

The proposals relating to the definition of "subsidiary" have been prepared in consultation with the Hong Kong Society of Accountants. The Administration received comments from various bodies in April 2003. The Hong Kong General Chamber of Commerce has no objection to the proposals. The Chinese General Chamber of Commerce supports the proposals. Both the Hong Kong Mortgage Corporation Limited and Hong Kong Capital Markets Association are concerned about the possible impact of the proposals on the asset securitisation market in Hong Kong, in particular, whether Hong Kong would be competitively disadvantaged when compared with other financial centres. The Administration appreciated their concerns and indicated that it would keep a close watch on international developments and refine the regime when necessary.

(c) Schedule 3 - Amendments relating to overseas companies and incorporation procedures

The recommendations of the Sub-Committee have been approved by the SCCLR.

(d) Schedule 4 - Amendments relating to shareholders' remedies

The amendments were contained in the Consultation Paper and the comments received on the Consultation Paper indicated support for the proposals.

### **Consultation with LegCo Panel**

7. At the meeting of the LegCo Panel on Financial Affairs (FA Panel) on 7 April 2003, the Administration briefed Members on the proposed amendments to the Ordinance to facilitate offers of shares and debentures, enhance shareholder remedies, define "subsidiary" for the purposes of group accounts, enable electronic incorporation and update the provision on partner limit.

8. At the Panel meeting, Members raised the following concerns and request:

- (a) checks and balances to be put in place to prevent abuse of shareholders' access to company records;
- (b) protection for investors against misleading or false information

disclosed by companies on their business and performance in its marketing materials;

- (c) propriety of the approach of making reference to company laws of different overseas jurisdictions; and
- (d) to facilitate Members' scrutiny of the Bill, Members urged the Administration to provide comparison between the legislation of overseas jurisdictions and the present proposals when introducing the Bill into the Council.

9. The Administration's reply was as follow:

- (a) the Administration explained that as the order for inspection of records would be made by the court on condition that the applicant was acting in good faith and the inspection was for a proper purpose, sufficient checks and balances would be provided in the system;
- (b) Members were advised that only factual and procedural rather than promotional information would be permitted in the issue of "awareness advertisements". Such advertisements would not constitute prospectuses nor prohibited advertisements under relevant securities laws; and
- (c) the Administration advised that its policy was to adopt the best practices of different overseas jurisdictions. In working out the current proposals, reference had been made to relevant legislation of overseas jurisdictions with well-developed regimes which were similar to those in Hong Kong.

## **Conclusion**

10. The Legal Service Division is still scrutinizing the legal and drafting aspects of the Bill. In view of Members' concerns and the wide range of interest affected, Members may wish to form a bills committee to study the Bill in detail.

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