

Companies (Amendment) Bill 2004

We are supportive of the proposals contained in the Companies (Amendment) Bill 2004 (the “Bill”). We note that the proposals have been the subject of previous consultation (as set out in Schedule 2 to the Companies (Amendment) Bill 2003) and we had previously provided comments on the proposals. Accordingly, we wish to only focus on the two areas set out below which we think may require clarification.

Section 18 of the Bill – Introduction of the Twenty-Third Schedule to the Companies Ordinance

1. Sections 2(1)(c) and 5 of the Twenty-Third Schedule propose to introduce the concept of determining parent/subsidiary relationship through the rights to exercise a “dominant influence” over another undertaking by virtue of the provisions contained in the undertaking’s constitutional documents or a “control contract”. Although these provisions track the legislative amendments made by the UK Companies Act 1989 to the definition of “subsidiary”, it would be important to clarify whether more than one entity can exercise “dominant influence” over another undertaking in the Hong Kong context, e.g. through joint control.¹ Further, “control contracts” (as defined in Section 5(b) of the Twenty-Third Schedule) do not appear to be common in Hong Kong. We understand that they are more relevant to European companies (e.g. German company) where entering into control contracts with subsidiaries are prevalent.² Hence, it seems that the meaning of “control contract” under the Hong Kong provisions may need to be specifically considered.

Sections 3 and 5 of the Bill – “True and fair view override”

2. We note that Sections 3(4A) and 5(5) of the Bill introduce the “true and fair view override” provisions to ensure that the Companies Ordinance could better cater for the evolving nature of accounting reporting requirements. Whilst we support the introduction of the provisions, the discretion for directors to exercise the “true and fair view override” without more specific guidance may create problems or uncertainties on how such discretion should be exercised.³ It would be helpful if the Hong Kong Institute of Certified Public Accountants could provide practical guidelines on the application of the override provisions prior to the Bill coming into effect.

Linklaters

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¹ We note that the Twenty-Third Schedule does not include provisions equivalent to Sections 258(4) and 260 of the UK Companies Act 1985 regarding “participating interest”.

² “Control contracts” are also not common in relation to UK companies in practice.

³ The UK equivalents of Sections 3(4A) and 5(5) of the Bill (Sections 226(5) and 227(5) of the UK Companies Act 1985) refer to “special circumstances” in which the override provisions can be used.