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LCQ2: Privatisation of listed companies
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Following is a question by the Hon Kam Nai-wai and a reply by the Secretary for Financial Services and the Treasury, Professor K C Chan, in the Legislative Council today (February 18):

Question:

At the court meeting and extraordinary general meeting (EGM) of the PCCW Limited (PCCW), a listed company, reconvened on the 4th of this month, the privatisation proposal made by two major shareholders were voted upon and approved. The High Court will hold a hearing on whether sanction will be given to the Scheme of Arrangement for privatisation. Yet, some members of the public and PCCW minority shareholders queried that improper share transfer had taken place before those meetings in an attempt to manipulate the voting results. It has been reported that the Securities and Futures Commission (SFC) also took away the voting records immediately after the EGM and commenced an investigation into the incident. The above incident has aroused public concern about how the Government safeguards the interests of minority shareholders and investors. In this connection, will the Government inform this Council:

(a) how it will assist the PCCW minority shareholders in knowing the results of SFC's investigation and clarifying their doubts and concerns before the High Court's substantive hearing; and whether it knows if SFC will request the High Court to suspend the sanction of the Scheme of Arrangement before completion of the SFC investigation;

(b) whether it will review the procedure and requirements for the privatisation of listed companies with a view to better protecting the interests of minority shareholders; if so, of the details; and

(c) whether it will study amending the law so that minority shareholders whose interests have been compromised may claim damages from the relevant parties by way of group litigation?

Reply:

President,

(a) The SFC has been monitoring the latest developments of the PCCW incident. The SFC took possession of the voting records of PCCW's Court meeting and the EGM held on February 4 and are now conducting further inquiries. Section 378 of the Securities and Futures Ordinance (SFO) provides that the SFC has to preserve secrecy with regard to any matter coming into its knowledge in the performance of its functions. Meanwhile, the scheme proposal is still pending the verdict of the court and subjudice. Hence, it is not appropriate for the SFC to comment publicly on the progress of its inquiries or the possible outcomes. The SFC will fully discharge its statutory obligations in performing its functions in accordance with the provisions of the SFO.

(b) At present, privatisation of a listed company has to be conducted under the relevant provisions of the Companies Ordinance (CO) and in compliance with the Codes on Takeovers and Mergers (Codes) issued by the SFC under the SFO.

Generally speaking, a listed company can be privatised by

way of a Scheme of Arrangement or a General Offer. If it is conducted through a General Offer, under Section 168 of the CO, once an offeror has obtained acceptances which in aggregate represent not less than 90% in value of shares for the offer is made within four months after submitting the initial offering documents, he may opt to exercise his power to compulsorily acquire securities to have the offeree company privatised. The Codes further require that the shares acquired by the offeror, together with the total shares purchased by the offerer and his concert parties within four months after posting of the initial offering documents, should amount to 90% of the disinterested shares.

As regards privatisation conducted through a scheme of arrangement, in accordance with Section 166 of the CO, the company concerned has to apply to the court and convene a meeting in a manner as directed by the court to put the scheme of arrangement to shareholders' vote. At such meeting, not only approval for the scheme of arrangement has to be obtained from shareholders, representing three-fourths of voting rights, present and voting either in person or by proxy, approval also has to be obtained from over half of the shareholders present and voting either in person or by proxy, and that the scheme of arrangement shall take effect only after the voting result has been sanctioned by the court.

The Codes further require that where any person who seeks to use a scheme of arrangement to acquire or privatise a company, the scheme must, in addition to satisfying any voting requirements imposed by law, be approved by at least 75% of the voting rights attached to the disinterested shares that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares. In addition, the number of votes cast against the resolution to approve the scheme at such meeting must not be more than 10% of the voting rights attached to all disinterested shares.

We believe that the above requirements have struck a balance among the interests of various shareholders. For the pursuance of privatisation proposal through a scheme of arrangement, the CO's requirement that support for the proposal must be obtained from over half of the shareholders mainly is to protect the interests of minority shareholders. Such requirement is similar to that adopted in other common law jurisdictions such as the United Kingdom, Australia and Singapore.

As a matter of fact, the Codes stipulate that the number of votes cast against the resolution shall not be more than 10% of the voting rights attached to all disinterested shares. This requirement, which renders additional safeguards for minority shareholders, is not provided by places adopting similar rules on takeovers and mergers such as the U.K., Australia and Singapore.

Apart from the above requirements protecting minority shareholders, at present, the CO and the SFO have empowered shareholders and the SFC respectively to apply to the court by petition to seek remedies.

According to section 168A of the CO, any member of a company can make an application to the court by petition if he considers that his interests have been unfairly prejudiced. If the court consents to the petition, it may grant appropriate remedies, including making an order restraining the company concerned to continue such conduct, appointing a receiver to manage the company's property or business and awarding damages to such members, etc.

In addition, section 214 of the SFO provides that if there is evidence showing that the listed company concerned or its

management has conducted its business or affairs in an unfair manner prejudicial to other members, the SFC may, after consulting the Financial Secretary, by petition apply to the court for an order restraining the unfair act concerned and granting other remedies. Also, under section 385 of the SFO, where there are any judicial or other proceedings (other than criminal proceedings) which concern a matter relating to its functions, the SFC may, after consultation with the Financial Secretary, apply to the court to intervene in the proceedings, if it is satisfied that it is in the public interest for the SFC to do so.

We are in the course of rewriting the CO. One of the objectives of the rewrite exercise is to strengthen corporate governance and enhance the protection for the interests of minority shareholders. In the process of the rewrite exercise, we have also reviewed the requirements for takeovers and mergers in the CO and consulted the Standing Committee on Company Law Reform (SCCLR) and relevant Advisory Group comprising professional bodies, business organisations, regulatory bodies and academics. The SCCLR and the advisory groups considered that the relevant provisions of the CO and the Codes have been generally working well. They have nonetheless recommended some technical amendments to individual provisions of the CO to enhance clarity. The proposals concerned are set out in the SCCLR Annual Report for 2007-08 which was publicised in early December 2008. The report is available for public reference at the Companies Registry's website. Relevant amendments will be incorporated into the Bill which is being drafted. We plan to conduct public consultation on the draft provisions of the Bill in the fourth quarter of this year.

(c) "Class action" is a procedure which enables the claims of a number of persons against the same defendant to be determined in a single suit. In a class action, a representative plaintiff sues on his own behalf and on behalf of the other persons (the class) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff.

The Law Reform Commission established a "class action" sub-committee in November 2006 to consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to devise a suitable scheme. The sub-committee hopes to consult the public on its proposals later this year and will submit them to the Administration thereafter.

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