

For information

**Bills Committee on
Competition Bill**

Definition of “Shadow Director”

Purpose

This paper explains the definitions of “shadow director” in Hong Kong ordinances (apart from the Companies Ordinance (Cap. 32)) and responds to Members’ suggestion of bringing the definition of “shadow director” in the Competition Bill (the Bill) in line with that in the Companies Ordinance.

Definition of “shadow director” in Hong Kong Ordinances

2. Apart from section 2(1) of the Companies Ordinance (Cap. 32), the expression “shadow director” is also defined in the Securities and Futures Ordinance (Cap. 571), Financial Report Council Ordinance (Cap. 588) and Mandatory Provident Fund Schemes (General) Regulation (Cap. 485A). Details of the relevant provisions in the respective ordinances were set out in paper no. CB(1)1759/10-11(01).

Securities and Futures Ordinance (Cap. 571)

3. The term “director” is defined in Schedule 1 to the Securities and Futures Ordinance as including “a shadow director and any person occupying the position of director by whatever name called”. The purpose is to bring within the scope of the regulatory regime any person whose name does not appear in the register of directors but who in fact exercises significant influence over decision-making by the company. This is to cater for the situation where such person is effectively controlling the company behind the scenes. This may be relevant in a number of ways such as (i) seeking disqualification orders under section 214(2)(d) against being or continuing to be a director (a civil matter) and (ii) in relation to the applicability of the disclosure of interests regime in Part XV which requires that a director (including a shadow director) disclose all interests and short positions in shares of the company and any changes in the nature of such interests or short positions (a criminal matter).

4. The term “shadow director” is understood as a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act.

Financial Report Council Ordinance (Cap. 588)

5. Section 2 of the Financial Report Council Ordinance stipulates that “director” include a shadow director and any person occupying the position of director by whatever name called. This definition follows that contained in Schedule 1 to the Securities and Futures Ordinance. The purpose is to extend the imposition of standards of conduct of directors to the shadow directors.

Mandatory Provident Fund Schemes (General) Regulation (Cap. 485A)

6. The term “shadow director” is defined only for the purpose of Part IVA of the Mandatory Provident Fund Scheme (General) Regulation. It is defined by reference to the definition of “controller” in section 2 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and was intended to have the same meaning as the definition of “shadow director” in the Companies Ordinance. Part IVA of the Mandatory Provident Fund Scheme (General) Regulation imposes on persons who are controllers of a Mandatory Provident Fund (MPF) trustee certain prior approval and ongoing requirements regarding their suitability to act as such. The purpose is to ensure that only suitable persons may become controllers of MPF trustees.

Definition of “Shadow Director” in Clause 2 of the Bill

7. Having reviewed the definition and interpretation of “shadow director” in other Hong Kong ordinances and the relevant case law in the UK, we propose to amend the expression “the directors of the company” in the definition of “shadow director” in clause 2 of the Bill to read “the directors or a majority of the directors of the company”. In other words, a person that can influence all directors or a majority of the directors of a company would be regarded as a shadow director and hence a director of a company under clause 2 of the Bill.