

Bills Committee on Companies Bill

Follow-up actions for the meeting held on 4 May 2012 relating to the imposition of daily default fines for offences attracting a Level 3 penalty

Purpose

This paper sets out the Administration's response to the issues raised by Members at the Bills Committee meeting on 4 May 2012 regarding the alignment of penalties for offences under the Companies Bill ("CB").

Background

2. At the said meeting, the Administration presented a proposal to remove the daily default fines for non-filing offences that attract a maximum penalty at Level 3¹ ("the original proposal"). The original proposal was made in response to earlier concerns expressed by Members that the imposition of a daily default fine for offences attracting a Level 3 penalty would impose undue burden on some small and medium enterprises ("SMEs"), especially if a company is not aware of the breach while the daily default fine incessantly accumulates. However, some Members were concerned that removal of the daily default fine in some cases would leave the Registrar of Companies ("the Registrar") powerless to deal with continuing default.

Administration's response

3. The intention of the Administration for the original proposal is only to remove the daily default fine for breach of a continuing nature and not to change the offence such that it is no longer an offence of a continuing nature.

4. Whether or not an offence is of a continuing nature depends upon the legislative intention. The fact that a daily default fine is imposed for continuous breach is only one factor to be taken into account. The recent case *HKSAR v Fastwin Global Investment Ltd* [HCMA 255/2011] deals with this issue. If the breach can be "stopped" by the

¹ Please see paragraphs 2 to 4 of the LegCo Paper No. CB(1)1490/11-12(02) "Administration's response to issues raised at the meeting on 16 March 2012 in relation to alignment of penalties for offences under the Companies Bill".

doing of a particular act not yet done, the offence continues until it is stopped².

5. The offences covered by our original proposal are clearly of a continuing nature, mostly concerning obligations to do something within a specific time, and until done, creating a breach. They can be “stopped” by compliance with the statutory obligation.

6. The intention of the Administration in removing the daily default fines for such offences is simply to reduce the amount of fine that will be imposed for these offences. There is no intention to change the nature of the offence or to restrict the ability of the Registrar to prosecute breach of a continuing nature. Notwithstanding the removal of the daily default fines, the Registrar will be entitled to commence further prosecution action either against the company or the directors, as the case may be, for continuous non-compliance with any of the provisions resulting in these offences.

7. In light of concerns expressed by Members, the Administration has reviewed the appropriateness of removing the daily default fines from the 27 non-filing offences³ under our original proposal. When reviewing these offences, we have taken into account the following factors –

(a) Parties which will be affected by the non-timely compliance

Unlike members of a company, members of the public have less channels of access to information on the operation of the company, and would need to rely on specific provisions in CB to

² Reference was made to the Court of Final Appeal’s decision in *HKSAR v Li Li Mua* [2001] 1 HKLRD 441 and the decision of Bokhary P J at page 446G-H, an immigration case concerning overstaying, where he stated –

“The courts are slow to conclude that an offence is a continuing one, but will do so if such a conclusion is plain from express words, compelling implication or the nature of the offence concerned. In my judgment, it is plain that overstaying is a continuing offence. For overstaying involves the situation where the material condition of a person’s permitted stay in Hong Kong is a limit on the period for which he may lawfully stay here. And if he exceeds that limit by remaining here beyond that period, the offence of breach of condition of stay which he commits is, by its very nature, an offence committed continuously from the time when the overstaying commences to the time when it comes to an end.”

³ Under our original proposal set out in the paper LegCo Paper No. CB(1)1490/11-12(02), we proposed to remove the daily default fines for 30 non-filing offences that attract a maximum penalty at Level 3. However, two of the offences will be removed from CB by proposed Committee Stage Amendments (CSAs) (clauses 463(4)(a) and 534(4)(a)) while another offence will no longer be a Level 3 offence as a result of another proposed CSA (clause 533(6) in respect of clause 533(2)).

ensure that they are being provided with information on the companies they are dealing with timeously. Therefore, non-timely compliance with statutory obligations which will affect not only the interests of members of the company but also those of the public at large should generally warrant a heavier sanction. For the same reason, there may be grounds for removing the daily default fines for relatively minor offences which relate only to sole director companies or sole member companies given non-timely compliance by these companies, which are likely to be SMEs, are less likely to affect the public at large or indeed other members. This is also consistent with the rationale behind the original proposal, which aims at addressing concerns by Members that imposing a daily default fine for relatively minor offences may result in an undue burden on SMEs;

(b) The extent to which other parties would be affected by the continuing default

The need for a daily default fine also depends on the extent to which other parties would be affected by a continuing default of the relevant obligation. In some instances, non-timely compliance with an obligation may be alleviated due to the presence of other provisions which offer access to other sources or forms of information or other remedies (e.g. the interests of a member who already has access to a company document in electronic form should not be seriously affected by the company failing to provide him with the same document in hard copy within a prescribed time); and

(c) Nature of prosecution action

The need for a daily default fine may also depend on the nature of prosecution action instituted as a result of the non-compliance. Where prosecution action concerning a particular offence is likely to be targeted at a specific breach on a specific date rather than over a continuous period, the need for a daily default fine for such offence will be less compelling.

8. Based on these guiding principles, we now propose to restore the daily default fines to 8 non-filing offences which attract a maximum penalty at Level 3, as follows –

(i) Clause 161(2)

This is an existing offence applicable only to a listed company, and relates to failure to publish in its website or in the Gazette a notice of the issue of the new share certificate and cancellation of the original certificate, and to deliver a copy of the notice to the recognized stock market concerned within the prescribed time.

As the shares of a listed company are openly traded on the stock market, non-timely compliance with the obligation may affect a shareholder and potential shareholder's interest in the company. And since a listed company should have sufficient funds and expertise to ensure timely compliance with the requirement, imposing a daily default fine on non-compliant companies is justified.

(ii) Clause 884(3) in respect of clauses 884(1) and 884(2)

These two are existing offences which relate to the improper uses of the word "limited" in a name by a person not incorporated with limited liability and the words "corporation" or "incorporated" by a person who is not incorporated.

Since a continuing default in respect of either of these two requirements may seriously affect the interests of members of the public, the daily default fines for these two offences should be restored.

(iii) Clause 279(5)

This is a new offence which relates to a failure to send to members a solvency statement and a notice containing prescribed information about the giving of financial assistance within the prescribed time.

The solvency statement and the prescribed notice contain important information on financial assistance given by the company. Members of the company would have no other means of access to such information, and non-timely compliance with the requirement by the company will affect the interests of

members. Therefore, we propose to restore the daily default fine to encourage timely compliance with the requirement.

(iv) Clause 372(5) in respect of clause 372(1) and clause 646(5) in respect of clause 646(1)

These two are new offences which relate to a company failing to adequately record information contained in accounting records and company records.

Accounting records and company records contain important information which enables members to have a comprehensive understanding of the operation of the company. A continuing breach of the two provisions would affect members' interests, and we therefore propose that the daily default fines for the two offences should be retained.

(v) Clause 416(4) in respect of clauses 416(1) and 416(2)

These breaches are new offences which relate to a retiring auditor not reappointed or an auditor removed failing to provide the company with a statement of circumstances or no circumstances requiring to be brought to the attention of members or creditors.

The said statement is an important piece of information highlighting the circumstances connected with the termination that should be brought to the attention of the company's members and creditors. Non-timely compliance with the obligation to provide the statement may affect the interests of members and creditors. We propose that the daily default fines should be retained.

9. For the remaining 19 non-filing offences which attract a maximum penalty at Level 3, we propose, having regard to the guiding principles as set out in paragraph 7, to remove the daily default fines from the relevant provisions as originally proposed. Details of our analysis are set out in **Annex**.

10. Under our original proposal, we proposed to retain the daily default fines for all filing offences which attract a maximum penalty at Level 3. We have also critically reviewed the need for retaining the

daily default fines for each of these offences, which relate to obligations to file information about the company with the Registrar. Since non-timely compliance with all of these obligations will affect the integrity of the Companies Register, upon which the public rely, we do not consider it appropriate to remove the daily default fines from these offences.

Financial Services and the Treasury Bureau
Companies Registry
21 May 2012

Proposed deletion of daily default fines**List of non-filing offences punishable by a Level 3 fine and daily default fine of \$300 under the Companies Bill (CB)**

Offence provision in CB	General description of the offence	Justifications
Clause 213(3) (in respect of clause 213(1))	<ul style="list-style-type: none"> Company failing to publish a notice about the particulars of a proposed reduction of share capital in the Gazette within the prescribed time. 	<ul style="list-style-type: none"> These offences relate to failure to publish the requisite notice within a prescribed time in relation to a proposed reduction of share capital or a proposed payment out of capital. Since these proposed transactions would need to be approved by a special resolution of the company, members of the company should already be aware of the proposals. Members of the public will also have access to information on these transactions as the solvency statement and the special resolutions supporting these transactions would need to be filed with the Registrar (with late filing being penalized by a daily default fine). Moreover, prosecution would focus on the actual breach as at a specific date and not a continuous period. Therefore, we consider the daily default fines for these provisions can be removed.
Clause 213(3) (in respect of clause 213(2))	<ul style="list-style-type: none"> Company failing to comply with the requirement either to publish a notice about the particulars of a proposed reduction of share capital in newspapers or give written notice to that effect to creditors within the prescribed time. 	
Clause 256(3) (in respect of clause 256(1))	<ul style="list-style-type: none"> Company failing to publish a notice about the particulars of a proposed payment out of capital in the Gazette within the prescribed time. 	
Clause 256(3) (in respect of clause 256(2))	<ul style="list-style-type: none"> Company failing to comply with the requirement either to publish a notice about the particulars of a proposed payment out of capital in newspapers or give written notice to that effect to creditors within the prescribed time. 	
Clause 372(5) (in respect of clause 372(3))	<ul style="list-style-type: none"> Company failing to reproduce in hard copy form the accounting records that are kept in electronic form. 	
Clause 646(5) (in respect of clause 646(3))	<ul style="list-style-type: none"> Company failing to ensure that the company records that are kept in electronic form are capable of being reproduced in hard copy form. 	
Clause 825(3)	<ul style="list-style-type: none"> Company failing to provide a document or information 	<ul style="list-style-type: none"> These provisions relate to the form of information provided or record kept by the companies. Provided there is an electronic version of the information, the interests of members are protected. Therefore, we consider that the daily default fines can be removed in respect of these clauses.

Offence provision in CB	General description of the offence	Justifications
	in hard copy form as requested by its member or debenture holders within the prescribed time.	
Clause 372(5) (in respect of clause 372(4))	<ul style="list-style-type: none"> Company failing to take adequate precaution and steps to guard against, and facilitate the discovery of, falsification of accounting records. 	<ul style="list-style-type: none"> These offences relate to a company taking adequate precautions to guard against falsification of accounting and company records if such records are kept otherwise than by making entries in a bound book. These offences are mainly about having a proper system or mechanism in place. It is considered that prosecution would focus on the actual breach as at a specific date and not a continuous period. Therefore, the daily default fines could be removed. Further, there are other provisions and penalties for non-compliance in CB dealing with the keeping of the various individual registers etc. to protect the interests of members.
Clause 647(2)	<ul style="list-style-type: none"> Company failing to take adequate precaution and steps to guard against, and facilitate the discovery of, falsification of company records. 	
Clause 462(5) (in respect of clause 462(2))	<ul style="list-style-type: none"> Company failing to keep available for members' inspection copy of permitted indemnity provision or memorandum thereof at the prescribed places. 	<ul style="list-style-type: none"> These offences relate to failure to keep copies of permitted indemnity provision or memorandum thereof made for a director of a company at a prescribed place and for at least one year after termination or expiry of indemnity. The daily default fine can be removed as prosecution would focus on the actual breach as at a specific date and not a continuous period.
Clause 462(5) (in respect of clause 462(3))	<ul style="list-style-type: none"> Company failing to retain and keep copy of permitted indemnity provision or memorandum thereof for at least one year after the date of termination or expiry of the permitted indemnity provision. 	
Clause 474(6) (in respect of clause 474(4))	<ul style="list-style-type: none"> Sole director of a company failing to provide the company with a written record of any of his decision that may be taken in a directors' meeting and has effect as if agreed in such meeting. 	<ul style="list-style-type: none"> Clause 474(6) relates to a sole director providing a written record of a decision taken in a director's meeting to the company within 7 days. This is likely to apply to small one person companies and non-timely compliance would be unlikely to affect the interests of the public or indeed other members. Prosecution of the breach should be sufficient to ensure compliance. Therefore, the daily default fine can be removed. Clauses 535(3) and 607(3) both relate to sole member companies and for the same reason, the daily default can also be removed from these offences.
Clause 535(3)	<ul style="list-style-type: none"> Company failing to ensure that the terms of a contract with its sole member who is also a director are set out in a written memorandum and the memorandum be kept at the prescribed place. 	
Clause 607(3)	<ul style="list-style-type: none"> Sole member failing to provide the company with a written record of any decision made by him within the 	

Offence provision in CB	General description of the offence	Justifications
	prescribed time.	
Clause 533(6) (in respect of clause 533(3))	<ul style="list-style-type: none"> Company failing to keep at a prescribed place a copy of the management contract; or a written memorandum setting out the terms of the contract if the contract is not in writing. 	<ul style="list-style-type: none"> These offences relate to the keeping of management contracts with directors, or in which they have an interest, or keeping them for a period of at least one year after termination or expiry of the contract. The daily default fines can be removed as prosecution would focus on the actual breach as at a specific date and not a continuous period.
Clause 533(6) (in respect of clause 533(4))	<ul style="list-style-type: none"> Company failing to retain and keep available for members' inspection copy of a contract by which a person undertakes the management and administration of the whole or any substantial part of any of the company's business or memorandum thereof for at least one year after the date of termination or expiry of the contract. 	
Clause 584(2)	<ul style="list-style-type: none"> Company failing to record in the minutes of proceedings of a general meeting the prescribed results of each resolution decided on a poll. 	<ul style="list-style-type: none"> This offence relates to a company failing to record in the minutes of proceedings of a general meeting the prescribed results of each resolution decided on a poll. As the members of the company should be aware of the result of the poll at the general meeting, their interests will not be affected by the late recording of the information provided the general meeting if the poll is properly conducted. Therefore, the daily default fine can be removed.
Clause 651	<ul style="list-style-type: none"> Company failing to disclose company name etc. in accordance with the requirements prescribed by the Financial Secretary in regulations. 	<ul style="list-style-type: none"> These offences will be included in Schedule 7 to CB as offences which can be compounded by the Registrar. When CB is implemented, it is anticipated that such breaches will be dealt with by compounding.
Clause 780(8) (in respect of clause 780(2))	<ul style="list-style-type: none"> Non-Hong Kong company failing to exhibit its names and place of incorporation on every place it carries on business in Hong Kong and (if applicable) conspicuously exhibit a notice of the fact that the liability of its members is limited. 	