Bills Committee on Companies Bill

Administration's Response to Deputations' Views on Clause 664 relating to the Headcount Test and Proposed Way Forward

Purpose

This paper sets out the Administration's response to the deputations' views on clause 664 of the Companies Bill ("CB") relating to retention of the headcount test and our proposed way forward.

Deputations' views

2. The Bills Committee has earlier invited deputations to give views on clause 664 relating to retention of the headcount test for members' schemes. We summarise below the views of the deputations expressed through written submissions or presentation at the meeting on 23 March 2012.

Members' Schemes

3. The majority of the deputations supported abolition of the headcount test in respect of members' schemes (a total of 23 deputations, including the Law Society of Hong Kong, Hong Kong Bar Association, Hong Kong Institute of Certified Public Accountants, the Hong Kong Institute of Directors, the Hong Kong Institute of Chartered Secretaries, Economic Synergy, Hong Kong General Chamber of Commerce, Federation of Hong Kong Industries, the Chinese Manufacturers' Association of Hong Kong, the Chamber of Hong Kong Listed Companies, the Canadian Chamber of Commerce in Hong Kong, some law firms, a few academics and Mr David Webb).

4. The major arguments for abolishing the headcount test include –

(a) the headcount test is contrary to the "one share, one vote" principle and gives disproportionate control to a potentially very small number of shareholders who may have invested very little in the company;

(b) the headcount test creates a loophole for vote manipulation, such as share splitting to unfairly influence the voting results by any shareholder groups, large and small shareholders alike;

(c) the proposal to give the court discretion to dispense with the test will create uncertainty;

(d) retention of headcount test will more likely than not result in significant regulatory, judiciary, issuers and shareholders resources being incurred on investigating into the question of whether there has been share splitting or other form of share manipulation;

(e) the proposal to retain the headcount test under the CB is contrary to the majority views in the earlier consultation;

(f) the headcount test is unnecessary since minority shareholders are adequately protected by other means, including the court's discretion not to approve a scheme and the requirement that the number of votes cast against the resolution shall not be more than 10% of the voting rights attached to all disinterested shares under Rule 2.10(b) of the Code on Takeovers and Mergers ("Takeovers Code");

(g) for listed companies, the headcount test fails to reflect the decisions of the beneficial owners of the overwhelming majority of listed shares in Central Clearing and Settlement System ("CCASS"). Even when a scripless market is introduced, most shareholders may still prefer to hold shares in the names of their nominees and custodians for ease of trading and to save costs;

(h) the existence of the headcount test, and the uncertainty that it introduces, currently acts as a deterrent to schemes of arrangement. As schemes typically provide an exit for minority shareholders at higher than current market prices, and very often in cases where trading in the shares is illiquid, having a deterrent to putting schemes forward is not in the interests of minority shareholders; and

(i) other jurisdictions are moving towards abolishing the headcount test. Jurisdictions quoted included Cayman Islands and New Zealand. The specialist government

advisory committees in the United Kingdom ("UK") and Australia have recommended that the headcount test be abolished. In addition, in many jurisdictions where the headcount test is still in force, like the UK and Australia, there is no such provision as Rule 2.10(b) of the Takeovers Code. Besides, in the UK and Australia, their central securities depositories are structured in such a way as to enable individual shareholders to be registered as legal owners of their listed shares. Hence, the concern on CCASS is not relevant to these jurisdictions.

5. On the other hand, a total of 10 deputations (including Securities and Futures Commission ("SFC"[1]), the Society of Chinese Accountants & Auditors, Association of Chartered Certified Accountants Hong Kong, Hong Kong Securities Association, the Hong Kong Association of Banks, some Small and Medium Enterprises associations and a representative of a small shareholders' group 電訊盈科小股東大聯盟) supported retention of the headcount test. The major arguments include –

(a) the headcount test serves as a potentially important check to counterbalance the value test. This can be significant for minority shareholders in the context of privatisations or takeovers since schemes, once sanctioned, will bind dissenting shareholders and permit the compulsory acquisition of their shares;

(b) any perceived imbalance in the current headcount test in section 166 of the Companies Ordinance ("CO") appears to have been addressed by the inclusion of clause 664 of CB providing a new discretion for the court to dispense with the headcount test;

(c) the implementation of scripless securities could help address the problem associated with beneficial ownership of shares;

(d) there is no credible evidence to support the argument that headcount test attracts vote manipulation or that reasonable privatisation schemes are blocked by the headcount test;

[1] See also paragraphs 17 and 22.

(e) the proportion of individual investors is higher in Hong Kong than in overseas jurisdictions. If the headcount test is abolished, the majority shareholders can easily control the voting result and the interests of minority shareholders could be affected; and

(f) retaining the headcount test places Hong Kong in line with other common law jurisdictions, such as Singapore, the UK and Australia.

6. Apart from the above, there was also one deputation suggesting that the headcount test be abolished for members' schemes of listed companies but the test be retained for non-listed companies because the Takeovers Code does not apply to non-listed companies.

7. In its submission, SFC reiterated its earlier views on the need for retention of the headcount test. However, it also suggested that there is merit in exploring whether or not minority protection might be achieved more effectively by aligning the test in CO with that in Rule 2.10(b) of the Takeovers Code. The Rule in essence provides that a resolution to approve a members' scheme can be defeated if the number of votes cast against it is more than 10% of the votes attaching to all disinterested shares ("10% objection rule").

8. SFC's suggestion was echoed by some deputations. Mr David Webb suggested that in addition to abolishing the headcount test, the 10% objection rule should be included in CB. It should also remain in the Takeovers Code which applies to listed companies incorporated both in and outside Hong Kong. Similar suggestion was also made by Prof Mark Williams and Mr Daniel Lam of the Hong Kong Polytechnic University.

9. A few other deputations (including the Hong Kong General Chamber of Commerce and the Chamber of Hong Kong Listed Companies) did not agree that the 10% objection rule should be included in the CB. The main reasons include –

(a) such a rule is inappropriate for private companies. In the context of a private company, the 10% objection rule may give too much of a veto power to a few shareholders;

(b) statutory backing for the 10% objection rule is unnecessary. There is no evidence that listed companies have proceeded with schemes when the requirement in Rule 2.10(b) of the

Takeovers Code cannot be met. In other words, the current Takeovers Code has worked well;

(c) the Takeovers Code, as administered by SFC, is a much more flexible and appropriate instrument for dealing with any necessary protections for minority interests. SFC is close to the market and any changes in processes required to accommodate the changing circumstances can be more readily identified and implemented through the Takeovers Code than by legislation; and

(d) there may be difficulties in defining disinterested shares in the absence of administration by SFC.

Creditors' Scheme

10. Some deputations also commented on creditors' schemes. The Hong Kong Institute of Directors and Mr David Webb expressed support for abolition of the headcount test for creditors' schemes. On the other hand, some suggested that the headcount test should be retained for creditors' schemes (including the Society of Chinese Accountants & Auditors and some Small and Medium Enterprises associations). The Hong Kong Association of Banks suggested that the new court discretion to dispense with the headcount test should be extended to creditors' schemes because circumstances similar to share splitting may also occur under creditors' schemes.

Bills Committee's Views

11. Having considered the views of the deputations, the Bills Committee requested the Administration to –

(a) provide information regarding measures in the CB that are aimed at protecting minority shareholders;

(b) provide statistics on privatization schemes that have passed or failed the headcount test;

(c) provide an update on the retention or otherwise of the headcount test in overseas jurisdictions; and

(d) explore other possible options to protect minority

shareholders' interest, if the headcount test is to be replaced, and revert to the Bills Committee on the proposed way forward.

Administration's Response

Protection of Minority Shareholders

12. Enhancing the protection of minority shareholders is a key feature of CB. The more notable examples include –

(a) Part 14 (Remedies for Protection of Companies' or Members' Interests) – this Part contains provisions relating to the members' right to inspect company records and the remedies available to members when their interests are compromised. These include remedies for unfair prejudice, for others' conduct in relation to the companies, and derivative action arising from misconduct against companies.

(b) In Part 11 (Fair Dealing by Directors) – there are specific rules that require fair dealing on the part of the directors to avoid conflicts of interests.

(c) Part 12 (Company Administration and Procedure) – dealing with shareholders' engagement in major decision-making. New measures include providing members with a right to propose a resolution at meeting, requiring companies to circulate at their expense members' statements and proposed resolutions for annual general meetings, lowering the threshold requirement for the right to demand a poll, and enhancing members' rights to appoint proxies.

(d) For more important transactions/actions, there will be more stringent requirements to protect minority members' interests. For example, in the case of a takeover offer, an offeror may only "squeeze out" remaining minority members if the offeror has acquired 90% in number of the shares to which the offer relates.

Statistics on Privatization Schemes

13. As advised by SFC, there were 42 privatization schemes proposed by listed companies by way of scheme of arrangement between 1 January 2005 and end 2011. Of these 42 schemes, two failed the headcount test. In these two schemes, the approval of 75% majority in value, as required under CO, was not secured either.

Headcount Test in Overseas Jurisdictions

14. In the case of UK and Australia, there have been recommendations for the abolition of the headcount test. However, there is no concrete plan to abolish the headcount test for the time being. Singapore still retains the test. For Cayman Islands, the headcount test is abolished in respect of mergers and consolidations but not in relation to arrangements and reconstructions. However, it should be pointed out that the abovementioned jurisdictions do not have rules similar to the 10% objection rule of the Takeovers Code. Hence, the headcount test is an important safeguard to project minority shareholders. As for New Zealand, the headcount test was present in section 205 of the repealed Companies Act 1955, but not in the current Companies Act 1993.

Proposed Way Forward

15. The majority view among the deputations is to abolish the headcount test. The main concerns are that the test is contrary to the "one share, one vote" principle and it has inherent problems, such as vote manipulation through share splitting and the difficulty to reflect the wish of the overwhelming majority of listed shares held in the names of nominees and custodians. These are valid concerns.

16. On the other hand, there is also a general consensus that, given the binding nature of these schemes, there should be adequate safeguard to protect the interest of the minority shareholders. If the headcount test is abolished without any replacement safeguard, the only test under the CB will be the requisite approval given by at least 75% of the voting rights of the members present and voting at the meeting. In terms of the level of statutory protection for minority shareholders, this is incommensurate with the binding nature of the schemes.

17. A few deputations (Mr David Webb and academics) suggested replacing the headcount test with the 10% objection rule of the Takeovers

Code. The SFC suggested that there is merit in exploring whether or not minority protection might be achieved more effectively by adopting the 10% objection rule. We believe that the rule, if suitably adapted to fit into the CB context, would be a balanced, sensible alternative. First, it upholds the "one share, one vote" principle whilst at the same time provides an added safeguard to protect minority shareholders' interest. Secondly, as compared to the headcount test, which does not differentiate between interested and disinterested shareholders in the counting of votes, the 10% objection rule clearly puts the veto power in the hands of the disinterested shareholders only. The 9:1 ratio also provides a high threshold that reflects the wish of the absolute majority view of disinterested shareholders which is required to be met before a proposed scheme becomes binding on dissenting shareholders. Thirdly, it avoids the inherent deficiencies of the headcount test as pointed out by many commentators. Fourthly, it provides a more certain and predictable framework for the proposer of a scheme to assess whether or not to put forward a scheme.

Proposed 10% Objection Rule

18. We propose to adopt the concept of the 10% objection rule of the SFC Takeovers Code, with suitable modification, to replace the headcount test. When making this proposal, we are mindful that the new test under CB would be applicable to public and private companies[2], and to large as well as small- and medium-sized companies. The test should therefore be reasonably simple and easy to administer so as to provide legal certainty and facilitate compliance by various parties. Besides, it should have internal consistency with the concepts and definitions adopted in other provisions of Part 13 of CB which differentiate between "interested" and "disinterested" members when dealing with changes in ownership of a company.

19. In short, we propose to replace the headcount test in clause 664 with a new requirement to the effect that the number of votes cast against the resolution to approve a scheme of arrangement is not more than 10% of the votes attached to all disinterested shares. The requirement would apply to the following two types of schemes of arrangement –

(a) takeover offer as defined in clause 678, with suitable modifications; and

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[2] Covering both types of company in the case of takeover offers and covering listed companies only in the case of general offers for share buy-backs.

(b) general offer for share buy-back as defined in clause 696.

Parties that may be included in the calculation of "interested shares" are: (a) the company which makes the buy-back offer and the non-tendering member, plus their associates and nominees; and (b) the offeror and his associates and nominees. The term "associate" will adopt the definition in clauses 658[3].

--------- 20. A copy of the CSA to reflect the above proposal is at **Annex** (English only).

21. After making the above change, a scheme can only be implemented with the sanction of the Court. In other words, the existing position under the CO, i.e. the Court playing the role of the gatekeeper, will be maintained.

22. We have consulted SFC in the course of developing the proposal and the CSA. The SFC has examined the proposal and considers it is broadly consistent with Rule 2.10(b) of the Takeovers Code, which was introduced for the protection of minority shareholders.[4] The SFC believes that embedding the principle underlying Rule 2.10(b) in the CB is in the interests of minority shareholders and addresses its main concerns about the abolition of the headcount test.

Other Schemes

23. For other types of schemes such as creditors' schemes, we would suggest retaining the headcount test. This is because the major objections relating to the test does not concern these schemes and the concept of "disinterested members" is not applicable.

Financial Services and the Treasury Bureau
Companies Registry
28 May 2012

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[3] We have proposed CSAs to include "illegitimate child" in the definition and to clarify that the 30% voting power provision in clause 658(2)(b) includes voting power the exercise of which is controlled through a body corporate.

[4] Rule 2.10(b) of the Takeovers Code was introduced in 2001 in order to enhance protection of minority shareholders and achieve consistency with the statutory 90% "squeeze out" threshold in CO. The "squeeze out" provision protects minorities in the specific circumstance when a general offer is made for their shares and the offeror wishes to mandatorily acquire shares from minorities which do not accept the offer. Rule 2.10(b) applies a similar test to privatizations by scheme of arrangement also involving mandatory acquisition of minority shares.

Annex / 附件

CSAs in relation to the proposal on Headcount Test
與人數驗證建議有關的修正案

657. Interpretation

In this Part—

child (子女) includes a step-child, an illegitimate child and a child adopted in any manner recognized by the law of Hong Kong;

~~***cohabitation relationship***~~ (同居關係) means a relationship between 2 persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship;

offer period (要約期), in relation to an offer, means the period within which the offer can be accepted.

658. Associate

(1) In this Part, a reference to an associate of an offeror or member, is—

(a) if the offeror or member is a natural person, a reference to—

(i) the offeror's or member's spouse;

(ii) a person who is in a cohabitation relationship with the offeror or member;~~any other person (whether of a different sex or the same sex) with whom the offeror or member lives as a couple in an enduring family relationship;~~

(iii) a child~~, step-child or adopted child~~ of the offeror or member;

(iv) a child~~, step-child or adopted child~~ of a person falling within subparagraph (ii) who—

(A) is not a child~~, step-child or adopted child~~ of the offeror or member;

(B) lives with the offeror or member; and

(C) has not attained the age of 18;

(v) a parent of the offeror or member;

(vi) a body corporate in which the offeror or member is substantially interested; or

(vii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member; or

(b) if the offeror or member is a body corporate, a reference to—

(i) a body corporate in the same group of companies as the offeror or member;

(ii) a body corporate in which the offeror or member is substantially interested; or

(iii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member.

(1A) In this Part, a reference to an associate of a repurchasing company is a reference to—

(a) a body corporate in the same group of companies as the repurchasing company;

(b) a body corporate in which the repurchasing company is substantially interested; or

(c) a person who is a party, or a nominee of a party, to an acquisition agreement with the repurchasing company.

(2) For the purposes of subsections (1) and (1A), an offeror ~~or~~, member or repurchasing company is substantially interested in a body corporate if—

(a) the body corporate, or its directors or a majority of its directors, are accustomed to act in accordance with the directions or instructions of the offeror, ~~or~~ member or repurchasing company; or

(b) the offeror, ~~or~~ member or repurchasing company is entitled to exercise, or control the exercise of, more than 30% of the voting power at any general meeting of the body corporate.

(2A) In subsection (2), a reference to voting power the exercise of which is controlled by an offeror, member or repurchasing company includes voting power the exercise of which is controlled by another body corporate if the offeror, member or repurchasing company is entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that other body corporate.

(3) For the purposes of subsections (1) and (1A), an agreement is an acquisition agreement if—

(a) it is an agreement for the acquisition of—

(i) any of the shares to which the takeover offer or general offer relates; or

(ii) an interest in those shares; and

(b) it includes provisions imposing obligations or restrictions on any of the parties to it with respect to the use, retention or disposal of the party's interests in the shares acquired pursuant to the agreement.

661. Court may order meeting of creditors or members to be summoned

(1) The Court may, on application made for the purposes of this subsection—

(a) ~~,~~ order a meeting specified in subsection (2)(a), or a meeting specified in subsection (2)(b), or both (as the case may be) to be summoned in any manner that the Court directs; and

(b) for the purposes of section 664A(4), declare a person to be a person specified under that section.

(2) The meeting is—

(a) if the arrangement or compromise is proposed to be entered into—

(i) with the creditors of the company, a meeting of those creditors; or

(ii) with a class of the creditors of the company, a meeting of that class of creditors; and

(b) if the arrangement or compromise is proposed to be entered into—

(i) with the members of the company, a meeting of those members; or

(ii) with a class of the members of the company, a meeting of that class of members.

(3) Subject to subsection (4), an application for the purposes of subsection (1) may be made only by—

(a) in the case of a meeting of creditors, the company or any of the creditors;

(b) in the case of a meeting of a class of creditors, the company or any creditor of that class;

(c) in the case of a meeting of members, the company or any of the members; or

(d) in the case of a meeting of a class of members, the company or any member of that class.

(4) If the company is being wound up, an application for the purposes of subsection (1) may be made only by the liquidator or provisional liquidator.

(5) An application for the purposes of subsection (1) must be made in a summary way.

664. Court may sanction arrangement or compromise

(1) This section applies if the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into, agree or agrees to the arrangement or compromise.

~~(2) For the purposes of subsection (1)~~

~~(a) the creditors agree to the arrangement or compromise if, at a meeting of the creditors summoned under section 661, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise;~~

~~(b) a class of creditors agrees to the arrangement or compromise if, at a meeting of the class of creditors summoned under section 661, a majority in number representing at least 75% in value of the class of creditors present and voting, in person or by proxy, agree to the arrangement or compromise;~~

~~(c) the members agree to the arrangement or compromise if, at a meeting of the members summoned under section 661~~

~~(i) members representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and~~

~~(ii) unless the Court orders otherwise, a majority in number of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and~~

~~(d) a class of members agrees to the arrangement or compromise if, at a meeting of the class of members summoned under section 661~~

~~(i) members representing at least 75% of the voting rights of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise; and~~

~~(ii) unless the Court orders otherwise, a majority in number of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise.~~

(3) The Court may, on application made for the purposes of this subsection, sanction the arrangement or compromise.

(4) Subject to subsection (5), an application for the purposes of subsection (3) may be made only by—

(a) in the case of an arrangement or compromise proposed to be entered into with the creditors of a company, the company or any of the creditors;

(b) in the case of an arrangement or compromise proposed to be entered into with a class of creditors of a company, the company or any creditor of that class;

(c) in the case of an arrangement or compromise proposed to be entered into with the members of a company, the company or any of the members; or

(d) in the case of an arrangement or compromise proposed to be entered into with a class of members of a company, the company or any member of that class.

(5) If the company is being wound up, an application for the purposes of subsection (3) may be made only by the liquidator or provisional liquidator.

(6) An arrangement or compromise sanctioned by the Court under subsection (3) is binding—

(a) on the company or, if the company is being wound up, on the liquidator or provisional liquidator and contributories of the company; and

(b) on the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into.

(7) An order made by the Court under subsection (3) has no effect until an office copy of the order is registered by the Registrar under Part 2.

(8) If the order of the Court amends the company's articles, or any resolution or agreement to which section 612 applies, the office copy of that order delivered to the Registrar for registration for the purposes of subsection (7) must be accompanied by a copy of those articles, or the resolution or agreement, as amended.

(9) If subsection (8) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

664A. Provision supplementary to section 664(1): agreement to arrangement or compromise

(1) For the purposes of section 664(1)—

(a) the creditors agree to the arrangement or compromise if, at a meeting of the creditors summoned under section 661, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise;

(b) a class of creditors agrees to the arrangement or compromise if, at a meeting of the class of creditors summoned under section 661, a majority in number representing at least 75% in value of the class of creditors present and voting, in person or by proxy, agree to the arrangement or compromise;

(c) subject to subsection (2)(a), the members agree to the arrangement or compromise if, at a meeting of the members summoned under section 661—

(i) members representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(ii) unless the Court orders otherwise, a majority in number of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(d) subject to subsection (2)(b), a class of members agrees to the arrangement or compromise if, at a meeting of the class of members summoned under section 661—

(i) members representing at least 75% of the voting rights of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(ii) unless the Court orders otherwise, a majority in number of the class of members present and voting, in person or by proxy, agree to the arrangement or compromise.

(2) However, where the arrangement involves a takeover offer or a general offer—

(a) the members agree to the arrangement if—

(i) at a meeting of the members summoned under section 661, members representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement; and

(ii) the votes cast against the arrangement at the meeting do not exceed 10% of the total voting rights attached to all disinterested shares in the company;

(b) a class of members agrees to the arrangement if—

(i) at a meeting of the class of members summoned under section 661, members representing at least 75% of the voting rights of the class of members present and voting, in person or by proxy, agree to the arrangement; and

(ii) the votes cast against the arrangement at the meeting do not exceed 10% of the total voting rights attached to all disinterested shares of the class in the company.

(3) In subsection (2)—

acquisition agreement ( ) means an agreement within the meaning of section 658(3);

disinterested shares ( ) means—

(a) in the case of a takeover offer, shares in the company other than those held—

(i) by the offeror, or by a nominee on behalf of the offeror;

(ii) by an associate of the offeror (except a person who falls within section 658(1)(a)(vii) or (b)(iii) or a person specified in subsection (4)); or

(iii) by a person who is a party to an acquisition agreement with the offeror (except a person specified in subsection (4)), or by a nominee on behalf of the person under the acquisition agreement;

(b) in the case of a general offer, shares in the company other than those held—

(i) by a non-tendering member as defined by section 694(1), or by a nominee on behalf of the member;

(ii) by an associate of such a non-tendering member (except a person who falls within section 658(1)(a)(vii) or (b)(iii) or a person specified in subsection (4));

(iii) by a nominee on behalf of the repurchasing company as defined by section 694(1);

(iv) by an associate of such a repurchasing company (except a person who falls within section 658(1A)(c) or a person specified in subsection (4)); or

(v) by a person who is a party to an acquisition agreement with such a non-tendering member or repurchasing company (except a person specified in subsection (4)), or by a nominee on behalf of the person under the acquisition agreement;

general offer ( ) means an offer within the meaning of section 696.

(4) The person specified for the purposes of paragraph (a)(ii) and (iii) and (b)(ii), (iv) and (v) of the definition of ***disinterested shares*** in subsection (3) is a person declared under section 661(1)(b) to be a person specified under this section.

(5) For the purposes of subsections (2), (3) and (4)—

(a) an offer to acquire shares in a company is a takeover offer if—

(i) it is an offer to acquire all the shares, or all the shares of any class, in the company, except those that, at the date of the offer, are held by the offeror; and

(ii) the terms of the offer are the same—

(A) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or

(B) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates; and

(b) an offer under which consideration is provided for the cancellation of shares in a company is also a takeover offer if—

(i) it is an offer under which consideration is provided for the cancellation of all the shares, or all the shares of any class, in the company, except—

(A) those that, at the date of the offer, are held by the offeror;

(B) those that are specified in the offer document as shares that are not to be cancelled under the offer; and

(C) those that, at the date of the offer, are held by a member residing in a place where such an offer is contrary to the law of the place; and

(ii) the terms of the offer are the same—

(A) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or

(B) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates.

(6) In subsection (5)—

shares ( ) means shares that have been allotted on the date of the offer.

(7) In subsection (5)(a)(i) and (b)(i), a reference to shares that are held by an offeror—

(a) includes shares that the offeror has contracted, unconditionally or subject to conditions being satisfied, to acquire; but

(b) excludes shares that are the subject of a contract—

(i) entered into by the offeror with a holder of shares in the company in order to secure that the holder will accept the offer when it is made; and

(ii) entered into for no consideration and by deed, for consideration of negligible value, or for consideration consisting of a promise by the offeror to make the offer.

(8) For the purposes of subsection (5)(a)(ii) and (b)(ii), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the value of consideration offered for the shares allotted earlier as against the value of consideration offered for those allotted later, the terms of the offer are to be regarded as the same in relation to all the shares concerned if—

(a) shares carry an entitlement to a particular dividend that other shares of the same class, by reason of being allotted at a different time, do not carry;

(b) the difference in value of consideration merely reflects that difference in entitlement to dividend; and

(c) but for the difference in the value of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(9) For the purposes of subsection (5)(a)(ii) and (b)(ii), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the form of consideration offered, the terms of the offer are to be regarded as the same in relation to all the shares concerned if—

(a) the law of a place outside Hong Kong precludes an offer of consideration in the form specified in the terms of the offer, or precludes it except after compliance by the offeror with conditions with which the offeror is unable to comply or that the offeror regards as unduly onerous;

(b) consideration in another form is offered to a person to whom an offer of consideration in the specified form is so precluded;

(c) the person is able to receive consideration in that other form that is of substantially equivalent value; and

(d) but for the difference in the form of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(10) Despite subsection (5), a takeover offer may include, among the shares to which it relates, shares that will be allotted after the date of the offer but before a date specified in the offer.

(11) In subsections (2) to (10), a reference to shares in a company includes—

(a) debentures that are convertible into shares in the company; and

(b) securities of the company that are convertible into, or entitle the holder to subscribe for, shares in the company.

Those subsections apply to those debentures or securities as if they were shares of a separate class of the company, and a reference to a member or a holder of shares in those subsections is to be read accordingly.