

**Bills Committee on  
Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015  
Response to Matters Raised by Members at the Meeting on 30 November 2015**

This paper sets out the Government's response to the matters, as listed in the letter from the Clerk to the Bills Committee dated 2 December 2015, raised by Members in relation to the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 ("the Bill") at the meeting on 30 November 2015.

Safeguards for employees under the provisions on "transaction at an undervalue"

2. The Bill proposes that the court, in certain circumstances, may set aside a transaction at an undervalue entered into by a company within five years before the commencement of its winding up. This is to ensure that the company's assets will not be inappropriately disposed of or transferred prior to its winding up and preserve as far as possible the company's assets available for distribution to the creditors. However, the relevant provisions of the Bill will not affect genuine business transactions e.g. where a company entered into a transaction with a person, at the time of the transaction the value of the consideration paid by that person for the transaction was not "significantly" less than the value of the goods or other considerations provided by the company; or where the company entered into the transaction in good faith at that time for the purpose of carrying on its business and there were reasonable grounds for believing that the transaction would benefit the company.

3. Some Members expressed concern about whether there would be adverse impact on employees who received commission from a transaction entered into by a company and the transaction was subsequently ruled by the court as a transaction at an undervalue. Employees' commission is generally calculated according to employment contracts or company policies, rather than as part of a transaction between the company and a third party. As the relevant provisions are applicable only to transactions which are at an undervalue, if the employee receives commission payment in accordance with the prevailing arrangement of the company in return for rendering his service in that transaction, the commission payments made to the employee will not in normal circumstances be affected.

Measures to streamline the winding-up process

4. The Bill has introduced a number of provisions to simplify the proceedings of the committee of inspection ("COI")<sup>1</sup> and promote court-free procedures. They include -

---

<sup>1</sup> In a court winding-up or a creditors' voluntary winding-up, a COI may be appointed to supervise and give directions to the liquidator.

- (a) allowing the bills of costs or charges of the liquidators' agents<sup>2</sup> in a court winding-up to be approved by the COI. If approved, the matter would not need to be put to the court for examination and determination as currently required; and
- (b) enabling the liquidator in a court winding-up to exercise the power to appoint a solicitor to assist in performing the liquidator's duties by giving seven days' advance notice to the COI (or to the creditors in case there is no COI) instead of the current requirement for obtaining the sanction of the court or the COI.

5. At present, the bills of costs or charges of the liquidators' agents in a court winding-up are to be examined and determined by the court. Such procedure can be costly and time-consuming. The proposal in paragraph 4(a) will streamline the process for determining the bills of costs or charges of the liquidators' agents, which will in turn reduce the costs and time for administering winding-up cases to the benefit of the creditors involved. During the public consultation, we received 18 submissions<sup>3</sup> on the proposal. Among them, 16 submissions supported the proposal, one submission objected to the proposal without giving reasons, and another submission objecting to the proposal remarked that small and medium enterprises creditors may not have sufficient knowledge to determine the reasonable costs and charges to reach the agreement with liquidators. The current requirement for liquidators to deliver relevant bills of costs or charges to the court for examination and determination offers better protection for creditors. In this connection, we responded in the consultation conclusions that this proposal aimed to provide an alternative for an agreement to be made between the two parties on the costs or charges of the liquidators' agents with a view to saving time and costs required for court's examination and determination. If the liquidators are unable to reach an agreement with the COI members, the liquidators are still required to make use of the existing mechanism in determining the costs or charges of their agents.

6. As regards the proposal in paragraph 4(b), given that it is very common for a liquidator to engage a solicitor to assist in the performance of his duties, and sanction is usually given for the liquidator to appoint one in a normal court winding-up case, there is room for streamlining the existing procedures. During the public consultation, we received 19 submissions<sup>4</sup> on the proposal. Among them, 17 submissions supported the proposal, one submission objected to the proposal without giving reasons, and the other submission stated that to protect the interests of the company concerned and its creditors, the current requirement for a liquidator to apply to the court or the COI for exercising the power of appointing a solicitor in a court winding-up would enable the court, the COI or the creditors to supervise and maintain checks and balances on the liquidator. In this connection, we responded in the

---

<sup>2</sup> Including solicitors, accountants and auctioneers, etc.

<sup>3</sup> Submissions received during the public consultation and the relevant consultation conclusions (including summary of respondents' views and Government's responses) are available on the website of the Financial Services and the Treasury Bureau at <http://www.fstb.gov.hk/fsb/ppr/consult/impcill.htm>.

<sup>4</sup> See Footnote 3.

consultation conclusions that sanction is usually given for the liquidator to exercise the power to appoint a solicitor in a normal court winding-up case, and after balancing the interests of different parties, the Bill proposes that a liquidator must give seven days' advance notice to the COI or, where there is no COI, to the creditors for the exercise of this power.

#### Measure relating to the redemption or buy-back for a company's own shares out of capital

7. A Member was concerned that the proposal might hinder the normal redemption and buy-back of shares by companies. In this connection, we must point out that the proposal only targets at shares redemption or buy-back "out of the company's capital" and applies only when the company is wound up insolvent within one year of the redemption or buy-back. The proposal aims to ensure that the company's capital is maintained and will not be improperly returned to its shareholders prior to its insolvent winding up at the expense of the interests of the creditors of the company being wound up. The proposal corresponds to the relevant provisions of the Companies Ordinance (Chapter 622) which provide that prior to the relevant redemption or buy-back, generally speaking, the directors of the company must make a solvency statement<sup>5</sup> to the effect that the company is able to pay its debts in full within one year after the transaction, before payment for shares redemption or buy-back can be made out of the company's capital. The proposed provisions will not affect a redemption or buy-back made with payment in other forms, i.e. out of the company's distributable profits or out of the proceeds of a fresh issue of shares for the purpose of the redemption or buy-back.

#### Changes to the existing insolvency regime

8. The major proposals<sup>6</sup> of the Bill are to improve the existing corporate winding-up regime by introducing new measures and enhancements to the existing regime, the details of which are in Annex. We will introduce the details of the provisions for each of these new and enhanced measures during the clause-by-clause examination stage of the Bills Committee.

**Financial Services and the Treasury Bureau**  
**Official Receiver's Office**  
**11 December 2015**

---

<sup>5</sup> Sections 205 and 206 of the Companies Ordinance (Chapter 622).

<sup>6</sup> Major proposals of the Bill are listed in paragraphs 6, 8 and 10 of the Legislative Council Brief issued on 30 September 2015.

**Major proposals in the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 (“the Bill”) for improving the existing corporate winding-up regime**

	<b>Major Proposals of the Bill</b>	<b>Existing Corporate Winding-Up Regime</b>
	<b>(a) New Measures</b>	
1.	<p><u>Transaction at an undervalue</u> The Bill provides for the power of the court to set aside transactions at an undervalue entered into by a company within five years before the commencement of its winding up. A “transaction at an undervalue” is defined as a transaction entered into by a company prior to its winding up that involves an outright gift given by the company to a party, or entered into by the company with a party on terms that provides for the company to receive no consideration or for a consideration which is significantly less than the value of the subject of the transaction. However, the relevant provisions in the Bill will not affect genuine business transactions. For example, the following transactions will not be affected -</p> <p>(i) where a company entered into a transaction with a person and at the time of the transaction the value of the consideration given by the person was not “significantly” less than the value of the goods or other consideration provided by the company; or</p> <p>(ii) where the company entered into the transaction in good faith at that time for the purpose of carrying on its business and there were reasonable grounds for believing that the transaction would benefit the company.</p>	There is no relevant provision in the existing legislation.
2.	<p><u>Redemption or buy-back of shares out of the company’s capital</u> The Bill provides for the liabilities of directors and members concerned to contribute to the assets of the company in connection with a redemption or buy-back of the company’s own shares out of capital in cases where the company is wound up insolvent within one year of the</p>	There is no relevant provision in the existing legislation.

	<b>Major Proposals of the Bill</b>	<b>Existing Corporate Winding-Up Regime</b>
	relevant payment out of capital.	
3.	<p><u>Appropriate restrictions on the powers of liquidators, provisional liquidators and directors under specified circumstances in voluntary winding-up</u>  For creditors' voluntary winding-up, before the holding of the first creditors' meeting, the powers of the following persons will be subject to appropriate restrictions -</p> <ul style="list-style-type: none"> <li>(i) liquidators appointed by members; and</li> <li>(ii) provisional liquidators appointed by directors.</li> </ul> <p>In addition, for voluntary winding-up, there will be appropriate restrictions on the powers of directors before the appointment of liquidators. If the relevant liquidators, provisional liquidators or directors without reasonable excuse fail to comply with the requirements, they will be liable to a fine.</p>	There is no relevant provision in the existing legislation.
4.	<p><u>Communication by electronic means</u>  Communications by a liquidator with members of the committee of inspection ("COI") and other persons (such as creditors and contributories) by electronic means will be allowed with their prior consent, while a recipient of a document from the liquidator may still request the document to be sent in hard copy form.</p>	There is no relevant provision in the existing legislation.
5.	<p><u>Measures for streamlining and rationalising the proceedings of COIs</u>  These measures include -</p> <ul style="list-style-type: none"> <li>(i) allowing remote attendance at meetings of COIs by the use of technology; and</li> <li>(ii) enabling COIs to perform their functions and make decisions through written resolutions sent by post or electronic means.</li> </ul>	There is no relevant provision in the existing legislation.

	<b>Major Proposals of the Bill</b>	<b>Existing Corporate Winding-Up Regime</b>
6.	<p><u>Disclosure requirement for prospective provisional liquidators or prospective liquidators</u></p> <p>A prospective provisional liquidator or prospective liquidator is required to disclose specified relationships between him or his immediate family members, etc. and the company being wound up before his formal nomination or appointment in order to increase transparency in the appointment process. A person will be liable to a fine if he acts as a provisional liquidator or liquidator in contravention of this requirement.</p>	<p>There is no relevant provision in the existing legislation.</p>
<b>(b) Enhancement of Existing Measures</b>		
7.	<p><u>Unfair preferences</u></p> <p>The Bill introduces standalone provisions on unfair preferences for enhancing clarity.</p>	<p>There are anomalies in the existing legislation (which incorporates and applies the relevant provisions in the Bankruptcy Ordinance (Chapter 6) (“BO”) by reference) arising from applying the relevant BO provisions in the corporate winding-up context.</p>
8.	<p><u>Liabilities of liquidators arising from misfeasance, breach of duty or breach of trust</u></p> <p>The Bill provides that a liquidator would not be absolved from liabilities arising from the liquidator’s misfeasance, breach of duty or breach of trust notwithstanding that he has obtained a court order releasing him as liquidator after the completion of the winding-up, such that a creditor or other interested party may apply to the court for leave to take legal action against the liquidator after the liquidator’s release.</p>	<p>Section 276 of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) (“CWUMPO”) provides, inter alia, that if any past or present liquidator of the company has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of duty or breach of trust in relation to the company, the court may compel such past or present liquidator to repay or restore the money or property or to contribute such sums to the assets of the company by way of compensation as the court thinks fit. However, there is another provision in CWUMPO (section 205) which authorizes the court to order a release of the liquidator and to discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company. As</p>

	Major Proposals of the Bill	Existing Corporate Winding-Up Regime
		the present provisions are not clear, it is therefore proposed to introduce express provisions to provide that notwithstanding a liquidator has obtained a court order releasing him as liquidator, he would not be absolved from liabilities arising from his misfeasance, breach of duty or breach of trust. Other professionals in Hong Kong currently have to assume similar liabilities in their fields.
9.	<p><u>Enhancing the arrangements for the first creditors’ meeting upon the commencement of a creditors’ voluntary winding-up</u>  To ensure that the creditors in a creditors’ voluntary winding-up have sufficient time and information to prepare for the meeting and make informed decisions, enhancing the requirements relating to the first creditors’ meeting and company’s meeting by-</p> <p>(i) prescribing a minimum notice period of seven days for calling the first creditors’ meeting; and</p> <p>(ii) removing the existing requirement of holding the first creditors’ meeting on the same day as, or the next following day after, the day of the company’s meeting, and prescribing that the first creditors’ meeting shall be held within 14 days after the holding of the company’s meeting.</p>	The existing legislation does not provide for the minimum period of notice required for calling the first creditors’ meeting. It only provides that the company shall arrange to hold the first creditors’ meeting on the same day as, or the next following day after, the day of the company’s meeting in which the resolution for voluntary winding-up is proposed. The relevant provisions of the existing legislation fail to ensure reasonably sufficient notice period for creditors to prepare for the first creditors’ meeting and to make appropriate decisions with sufficient information and time.
10.	<p><u>Charges of agents</u>  The Bill provides that the bills of costs or charges of the liquidators’ agents in a court winding-up can be approved by the COI.</p>	Under the existing legislation, the bills of costs or charges of the liquidators’ agents shall be put to the court for examination and determination. Such procedure can be costly and time consuming.
11.	<p><u>Appointment of solicitors</u>  The Bill provides that the liquidator in a court winding-up can exercise the power to appoint a solicitor to assist in performing the liquidator’s duties by giving seven days’ advance notice to the COI (or, in case there is no COI, to the creditors).</p>	Under the existing legislation, the liquidator is required to obtain the sanction of the court or the COI before appointing a solicitor. It is very common for a liquidator to engage a solicitor to assist him in the performance of his duties, and sanction is usually given for the liquidator to appoint solicitor in normal court winding-up cases. There is room for saving costs and time for such procedure.

	<b>Major Proposals of the Bill</b>	<b>Existing Corporate Winding-Up Regime</b>
12.	<p><u>Powers, duties, basis for determining remuneration, and tenure of provisional liquidators in court winding-up</u>  The Bill sets out more clearly the powers, duties, basis for determining remuneration, and tenure of office of a provisional liquidator appointed under different provisions of the existing legislation in a court winding-up.</p>	<p>Some provisions in the existing legislation about provisional liquidators in court winding-up are not adequately clear and certain.</p>
13.	<p><u>Expanding the scope of prohibition on offering inducement</u>  For the provision on prohibition on offering an inducement to a member / creditor of a company, the Bill proposes expanding the scope to cover any such inducement offered to any person.</p>	<p>For deterring touting for appointment as provisional liquidator or liquidator, the existing legislation prohibits offering an inducement to a member / creditor of a company with a view to securing or preventing an appointment or nomination as a provisional liquidator or liquidator of that company. Apart from the members or creditors of a company, other persons (such as the directors or the members of the management of the company) may have an influence on the choice of the liquidator.</p>
14.	<p><u>Expanding the list of persons disqualified for appointment as a provisional liquidator or liquidator</u>  The Bill expands the list of persons disqualified for appointment as a provisional liquidator or liquidator to cover-</p> <ul style="list-style-type: none"> <li>(i) persons having a conflict of interest;</li> <li>(ii) persons against whom a disqualification order has been made by the court and remaining in effect; and</li> <li>(iii) persons with mental incapacity.</li> </ul> <p>The Bills provides that a person under (i) or (ii) above may be appointed as a provisional liquidator or liquidator with the leave of the court.</p>	<p>The existing legislation only provides that a person who is an undischarged bankrupt and a body corporate are not qualified for appointment as liquidator. The scope is too narrow and it is therefore suggested to include persons having a conflict of interest etc. in the scope.</p>
15.	<p><u>Removal and resignation of liquidator</u>  The Bill stipulates the procedures for removal of liquidator in creditors' voluntary winding-up and resignation of liquidator in voluntary</p>	<p>The existing legislation has stipulated the procedures for removal of liquidator in court winding-up and members' voluntary winding-up;</p>



	<b>Major Proposals of the Bill</b>	<b>Existing Corporate Winding-Up Regime</b>
	winding-up.	and for resignation of liquidator in court winding-up. For the completeness of the regime, it is necessary to stipulate the relevant procedures in voluntary winding-up.
16.	<p><u>Private and public examination procedures</u> The Bill seeks to improve the private and public examination procedures of the existing legislation. These procedures are part of the process of investigation conducted by the liquidator during a winding-up to ascertain information about the company's affairs and property etc.</p>	After a review, it is found that there is room for improvement for the existing legislation regarding the private and public examination procedures. For example, the existing legislation does not have express provisions on whether a person summoned for the examination may claim the privilege against self-incrimination to refuse to answer questions, or may employ a solicitor at his own expense, etc.
17.	<p><u>Measure for streamlining and rationalising the proceedings of COI</u> The Bill prescribes the maximum and minimum numbers of members of COIs.</p>	<p><i>COI in a court winding-up</i> There is currently no express provision in the legislation setting a maximum and minimum number of members of a COI, however, notwithstanding any vacancy in the COI, the members may act so long as the number of members does not fall below two.</p> <p><i>COI in a creditors' voluntary winding-up</i> According to the existing legislation, the creditors' meeting may appoint a COI consisting of not more than five persons. There is no provision which sets a minimum number of members of a COI, however, notwithstanding any vacancy in the COI, the members may act so long as the number of members does not fall below two.</p>