Bills Committee on Financial Institutions (Resolution) Bill

Response to Matters Raised by Members at the Meeting on 15 March 2016

This paper sets out the Government's response to the matters raised by Members in relation to the Financial Institutions (Resolution) Bill (the Bill) at the Bills Committee (BC) meeting on 15 March 2016.

Transfer under a Part 5 instrument

Clause 33(3) of the Bill provides that the value of any consideration due to the transferor in respect of any transfer under a Part 5 instrument must be "fair and reasonable" in the circumstances. Clauses 35 and 36 set out the requirement for a resolution authority (RA) to make a valuation before applying a stabilization option to, or making a capital reduction instrument in respect of, a within scope financial institution (FI); and how the valuation is to be made. The Administration is requested to consider stating explicitly in clause 33(3) that the "fair and reasonable" consideration in the circumstances is subject to the valuation made under clauses 35 and 36, so as to enhance the clarity of the provisions.

2. The RA, pursuant to clause 35(1), must make a valuation before applying a stabilization option to, or making a capital reduction instrument in respect of, a within scope FI. Such valuation must be made to inform a range of resolution decisions, including the decision of the RA as to the value of any consideration due in respect of anything transferred under a Part 5 instrument.

3. In light of the discussion at the BC meeting on 15 March 2016, we confirm that the assessment of "fair and reasonable" consideration that is due to a transferor in respect of any transfer under a Part 5 instrument (pursuant to clause 33(3)) is to be made with regard to the valuation performed under clause 35(1) (in line with the requirements of clause 36). To enhance clarity, we will therefore move a Committee Stage Amendment to make such explicit reference in clause 33(3) that the "fair and reasonable" consideration is closely connected to the valuation pursuant to clauses 35 and 36.

Business reorganization plan

Clause 63(1) of the Bill requires an RA to include in the bail-in instrument that "one or more directors of the FI" have to prepare and submit to the RA a business reorganization plan in respect of the FI. Clause 63(3) further provides that "a person" may submit or re-submit a business reorganization plan to the RA for approval. It is unclear whether the "person" referred to in clause 63(3) is the "one or more directors of the FI". To better reflect the legislative intent, the Administration is requested to consider replacing "a person" in clause 63(3) with "one or more directors of the FI".

4. We agree and will move a Committee Stage Amendment to replace "a person" in the lead-in provision with "a director of the financial institution", and to replace "the person" in paragraph (b) with "the director".

Drafting issues

In the light of members' concerns, the Administration has agreed to:

(a) review the Chinese rendition "內部財務調整文書" for the term "bail-in instruments" to better reflect its meaning in the context of the Bill. The Administration is also requested to provide information on the Chinese renditions adopted by the Mainland and Taiwan for "bail-in instruments" and make reference to such renditions in reviewing the term; and

5. Given the absence of equivalent, stand-alone legislation in the Mainland or in Taiwan, our desktop search of the Chinese terms adopted by the Mainland and Taiwan for "bail-in" largely relied on unofficial publications. Most of the terms we found include the element "自救" or "債權人紓困".

6. When preparing the Bill, "自救" (which literally means "self-help") was not chosen because bail-in is not entirely a self-help measure. Bail-in essentially means the compulsory write-off and/or conversion of the liabilities of a failing FI into shares to absorb losses and recapitalize the failing FI. Since losses are imposed compulsorily on the shareholders and creditors of the FI by an RA, it is not accurate to give

connotations of "self-help (自救)" by the FI resulting in the recapitalization.

7. As for "債權人紓困", which has the meaning of "creditors to relieve the distress", we consider that the term fails to convey the meaning of "writing off or converting into shares" and "recapitalizing the FI", both of which are core concepts of bail-in.

8. Having carefully considered the above, we are of the view that "內部財務調整" should reflect the meaning of bail-in more accurately and comprehensively.

9. In practice, a bail-in instrument will be made in the form of a written document setting out the terms of the bail-in and other matters which may be contained in a bail-in instrument.[1] Hence, we believe that the use of the term "文書" for "instrument" in the context reflects the policy intent. While we have not been able to locate a specific reference showing how the term "bail-in instrument" is rendered in Chinese in the Mainland or in Taiwan, we note that the use of "文書" for "instrument" in this context is consistent with how the word "instrument" is rendered in relevant contexts in other ordinances.[2]

(b) consider providing the long form of TPO (i.e. temporary public ownership) in the definition of "TPO company" in clause 2 of the Bill.

10. We agree and will move a Committee Stage Amendment to provide the long form "temporary public ownership" in the definition of TPO company in the English text.

In the light of comments by the legal adviser to the Bills Committee, the Administration is requested to:

(a) review the Chinese text of clause 35(2) as the phrase "如作出估

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[1] See Subdivision 5 of Division 1 of Part 5, which has already been covered during clause-by-clause examination at the BC meeting on 15 March 2016; and Schedule 6, which we anticipate will be covered at the BC meeting on 31 March 2016.

[2] Examples include "instrument (文書)" in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) and section 2 of the Trustee Ordinance (Cap. 29), "instrument in writing (書面形式的文書)" in the Land Registration Ordinance (Cap. 128) and "instrument of transfer (移轉文書)" in the Merchant Shipping (Registration) Ordinance (Cap. 415).

值的時間，早於處置機制當局 …" seems to have different emphasis from the English text; and

11. We take note of Assistant Legal Adviser's views expressed at the BC meeting on 15 March 2016 and have carefully deliberated the Chinese text of clause 35(2). We consider that no change to this clause is necessary. Our rationale is set out below.

12. In preparing the bilingual texts of legislation, we follow the respective language rules and usage customs of the Chinese and English languages respectively. The Chinese text of the legislation should be treated as a stand-alone piece of legislation, without being subsumed under the English version as a "shadow" version of the legislation. The structure and presentational style adopted in the Chinese and English texts of a piece of legislation might differ depending on the context and usage, as long as there is no discrepancy in meaning and the legal effect of the two texts. Having critically considered the meaning and legal effect of clause 35(2) in both versions, we consider that they are essentially equivalent and hence no change is considered necessary.

(b) review the Chinese text of clause 58(6)(a) to simplify the drafting as the first sentence (i.e. 顧及根據第 35(1)條作出的估值) may overlap with the second sentence (i.e. 顧及該項估值的出發點).

13. We have reviewed the Chinese text of clause 58(6). We will move a Committee Stage Amendment to improve clarity of the Chinese text and accordingly amend the English text to align with the Chinese wording of the provision.

Financial Services and the Treasury Bureau (Financial Services Branch)
Hong Kong Monetary Authority
Securities and Futures Commission
Office of the Commissioner of Insurance
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