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Paper for the House Committee

**Report of the Bills Committee on Bank of Communications (Hong Kong)
Limited (Merger) Bill**

Purpose

This paper reports on the deliberations of the Bills Committee on Bank of Communications (Hong Kong) Limited (Merger) Bill ("the Bills Committee").

Background

2. To implement a bank merger, acquisition or transfer of business (collectively referred to as "merger") in Hong Kong, the institutions concerned must first obtain the relevant supervisory approvals of the Monetary Authority ("MA") under the Banking Ordinance (Cap. 155) ("BO"). In addition, they should find a legally effective way to transfer the existing assets and liabilities to a new entity or to the institution which remains after the merger. Currently, there is no common international practice in effecting transfer of banking business. Mergers in Hong Kong involving locally-incorporated banks are normally effected by private legislation with the approval of the Legislative Council ("LegCo").¹

¹ For details of the framework of transferring banking business in Hong Kong, please refer to the information note dated 27 January 2006 and provided by the Financial Services and the Treasury Bureau to the Panel on Financial Affairs (LC Paper No. [CB\(1\)813/05-06\(01\)](#)).

Bank of Communications (Hong Kong) Limited (Merger) Bill

3. The Bank of Communications (Hong Kong) Limited (Merger) Bill ("the Bill") is a Member's bill introduced by Mr NG Leung-sing (with the consent of the Chief Executive) to provide for the transfer of the activities, assets and liabilities which constitute the retail banking business and private banking business of Bank of Communications Co., Ltd. ("BCOM") located in Hong Kong, currently operated through a branch in Hong Kong ("BCOM, Hong Kong Branch"), to a newly established and wholly owned subsidiary within the BCOM group of companies of which BCOM is the ultimate holding company ("the proposed business transfer"). The subsidiary, Bank of Communications (Hong Kong) Limited ("BCOM (Hong Kong)"), is incorporated in Hong Kong and holds a full banking licence under BO.

4. The LegCo Panel on Financial Affairs was consulted on the Bill at its meeting on 6 July 2015. The Bill was published in the Gazette on 18 and 24 December 2015, and received its First Reading at the LegCo meeting of 22 June 2016. The main provisions of the Bill are summarized in **Appendix I**.

The Bills Committee

5. At the House Committee meeting on 24 June 2016, Members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix II**. Under the chairmanship of Mr SIN Chung-kai, the Bills Committee has held three meetings to discuss the Bill with BCOM, Hong Kong Branch and the Administration.

Deliberations of the Bills Committee

Reasons for the proposed business transfer

6. The Bills Committee notes that it has been the Government's policy to support consolidation in the banking sector, subject to the overall aims of promoting the stability of the banking system and ensuring appropriate protection for relevant depositors. According to the Hong Kong Monetary Authority ("HKMA"), its supervisory policy is that, a non-locally incorporated bank with sizeable retail banking business in Hong Kong should operate in the form of a locally-incorporated bank rather than a branch.²

² According to HKMA, the policy in question was formally introduced in 2011.

Locally-incorporated banks are required to observe HKMA's requirements in relation to, among others, corporate governance, capital, large exposure limits and connected lending limits. These supervisory requirements enable HKMA to more effectively carry out its duty to protect depositors under BO.

7. The Bills Committee further notes that according to BCOM, Hong Kong Branch, the proposed business transfer is part of BCOM's strategy to expand and intensify its business, and is in line with the rising trend for international financial institutions to transfer their retail banking businesses to locally-incorporated subsidiaries. By localizing governance and interacting directly with the service targets, the proposed business transfer demonstrates BCOM's commitment to its customers, employees and business partners in Hong Kong. As BCOM (Hong Kong), the newly established subsidiary, will have a corporate governance structure consisting mainly of an independent board of directors, board-level committees and senior management in accordance with the regulatory requirements, this will strengthen the internal governance of the bank and enhance the transparency of its operation.

8. Noting the regulatory benefits arising from subsidiarization, members have enquired about whether HKMA will encourage more non-locally incorporated banks to operate through locally-incorporated subsidiaries in Hong Kong. The Chairman and Mr James TO have queried why HKMA has not requested BCOM to subsidiarize its retail banking business in Hong Kong earlier.

9. HKMA has advised that at present, there are 156 banks which have been granted a banking licence by MA to carry on banking business in Hong Kong. BCOM is currently the only licensed bank conducting sizeable retail banking business in the form of a branch.³ In accordance with its supervisory policy, HKMA supports the proposed business transfer. HKMA points out that non-locally incorporated banks will take into account, among other factors, the nature and scale of their banking businesses in Hong Kong, when considering whether and when to take forward subsidiarization. In this connection, HKMA exercises flexibility of its supervisory policy as appropriate having regard to the unique circumstances of individual banks.

³ Please refer to the paper provided by HKMA and issued to the Bills Committee on 7 July 2016 (LC Paper No. [CB\(1\)1106/15-16\(05\)](#)) for more information on the operation of retail banking businesses by other non-locally incorporated banks operating through branches in Hong Kong.

Vesting of undertakings in Bank of Communications (Hong Kong) Limited

Scope of banking businesses to be transferred

10. Mr James TO has raised concerns as to whether the retail banking business and private banking business to be transferred to BCOM (Hong Kong) as well as the relevant exclusions (i.e. property and liabilities to be excluded from the proposed business transfer) are clearly defined by the Bill. He has emphasized the need to provide certainty to customers on whether and how they will be affected by the proposed business transfer.

11. BCOM, Hong Kong Branch has advised that customers are classified into retail, private, corporate or institutional customers when they open accounts with the bank, which will form a clear basis for determining which customer accounts should be transferred under the Bill. The bank will make reference to, among other things, its books and records concerned, to determine whether certain businesses are part of the retail or private banking business, etc. BCOM, Hong Kong Branch stresses that, as set out in the relevant definitions of the Bill, only those property, reserves and liabilities of BCOM, Hong Kong Branch which relate in whole to private banking business, or in whole to retail banking business, or in whole to the retail banking business and private banking business, will be transferred. At the request of the Bills Committee, BCOM, Hong Kong Branch has provided supplementary information for members' reference of the property, reserves and liabilities to be transferred to BCOM (Hong Kong), and the type of banking services that belong to the retail and private banking businesses to be transferred.⁴

12. The Bills Committee further notes the Administration's view that the proposed business transfer will not adversely impact on tax revenue. For the purposes of the Inland Revenue Ordinance (Cap. 112), Clause 8 of the Bill has the effect of deeming BCOM (Hong Kong) as one and the same as BCOM, Hong Kong Branch, with regard to the relevant retail banking business and private banking business, on and from the appointed day for effecting the Bill ("the appointed day").

Definition of excluded property and liabilities

13. The Bills Committee notes that "excluded property and liabilities" is defined in the Bill to mean, among other things, —

⁴ Please refer to the paper provided by BCOM, Hong Kong Branch and issued to the Bills Committee on 7 July 2016 (LC Paper No. [CB\(1\)1106/15-16\(03\)](#)).

"all existing property, reserves and liabilities of BCOM, Hong Kong Branch of whatever nature which relate in whole or in part to the corporate banking business or any other businesses (including treasury) of BCOM, Hong Kong Branch other than those which relate in whole to the retail banking business, or in whole to the private banking business, or in whole to the retail banking business and private banking business."

Mr James TO has suggested that the Bill should set out what "any other businesses" in the above definition refers to specifically, with a view to enhancing the clarity of the definition and hence protection of customers' interests. After consideration and making reference to comparable provisions in BO, BCOM, Hong Kong Branch maintains that the current drafting is appropriate, and that the bank is clear as to the scope and coverage of its retail and private banking businesses so that the above definition will be operative in the context of the Bill.

14. The Bills Committee also notes that BCOM may specify, on or before the appointed day, by a resolution or resolutions of its board directors, or by a certificate given by an authorized person of BCOM, certain property and liabilities of the retail or private banking business of BCOM, Hong Kong Branch to be excluded from the proposed business transfer. Such power is laid down in the definition of "excluded property and liabilities" under Clause 2 of the Bill. Mr James TO has queried whether it is appropriate to confer on BCOM the power to designate such exclusions. In his view, this will undermine the certainty of whether certain customers/accounts will be transferred to BCOM (Hong Kong). It may also give rise to possible loopholes for BCOM to manipulate the scope of transfer or exclusion.

15. BCOM, Hong Kong Branch has explained that BCOM will exercise the said power only in very limited cases. For instance, there may be some selected customers who request to retain its account with BCOM, Hong Kong Branch and whom are appropriate to be retained by BCOM, Hong Kong Branch. Some contracts between BCOM, Hong Kong Branch and certain counterparties (e.g. service providers) which, for the sake of clarity and to avoid uncertainty, should be clearly specified that they will not be transferred to BCOM (Hong Kong). Also, for some foreign law governed contracts, steps are required to be taken under the relevant foreign law to individually transfer the contracts to BCOM (Hong Kong). BCOM, Hong Kong Branch further points out that:

- (a) the Bill contains saving provisions to ensure that nothing in the Bill will affect the legal rights of customers and other relevant stakeholders as a result of the proposed business transfer;

- (b) BCOM, Hong Kong Branch has been conducting due diligence review of its contracts and other instruments on an ongoing basis to ensure that the terms and conditions contained therein will secure an effective transfer of such contracts/instruments to BCOM (Hong Kong); and
- (c) where any property and liabilities of BCOM, Hong Kong Branch cannot be transferred to BCOM (Hong Kong) as a result of them being governed by foreign laws, Clause 4(2) provides that BCOM, Hong Kong Branch may hold any of those property and liabilities in trust absolutely for BCOM (Hong Kong) from the appointed day until the transfer and vesting is effective by completing all the necessary steps.

16. Notwithstanding the explanation given by BCOM, Hong Kong Branch above, Mr James TO remains concerned and has suggested that Mr NG Leung-sing, Member in charge of the Bill, may consider moving Committee Stage amendments ("CSAs"), or giving an undertaking at the resumption of Second Reading debate of the Bill, to specify the circumstances under which BCOM can or cannot exercise the designating power in question. BCOM, Hong Kong Branch has advised that Mr TO's suggestion may not be practicable as it will be difficult to make an exhaustive list of the circumstances for BCOM to exercise, or not to exercise, the power in question.

Notice of appointed day

17. Clause 3 provides that the directors of BCOM (Hong Kong) may appoint a day to be the appointed day for effecting the Bill. The Bills Committee has enquired whether the provision may amount to requiring the consent of all the directors in question, which may be potentially difficult or impracticable. In this connection, the Legal Adviser to the Bills Committee has advised that under the common law, a company can only act through directors, and "the directors" in the present context usually refers to the board of directors, and this provision should be taken as referring to the decision of the board of directors regarding the appointed day. In response to the enquiry of the Bills Committee, BCOM, Hong Kong Branch has indicated that, subject to the passage of the Bill by mid-July 2016 and various preparation and circumstances, it intends to execute the proposed business transfer in the remainder of the year.

Impact on customers

Notification to existing customers about the proposed business transfer

18. Some members are concerned about how BCOM, Hong Kong Branch will ensure that its existing customers, in particular the dormant account holders and account holders residing outside Hong Kong, will be duly informed of the proposed business transfer, and whether a sufficient notification period will be provided, for better protection of customers' interests.

19. BCOM, Hong Kong Branch has advised that there will be a two-month notification period prior to the appointed day. The bank will issue letters of notification to its existing customers as well as set up a designated hotline to answer enquiries and provide assistance to the customers as appropriate. The bank will also contact the holders of relevant dormant accounts (i.e. accounts which do not have any transactions within 24 months). To ensure protection for the dormant account holders, BCOM (Hong Kong) will maintain a matching escrow account of the same amount in these dormant accounts with BCOM, Hong Kong Branch when these accounts are transferred to BCOM (Hong Kong). BCOM, Hong Kong Branch stresses that the rights and protection affordable to its existing customers will remain unchanged after the proposed business transfer.

20. As regards the transfer of personal data from BCOM, Hong Kong Branch to BCOM (Hong Kong), Clause 6 provides that the transfer shall not result in a breach of any duty of confidentiality or a contravention of the Personal Data (Privacy) Ordinance (Cap. 486) or the data protection principles. The Bills Committee notes that BCOM, Hong Kong Branch has consulted the relevant government departments on the provision and related arrangements, and the latter have not raised any issues of concerns.

Provision of banking services after the proposed business transfer

21. Since BCOM, Hong Kong Branch will continue to operate corporate banking services and other banking services after the transfer of its retail banking business and private banking business to BCOM (Hong Kong), some members are concerned whether this may cause confusion to existing customers of the branch.

22. BCOM, Hong Kong Branch has advised that currently, it primarily carries out its retail and private banking businesses at sub-branches situated at over 40 locations in Hong Kong. The tenancy agreements with respect to the premises that have been leased by BCOM, Hong Kong Branch to operate these

sub-branches are also intended to be transferred to BCOM (Hong Kong) under the Bill in order to ensure a continuous and smooth operation of these sub-branches after the transfer. In fact, after the proposed business transfer, there will be a clearer and more focused separation in the servicing of different customer groups of BCOM, i.e. the locally-incorporated bank (i.e. BCOM (Hong Kong)) will focus primarily on providing retail and private banking services in Hong Kong, whereas BCOM, Hong Kong Branch continues to provide corporate banking services and other banking services. On this basis, both banks will be able to devise products and services of a more professional and satisfactory quality.

Capital base and financial soundness of Bank of Communications (Hong Kong) Limited

23. Mr James TO has pointed out that while existing customers of BCOM, Hong Kong Branch are clients of a branch of BCOM which is a nationwide state-owned commercial bank well established in the Mainland with a huge capital size, BCOM (Hong Kong) is only a subsidiary of BCOM established in Hong Kong. Mr TO has therefore sought information on the capital base and financial soundness of BCOM (Hong Kong) for consideration of whether and how far this newly established subsidiary can provide sufficient protection for customers' interests.

24. HKMA has advised that BCOM (Hong Kong) needs to comply with HKMA's capital adequacy requirement for locally-incorporated banks. The statutory minimum capital adequacy ratio ("CAR") for locally-incorporated authorized institutions and minimum level of share capital required for licensed banks are 8% and \$300 million respectively. The CARs of locally-incorporated banks usually exceed the statutory minimum level due to the need to meet other regulatory requirements under BO, and commercial considerations such as enhancing customers' confidence in the banks. HKMA has further advised that, based on the information published by the China Banking Regulatory Commission, the average CAR of commercial banks in Mainland China was 13.4% as of March 2016, whereas the corresponding period's average CAR of locally-incorporated banks in Hong Kong was 18.2%, which is indicative of a relatively higher capital adequacy of locally-incorporated banks in Hong Kong. When considering the banking licence application in respect of BCOM (Hong Kong), HKMA has examined the bank's business plan, and considers that it can meet the statutory minimum share capital requirement for locally-incorporated banks. BCOM (Hong Kong)

has to continuously observe the regulatory requirements on capital adequacy after the granting of banking licence.⁵

Impact on staff

25. Clause 9 of the Bill provides that all contracts of employment of BCOM, Hong Kong Branch with its employees who are solely engaged in the retail banking business and private banking business of BCOM, Hong Kong Branch shall be transferred to BCOM (Hong Kong) at the merger but that such contracts shall be deemed for all purposes to be a single continuing employment. According to BCOM, Hong Kong Branch, the accrued benefits of existing employees, including their years of services, will be fully recognized, and the promotion prospects of existing employees will not be adversely affected by the proposed business transfer. Following the transfer, BCOM, Hong Kong Branch and BCOM (Hong Kong) will continue to expand their respective businesses.

26. Mr James TO has expressed concern about the potential difficulties in classifying the job duties of the supporting staff of BCOM, Hong Kong Branch into retail, private, corporate and other banking businesses in making staff transfer arrangements. He stresses that the existing staff of BCOM, Hong Kong Branch should be informed of, as early as practicable, whether they are to be transferred to BCOM (Hong Kong). BCOM, Hong Kong Branch has taken note of the member's concern and suggestion.

27. Noting that there is a specific provision in the Bill on the arrangements relating to the mandatory provident fund scheme of BCOM, Hong Kong Branch arising from the proposed business transfer, the Chairman has enquired about the arrangements for the accounts of the occupational retirement scheme of the bank registered under the Occupational Retirement Schemes Ordinance (Cap. 426) ("ORSO scheme"). BCOM, Hong Kong Branch has advised that the occupation retirement scheme of the bank is a closed scheme, and due to turnover, the number of participating members in this scheme is decreasing. In anticipation of the proposed business transfer, the bank is making arrangements, including amending the trust deed to include BCOM (Hong Kong) as an employer of the staff to be transferred to BCOM (Hong Kong), which will be

⁵ At the request of the Bills Committee, BCOM, Hong Kong Branch provided information on the paid-up share capital of BCOM (Hong Kong) via a paper tabled at the meeting of the Bills Committee held on 5 July 2016. As requested by BCOM, Hong Kong Branch, the paper is restricted to Bills Committee members only as it potentially relates to share-price-sensitive data or inside information of BCOM, which is listed on the main board of The Stock Exchange of Hong Kong Limited.

executed by the scheme trustee with the authorization of both banks involved in the proposed business transfer. BCOM, Hong Kong Branch has further advised that the relevant staff have been informed of the proposed transfer of their ORSO scheme accounts.

Drafting issues

28. The Bills Committee has noted the enquiries raised by members, and the response given by the legal advisers to the Bills Committee and BCOM, Hong Kong Branch respectively on the drafting or technical issues relating to certain terminologies in the Bill.⁶

Committee Stage amendments

29. The Bills Committee and Mr NG Leung-sing (Member in charge of the Bill) have not proposed any CSAs to the Bill.

Resumption of Second Reading debate

30. The Bills Committee has considered and, after discussion, agreed to Mr NG Leung-sing's proposal to resume the Second Reading debate on the Bill on 13 July 2016. In this connection, the Bills Committee recommends that the President's permission be sought under Rules 54(5) and 57(2) of the Rules of Procedure to dispense with the notices in respect of:

- (a) resumption of Second Reading debate on the Bill on 13 July 2016; and
- (b) moving CSAs to the Bill.

31. Subject to the President's permission to dispense with the aforesaid notices, the Bills Committee also recommends that the deadline for giving the aforesaid notices be waived till noon on 9 July 2016.

⁶ These include (a) "reserves" ("儲備金") in the proposed definitions of "excluded property and liabilities" and "undertakings"; (b) "business" and "undertakings" for which the same Chinese rendition "業務" is used throughout the Bill; and (c) "insurance agent" within the meaning of the Insurance Companies Ordinance (Cap. 41)" used in certain definitions under the Bill.

Advice Sought

32. Members are invited to note the deliberations of the Bills Committee, and support the Bills Committee's recommendations in paragraphs 30 and 31.⁷

Council Business Division 1
Legislative Council Secretariat
8 July 2016

⁷ Before submission of this written report to the House Committee on 8 July 2016, the Chairman of the Bills Committee has given a verbal report on the Bills Committee's deliberations to the House Committee at its meeting on the same day, and obtained the support of the House Committee for the Bills Committee's recommendations in paragraphs 30 and 31 of the report.

Main provisions of the Bank of Communications (Hong Kong) Limited (Merger) Bill

The Bank of Communications (Hong Kong) Limited (Merger) Bill ("the Bill") contains 18 clauses. The main provisions are as follows:

- (a) **Clause 4** is the main transfer and vesting provision in the Bill. It provides that the undertakings of Bank of Communications, Hong Kong Branch (not including the "excluded property and liabilities") shall transfer to and vest in Bank of Communications (Hong Kong) on the appointed day as if Bank of Communications (Hong Kong) were the same person in law as Bank of Communications, Hong Kong Branch.
- (b) **Clause 5** deals with property which, before the merger, is held by Bank of Communications, Hong Kong Branch in a capacity as a trustee. It provides that in such a case, the relevant document should be read as if references to Bank of Communications, Hong Kong Branch were references to Bank of Communications (Hong Kong).
- (c) **Clause 6 (a) to (k)** provide that all contracts and agreements made with, given to or addressed to Bank of Communications, Hong Kong Branch (and insurance policies in which Bank of Communications, Hong Kong Branch has an interest) shall, after the merger takes effect, be construed as if Bank of Communications (Hong Kong) had been the original party instead of Bank of Communications, Hong Kong Branch (or Bank of Communications) and, accordingly, all references to Bank of Communications, Hong Kong Branch (or Bank of Communications) must be construed as if they were to Bank of Communications (Hong Kong).
- (d) **Clause 6(l)** provides that the transfer of personal data from Bank of Communications, Hong Kong Branch to Bank of Communications (Hong Kong) under the Bill shall not result in a breach of any duty of confidentiality or a contravention of the Personal Data (Privacy) Ordinance or the data protection principles. The Privacy Commissioner may exercise in respect of Bank of Communications (Hong Kong) any power which he could, before the merger, have exercised in respect of Bank of Communications, Hong Kong Branch.

- (e) **Clauses 7 and 8** provides for accounting treatment and taxation arrangements of Bank of Communications (Hong Kong) following the merger.
- (f) **Clause 9** provides that all contracts of employment of Bank of Communications, Hong Kong Branch with its employees who are solely engaged in the retail banking business and private banking business of Bank of Communications, Hong Kong Branch shall be transferred to Bank of Communications (Hong Kong) at the merger but that such contracts shall be deemed for all purposes to be a single continuing employment.
- (g) **Clause 10** ensures that the employees of Bank of Communications, Hong Kong Branch who will be transferred to Bank of Communications (Hong Kong) at the merger shall continue to enjoy the same benefits under the mandatory provident fund scheme participated by Bank of Communications, Hong Kong Branch for its employees following the merger as before the merger.
- (h) **Clauses 12 to 14** set out provisions dealing with evidence and the admissibility of evidence in respect of any matter for or against Bank of Communications, Hong Kong Branch which, when transferred by the Bill (once it is enacted and comes into effect), becomes admissible in evidence after the merger in respect of the same matter for or against Bank of Communications (Hong Kong).
- (i) **Clause 15** deals with the effect of the merger on interests in land in Hong Kong held by Bank of Communications, Hong Kong Branch (not including the excluded property and liabilities) and provides that the vesting of the interest of Bank of Communications, Hong Kong Branch in land in Bank of Communications (Hong Kong) pursuant to the merger does not constitute an acquisition, assignment, transfer or parting with possession under the Landlord and Tenant (Consolidation) Ordinance (Cap. 7).

[Source: Adapted from the Legislative Council Brief issued by Hon NG Leung-sing's office on 24 December 2015.]

**Bills Committee on Bank of Communications (Hong Kong) Limited
(Merger) Bill**

Membership list

Chairman Hon SIN Chung-kai, SBS, JP

Members Hon James TO Kun-sun
Hon CHAN Kam-lam, GBS, JP
Hon Alan LEONG, SC
Hon NG Leung-sing, SBS, JP
Hon Kenneth LEUNG
Hon Christopher CHEUNG, SBS, P

(Total: 7 members)

Clerk Ms Angel SHEK

Legal Adviser Mr YICK Wing-kin