

立法會
Legislative Council

LC Paper No. LS104/19-20

**Further Report by Legal Service Division on
Insurance (Amendment) (No. 2) Bill 2020**

Members may recall from LC Paper No. LS96/19-20 dated 11 June 2020 and issued to Members vide LC Paper No. CB(2)1197/19-20 that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of the Bill.

2. To recap, the Bill seeks to amend the Insurance Ordinance (Cap. 41) to provide for the regulation and supervision of insurance groups by the Insurance Authority ("IA") through exercising direct regulatory powers over their Hong Kong-incorporated holding companies. No Bills Committee has been formed to study the Bill. LSD has sought clarifications from the Administration on certain matters relating to the proposed regulatory regime. Major issues in our enquiries and the Administration's responses (at **Appendix**) are summarized below.

Application of the proposed regulatory regime to insurance groups

3. Under the Bill, IA's being appointed as the group supervisor of an insurance group in accordance with principles adopted by the International Association of Insurance Supervisors ("IAIS") would be a pre-condition for the application of the proposed regulatory regime to the insurance group and IA's exercise of direct regulatory powers over it (proposed new sections 95B and 95C). We have asked the Administration: (i) for the reasons for such arrangement whereas no such arrangement is provided for the regulation of financial holding companies (including insurance groups) under the Financial Holding Companies Act 2013 which has been enacted (but has not yet commenced) in Singapore; and (ii) if the Bill is enacted, who would be responsible for the appointment of IA as the group supervisor of the insurance groups and whether IA's current status as the group supervisor of the three insurance groups (i.e. AIA, FWD and Prudential) would be affected.

4. In response, the Administration has explained that the pre-condition aims to provide an objective criterion to be met for IA to consider whether to designate an insurance holding company subject to IA's group-wide supervision. According to IA's understanding, the Monetary Authority of Singapore would, in practice, designate an insurance holding company to be subject to the Financial Holding Companies Act 2013 only after being appointed as the group supervisor

by a supervisory college established by the involved supervisors¹ of the insurance group in accordance with the principles, standards and guidance promulgated by IAIS. This is the same as the proposed arrangement under the Bill. According to the Administration, IA's current status as the group supervisor of the three insurance groups mentioned above would not be affected by the enactment of the Bill.

Criteria for designation of insurance holding companies

5. Under the Bill, IA would exercise its supervisory functions over an insurance group through designating an insurance holding company within the group as a "designated insurance holding company" ("DIHC"). The proposed new section 95C(2) sets out the criteria for determining whether it is appropriate to make a designation. Upon our enquiry, the Administration has explained that as a general principle, an insurance holding company in an insurance group with insurance operations in more markets and with larger business scale is more likely to be designated. IA's designation would also take into account the prevailing criteria for an Internationally Active Insurance Groups promulgated by IAIS (e.g. premiums being written in three or more jurisdictions and total assets (based on a three-year rolling average) being at least US\$50 billion).

Group-wide supervision by IA

6. Upon designation of a DIHC, IA would determine which member of an insurance group would be subject to the supervision by IA ("supervised group") (the proposed new section 95D). The supervised group would by default consist of members including the DIHC, all its subsidiaries, and any other entities that are, according to applicable accounting standards, treated as members of the insurance group to which the DIHC belongs ("default members"). Also, IA would be empowered to include in the supervised group any entity considered by IA to be closely linked to a default member of the supervised group through any financial, contractual or operational relationship.

7. Upon our enquiry, the Administration has explained that IA would take a "substance over form" approach and may consider various matters in determining whether an entity is closely linked to a default member of a supervised group. These considerations would include whether there is any common director among the relevant entities; whether the relevant entities are involved in the policy-making process of each other; and whether there is any material transaction among the relevant entities.

¹ According to the proposed new section 95A to be added by clause 12 of the Bill, "involved supervisor", in relation to an insurance group or a supervised group, means an authority that performs a function under the law of any place to supervise a member of the group in relation to matters concerning insurance or any other financial service.

8. The Administration has also explained that the supervised group might include entities the primary business of which is not insurance business, but the inclusion of non-insurance entities would not be *ultra vires* the principal functions of IA under Cap. 41 because policy holders of the insurance entities in the insurance group could be exposed to risks acquired by business carried on by non-insurance entities in the group and the inclusion of non-insurance entities in the group to be subject to IA's supervision would serve to protect existing and potential policy holders, which is one of the principal functions of IA as provided for under section 4A(1) of Cap. 41. Furthermore, the proposed new section 95B(1)(b) would extend the functions of IA to include regulating and supervising insurance groups of which IA is appointed as the group supervisor.

Other issues

9. We have also sought clarifications on various issues including (i) the differences between IA's "regulatory functions" and "supervisory functions" over the insurance groups and the respective measures to be taken in practice; (ii) the basis for determining the level of proposed prescribed fees to be payable by DIHCs; (iii) the types of specified arrangements to be maintained by a DIHC with its holding company; (iv) justifications for the exercise of IA's powers to wind up a DIHC; and (v) drafting issues in relation to certain provisions of the Bill.

Amendments proposed by Administration

10. The Administration intends to move certain textual and consequential amendments to the Bill upon resumption of the Second Reading debate at the Council meeting of 8 July 2020. The proposed amendments are set out in Annex 2 to the Administration's reply letter dated 24 June 2020 to LSD's letter dated 17 June 2020. It is noted that the Administration's proposed amendments are technical in nature.

11. Subject to Members' views on the matters set out in this report, no difficulties have been identified in relation to the legal and drafting aspects of the Bill and the Administration's proposed amendments.

Encl.

Prepared by
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(By email)

24 June 2020

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Dear Ms Tam,

Insurance (Amendment) (No. 2) Bill 2020 (“the Bill”)

Thank you for your letter of 17 June 2020. Having consulted the Insurance Authority (“IA”), our response to the matters as set out in the Appendix to your letter is as follows.

Application of the proposed regulatory regime to insurance groups

Item 1 (a)

2. In accordance with the principles, standards and guidance promulgated by the International Association of Insurance Supervisors (“IAIS”), the involved supervisors¹ of the insurance group would establish a supervisory

¹ According to the proposed section 95A to be added by clause 12 of the Bill, “involved supervisor, in relation to an insurance group or a supervised group, means an authority that performs a function under the law of any place to supervise a member of the group in relation to matters concerning insurance or any other financial service”.

college, which will be responsible for appointing one of the involved supervisors (e.g. IA) as the group supervisor of the insurance group.

Item 1 (b)

3. The intended starting point for IA’s exercise of group-wide supervision powers in relation to an insurance group is where IA has been appointed by the supervisory college to be the group supervisor of the relevant insurance group. The pre-condition aims to provide an objective criterion to be met for IA to consider whether to designate an insurance holding company subject to IA’s group-wide supervision.

4. For clarity, we have set out such pre-condition in the Bill. It is also noteworthy that according to the IA’s understanding, although Singapore’s Financial Holding Companies Act 2013 has not yet commenced, in practice, the Monetary Authority of Singapore would designate an insurance holding company to be subject to the Financial Holding Companies Act 2013 only after being appointed as the group supervisor by a supervisory college. This is same as the arrangement under the Bill.

Item 1 (c)

5. IA’s current status as the group supervisor of the three insurance groups will not be affected by the enactment of the Bill.

IA’s functions in relation to insurance groups

Item 2 (a)

6. Under the proposed section 95B(1)(b), IA would be conferred with the function of regulating and supervising insurance groups of which IA is appointed as the group supervisor. This formulation is similar to the existing section 4A(1) of the Insurance Ordinance (Cap. 41) (“IO”), which provides, among other things, that the principal function of IA shall be to regulate and supervise the insurance industry for the promotion of the general stability of the insurance industry. We consider that “regulate” would involve IA’s power to make rules, publish guidelines, as well as the enforcement of such; whereas “supervise” would involve continuous monitoring to discharge IA’s responsibilities.

Item 2 (b)

7. To discharge the “regulatory” function, IA will make rules under section 129 of the IO and publish guidelines under section 133 of the IO to facilitate group-wide supervision.

8. To discharge the “supervisory” function, IA will continuously monitor the affairs of relevant insurance groups. Specifically, under the proposed section 95B(2)(c), IA will co-ordinate a crisis management group comprising key involved supervisors of the insurance group to facilitate the development and assessment of recovery and resolution plan for the group. Also, under the proposed section 95B(2)(f)(ii), IA will supervise the compliance of the designated insurance holding company (“DIHC”) by, for instance, reviewing information submission (e.g. financial statements), conducting risk assessment, carrying out on-site inspections, vetting applications and convening supervisory college meetings to facilitate information exchange and sharing of any issues of regulatory concerns on the group.

Designation of insurance holding companies

Item (3) (a) and (b)

9. As a general principle, an insurance holding company in an insurance group with insurance operations in more markets and with larger business scale are more likely to be designated. In determining whether to designate an insurance holding company in an insurance groups as DIHC, IA will take into account the prevailing criteria for an Internationally Active Insurance Group (“IAIG”) as promulgated by the IAIS. In this regard, under the Common Framework for the Supervision of Internationally Active Insurance Groups adopted by IAIS in November 2019², an IAIG has to meet the following criteria

(a) Internationally active –

(i) Premiums are written in three or more jurisdictions; and

(ii) Gross written premiums outside of the home jurisdiction are at least 10% of the group’s total gross written premiums.

² <https://www.iaisweb.org/page/supervisory-material/insurance-core-principles>

and

- (b) Size (based on a three-year rolling average) –
- (i) Total assets are at least USD 50 billion, or
 - (ii) Total gross written premiums are at least USD 10 billion.

Item 3 (c)

10. “International standards setting body” in the proposed section 95C(2)(c) means a body which issues international standards for financial services supervision or international accounting standards. Examples of international standards setting body are IAIS, the Financial Stability Board (“FSB”) and the International Accounting Standards Board. IAIS is mentioned in the proposed section 95C(2)(c) as it is the primary reference. For other international standards setting bodies, as they may evolve over time (e.g. FSB was established in 2009 as the successor for the Financial Stability Forum), we do not propose to define these bodies in the Bill but to set out them in guidelines to be issued by IA to allow flexibility.

Scope of supervised group of a DIHC

Item 4 (a)

11. IA will take a “substance over form” approach and may consider the following criteria for determining whether an entity is closely linked to a default member of a supervised group through financial, contractual or operational relationship –

- (a) whether there is any common director among the relevant entities;
- (b) whether there is any membership right in a mutual or similar entity;
- (c) whether the relevant entities involve in the policy-making process of each other;
- (d) whether there is any material transaction among the relevant entities; and

- (e) whether the financial operations of an entity may have a material impact on the operation of the supervised group.

Item 4 (b)

12. The supervised group might include entities the primary business of which is not insurance business. The inclusion of non-insurance entities would not be ultra vires because policy holders of the insurance entities in the insurance group could be exposed to risks acquired by business carried on by non-insurance entities in the group and the inclusion of non-insurance entities would serve to protect existing and potential policy holders, which is one of the principal functions of IA as provided for under section 4A(1) of the IO. Furthermore, the proposed section 95B(1)(b) extends the function of IA to include regulating and supervising insurance groups of which IA is appointed as the group supervisor.

Proposed prescribed fees

Item 5 (a)

13. It is proposed that a DIHC should provide the amount of its latest audited group insurance liabilities and conduct a preliminary calculation of the fee payable in the specified form to ascertain the amount of fees payable.

Item 5 (b)

14. As stated in paragraph 13 of the Legislative Council (“LegCo”) Brief, the prescribed fees would be charged for recovering the cost of IA in acting as the group supervisor of the supervised group, i.e. on a cost-recovery basis. According to the IA’s current thinking, the proposed formula in determining the designation fee and annual fees would be the same, except that the designation fee would be prorated for the period from designation to the prevailing financial year end of the IA. In determining the specified percentage for the designation and annual fees, IA would first estimate the costs incurred in conducting group-wide supervision for insurance groups currently supervised by IA. The specified percentage would be worked out taking into account the group insurance liabilities with reference to such estimated costs.

Item 5(c)

15. IA is consulting relevant stakeholders on details of the prescribed fees under the proposed section 95F. The fees will be prescribed by a regulation to be made by the Chief Executive in Council under section 128 of the IO. In line with established practice, we will consult the relevant LegCo panel on the fees proposals before tabling the relevant regulation at LegCo for negative vetting.

Maintaining arrangements with the holding company of DIHCs

Item 6

16. Examples of arrangements to be specified by IA include –

- (a) the membership of the respective boards of directors of the DIHC and its holding company are the same;
- (b) the membership of the respective board committees of the DIHC and its holding company are the same; and
- (c) the respective chief executives or key persons in control functions of the DIHC and its holding company are the same.

17. As IA's specification of the arrangements under the proposed section 95H would involve consultation with other involved supervisors, we consider it not appropriate for such specification to be subject to review by the Insurance Appeals Tribunal. IA will ensure relevant arrangements are feasible and effective to ensure the DIHC can, through procuring its holding company to take any necessary steps, comply with the proposed Part XIA of the IO and any notice, requirement or condition given or imposed thereunder. Under the proposed section 95H(5) and (6), the DIHC will have the opportunity to make representations to IA, and IA must take them into account before specifying the arrangements.

Winding up of DIHCs

Item 7 (a) and (b)

18. The proposed section 95ZZB(2) provides IA with powers to petition for the winding up of a DIHC similar to those which IA currently has in respect of an authorized insurer under section 44(1) of the IO.

19. IA would only exercise the powers conferred under the proposed section 95ZZB(2) for protecting existing and potential policy holders. For instance, if a DIHC fails to comply with the group capital requirements mentioned in the proposed section 95ZI and fails to submit or effect a restoration plan, it may be in the interest of policy holders for an early winding-up of the DIHC. This aims to avoid any person from transferring money out and to retain the capital within the insurance entities of the DIHC as far as possible.

20. IA is fully aware that petition for winding-up is an extreme measure and it is a step that would not be taken unless IA considers there are no other options available for protection of policy holders. In practice, IA will exercise other powers under the IO and the Bill, including (a) requesting the DIHC to submit and effect restoration plan under the proposed section 95ZI(4) and (b) directing the DIHC to be managed by supervisory manager under the proposed section 95ZT(1), before filing a petition for winding-up under the proposed section 95ZZB(2).

Drafting issues

Item 8 – proposed section 95ZZS(1)(c)(ii)

21. The intended point of time at which the “fit and proper” test is relevant under the proposed section 95ZZS(1)(c)(ii) is the time when the person was a shareholder controller of or held the relevant position in the company.

22. For the English text, the past tense in “a person who was a shareholder controller ... or who held the position ...” and “was not a fit and proper person” helps connect the point of time for the two conditions to show that both conditions refer to the same point of time.

23. On the other hand, since there is no tense conjugation for verbs in Chinese, we need to add words denoting the past such as “曾” and “在過去” (as in “曾身為……或曾擔任……的人，在過去……並非……適當人選) to make the point of time clear. Even so, given that the connection between “曾” and “過去” in the sentence is not as clear as that afforded by the past tense in the English text for the two conditions, we consider it appropriate to add “有關時間” to make it clear that “過去” refers to the same point of time as that referred to by “曾”.

24. Therefore, we consider that the current English and Chinese versions of the proposed section 95ZZS(1)(c)(ii) correspond to each other and each of them expresses the intended point of time with a level of precision that suits the language respectively. The same drafting has already been adopted in the existing section 41P(1)(c)(ii) of the IO.

Item 9 – proposed sections 95V(1), 95ZD(2), 95ZG(1)(a) and 95ZH(1)(b)

25. There is no hard-and-fast rule in determining how specific a cross-reference should be. On the one hand, plain language drafting encourages minimising cross-references where appropriate, because excessive cross-references could interrupt the flow of sentences and the reader’s chain of thought³. On the other hand, there would also be cases where a specific cross-reference is necessary because, for example, the absence of a cross-reference, or a less specific cross-reference, would create ambiguity. Sometimes, a more specific cross-reference could also, as suggested in your letter, assist the reader to locate the exact provision more easily. Ultimately, the appropriate level of specificity for a cross-reference is a matter of judgment, taking into account the context of the provisions.

26. For the present case, the suggested cross-references concern the following three matters –

- (a) the approval of a person as a shareholder controller under the proposed section 95M;

³ See paragraphs 9.1.7 to 9.1.9 of *Drafting Legislation in Hong Kong – A Guide to Styles and Practices*.

- (b) the approval of an appointment of a person as a chief executive, director or key person in control functions under the proposed section 95U; and
- (c) the appointment of a person as an auditor under the proposed section 95ZF.

27. There are numerous provisions throughout the Bill (in addition to those identified in your letter) that refer to the three matters. Please see **Annex 1** for details on such provisions.

28. For the approvals under the proposed sections 95M and 95U, we consider that a cross-reference to the section level is sufficient because approval is the main subject matter of the two sections (as indicated by their section headings) and there is neither ambiguity created by referring to the section level only nor a strong need for the reader of the provisions that refer to the approvals to know the exact subsections under which the approvals are given in order to understand the provisions concerned. As all provisions listed at **Annex 1** consistently refer to the proposed section 95M or 95U, we consider that no amendment is required.

29. For the appointment under the proposed section 95ZF, because of similar reasons, we consider that a cross-reference to the section level is sufficient. We would therefore take the opportunity to amend the cross-references in the amended sections 2(1) and 53A(3)(f) from “section 95ZF(1)” to “section 95ZF” in order to align with the other provisions.

Item 10 – proposed section 95A(1) – definition of “shareholder controller”

30. In the English text of the Bill, we agree that “a person, who alone ...” should be amended to read “a person who, alone ...” instead.

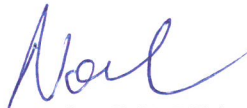
Committee Stage Amendments (“CSAs”)

31. In addition to the amendments in paragraphs 29 and 30 above, we intend to move one CSA, which is consequential to the Insurance (Amendment) Bill 2020. As both the Insurance (Amendment) Bill 2020 and the Insurance (Amendment) (No. 2) Bill 2020 propose to amend section 2 of the IO by adding

a new subsection (8), it is necessary to rationalize the numbering of the two subsections within section 2 of the IO.

32. The list of CSAs to be moved to the Bill is at Annex 2.

Yours sincerely,



(Ms Noel TSANG)

for Secretary for Financial Services and the Treasury

c.c.

Department of Justice
Insurance Authority

(Attn: Mr Peter SZE)
(Attn: Ms Wynnie YEUNG)

Provisions in the Insurance (Amendment) (No. 2) Bill 2020 (“the Bill”) that Refers to Matters under the Proposed Sections 95M, 95U and 95ZF

Reference to	Proposed / amended sections in the Bill	Present cross-reference in the Bill
An approval of a person as a shareholder controller under the proposed section 95M	section 95I(1) and (2)	section 95M
	section 95J(1)	section 95M
	section 95K(2)	section 95M
	section 95L(2) and (5)	section 95M
	section 95N(1)	section 95M
	section 95O(1)(a)	section 95M
	section 95P(2)(b) and (7)(a)	section 95M
	section 95Q(2)(a)	section 95M
An approval of an appointment of a person as a chief executive, director or key person in control functions under the proposed section 95U	section 95ZA(1) and (2)	section 95M
	section 95S(1) and (2)	section 95U
	section 95T(2)(b)	section 95U
	section 95V(1)	section 95U
	section 95Z(1)(b) and (11)(b)	section 95U
	section 95ZA(1) and (2)	section 95U
An appointment of a person as an auditor under the proposed section 95ZF	section 95ZD, heading and subsection (2)	section 95U
	section 95ZV(5)(b) and (c)	section 95U
	section 2(1), definition of <i>former auditor</i>	section 95ZF(1)
	section 2(1), definition of <i>prescribed person</i>	section 95ZF(1)
	section 53A(3)(f)	section 95ZF(1)
	section 95ZG(1)(a), (b) and (c)(i) and (2)	section 95ZF
section 95ZH(1)(b)	section 95ZF	
section 118(2)(a)	section 95ZF	

**Insurance (Amendment) (No. 2) Bill 2020 (“the Bill”)
Summary of Committee Stage Amendments**

<u>Item</u>	<u>Clause</u>	<u>Amendment Proposed</u>	<u>Explanation</u>
1	3(5)	In the amended section 2(1), under the proposed definition of <i>former auditor</i> , by deleting “95ZF(1)” and substituting “95ZF”.	To align with other provisions in the Bill, changing the cross-reference to the section level.
2	3(8)(b)	In the amended section 2(1), under the amended definition of <i>prescribed person</i> , by deleting “95ZF(1)” and substituting “95ZF”.	To align with other provisions in the Bill, changing the cross-reference to the section level.
3	3(13)	By deleting the clause and substituting— “(13) At the end of section 2— Add “(9)A note located in the text of this Ordinance is provided for information only and has no legislative effect.”.”.	Consequential amendments arising from the Insurance (Amendment) Bill 2020. As both the Insurance (Amendment) Bill 2020 and the Insurance (Amendment) (No. 2) Bill 2020 propose to amend section 2 of the IO by adding a new subsection (8), it is necessary to rationalize the numbering.

<u>Item</u>	<u>Clause</u>	<u>Amendment Proposed</u>	<u>Explanation</u>
4	8(9)	In the amended section 53A(3)(f), by deleting “95ZF(1)” and substituting “95ZF”.	To align with other provisions in the Bill, changing the cross-reference to the section level.
5	12	In the proposed section 95A(1), in the English text, in the definition of <i>shareholder controller</i> , by deleting “person, who” and substituting “person who,”.	Textual amendment.