

9<sup>th</sup> October 2008  
Our Ref:

Prof K C Chan SBS JP  
Secretary for Financial Services and the Treasury  
8/F, West Wing  
Central Government Offices  
Hong Kong

*by post and fax: 25371736*

Dear Prof Chan,

**Third Public Consultation on Companies Ordinance Rewrite -  
Share Capital, the Capital Maintenance Regime, and Statutory Amalgamation Procedure**

The Hong Kong General Chamber of Commerce is pleased to submit the following views in respect of the proposals made in the captioned consultation document.

***SHARE CAPITAL***

1. *Do you agree that Hong Kong should adopt a mandatory system of no-par for all companies with a share capital?*

Yes.

2. *Do you agree that a period of 12 months would be reasonable for companies to review their arrangements before migration to no-par? If you think another period more appropriate, please specify what that is and your reasons.*

We would suggest that the period for companies to review their arrangements before migration to no-par should be at least 24 months. We would not consider 12 months to be adequate time for companies to review their documents and make any necessary changes, given the number of companies involved, particularly in larger groups.

3. *Do you agree that there should not be any legislative control over the setting of the issue price of the no-par shares?*

We would not support any legislative control over the setting of the issue price of no-par shares. This should be left to the directors to decide in accordance with their fiduciary duties, as is the case now when directors determine the price at which shares are issued.

4. *Assuming the abolition of par value while the existing capital maintenance rules are largely maintained, do you favour:*

- (a) The abolition of the merger relief; or*
- (b) Its application to the amount in excess of the subscribed capital of the acquired company attributable to the shares acquired or cancelled; or*
- (c) Some other alternatives (please specify)?*

*Please provide reasons.*

- (a)* Merger relief should not be abolished. It is a familiar concept under Hong Kong law and provides flexibility to Hong Kong companies in merger situations.
- (b)&(c)* We do not have a firm view on which part of the proceeds from the issue of shares should qualify for merger relief as this is perhaps an area where the

accountancy bodies would express a more informed view. However, we can see the advantage in applying the relief to the amount in excess of the subscribed capital of the acquired company attributable to the shares acquired as this would involve a straightforward calculation without the directors having to form a view on an appropriate allocation.

5. *Assuming the abolition of par value while the existing capital maintenance rules are largely maintained, do you favour:*
- (a) *The abolition of the group reconstruction relief; or*
  - (b) *Its application to the excess of the consideration for the shares over the base value of the assets transferred; or*
  - (c) *Some other alternatives (please specify)?*

*Please provide reasons.*

- (a) We would not be in favour of abolishing group reconstruction relief.
  - (b)&(c) We can see the sense in applying such a relief to the excess of the consideration for the shares over the base value of the assets transferred, although again we would defer to the views from the accountancy bodies on whether this is an appropriate basis of calculation.
6. *Do you agree with, or have any comments on, the proposals outlined above on:*
- (a) *Capitalisation on profits with or without an issue of shares;*
  - (b) *Issuance of bonus shares without the need to transfer amounts to share capital;*
  - (c) *Consolidation and subdivision of shares; and*
  - (d) *Redeemable shares.*

We agree with all the proposals covered by this question.

7. *Do you agree with the requirement for authorised capital should be removed?*

Yes.

8. *Do you see value in companies having a choice whether to retain or delete the authorised capital from their Articles of Association?*

Although we recognise that some companies having authorised capital and others not having authorised capital may lead to a certain degree of confusion, we think that companies should retain the right to have authorised capital, given that the shareholders may wish to place an overall limit on the number of shares which can be issued by the directors.

9. *Do you see value in retaining the option of having partly paid shares? Please provide reasons.*

Yes, we do see value in retaining the option of having partly paid shares which gives companies another financing option.

10. *Do you agree that the amount unpaid on partly paid shares should be defined by reference to the issue price, without a need to distinguish between shares issued before and after migration to no-par?*

Yes.

11. *Where partly paid shares without a par value are subdivided, so you agree that there should be reallocation (by legislation) of the outstanding liability on existing shares to the new shares to maintain the pre-existing ratios?*

Yes.

#### **THE CAPITAL MAINTENANCE REGIME**

12. *Do you agree that Hong Kong should NOT adopt the solvency test approach to creditor protection which applies to all forms of distribution? Please provide reasons.*

Yes, we agree that Hong Kong should not adopt the across-the-board solvency test approach to creditor protection for the reasons given by the SCCLR which we find persuasive.

13. *Should the solvency test currently used in Hong Kong (which is basically a cash flow test) be modified by including a balance sheet test?*

We think, on balance, that the solvency test currently used in Hong Kong should not include a balance sheet test.

14. *Do you agree that reduction of capital should continue to be subject to judicial control and there is no need to introduce a court-free procedure as an alternative process in addition to the current rules?*

Yes, we agree that the reduction of capital should continue to be subject to judicial control and therefore concur with the views expressed by the SCCLR. Having said that, we do recognise the current anomalous situation where a private company can buyback its shares out of capital based on a solvency declaration by the directors without court sanction. However, on balance, we feel that it would still be beneficial to retain a court-sanctioned reduction of capital as it provides certainty as to the legality of the transaction and arguably provides more protection for the creditors.

15. *If your answer to Question 14 is negative (i.e. you think that an alternative court-free process for reduction of capital should be introduced):*

- (a) *Should it be available to all companies (whether listed or unlisted) or just private companies or private and unlisted public companies; and*
- (b) *Should all directors make the solvency declaration, or is it sufficient for the majority to do so?*

If it is decided to introduce an alternative court-free process for reduction of capital (which we do not support), then it should only be available to private companies and unlisted public companies and all the directors should have to make the solvency declaration.

As a general point, we would be interested to know how many unlisted public companies exist in Hong Kong as our perception is that public companies are only used in connection with a listing.

16. *Should the current provisions on buy-backs in relations to protection of creditors be:*

- (a) *retained;*
- (b) *amended to allow public companies (whether listed or unlisted) to fund buy-backs from capital subject to the solvency and other procedural requirements currently applicable to a buy-back out of capital by private companies; or*

(c) *amended to allow all companies (whether listed or unlisted) to fund buy-backs (regardless of the source of funds) subject to a solvency requirement (in a manner similar to that of the SCA)?*

(a) The current provisions on buy-backs in relation to protection of creditors should be retained.

(b) The provision should apply to private companies and unlisted public companies but not to listed public companies where there are public shareholders who require greater protection.

(c) No.

**17. *Is there a case for legislating for treasury shares for all companies (as in Singapore)?***

Hong Kong should permit treasury shares for all companies, subject to appropriate safeguards.

**18. *Should the current financial assistance provisions be streamlined in a manner similar to the NZCA?***

Given the complexity of the rules on financial assistance and the compliance cost, we support the view that the provisions should be streamlined at least for private companies. Whether the NZCA approach is the right one remains to be seen but we do feel that for private companies this whole area requires further consideration.

**19. *If your answer to Question 18 is in the negative, would you prefer instead:***

(a) *the current provisions be retained;*

(b) *the prohibition of financial assistance be abolished in respect of private companies (as the UK has done); or*

(c) *making solvency an additional exception to the prohibition for all companies (whether listed and unlisted) in a manner similar to the SCA?*

(a) We would support the current provisions being retained for listed public companies.

(b) We do not think that the prohibition on financial assistance should be abolished altogether for private companies but consideration should be given to streamlining the provisions.

(c) We would not support making solvency an additional exception to the prohibition for all companies.

## **STATUTORY AMALGAMATION PROCEDURE**

**20. *Do you consider that there is a need for Hong Kong to have a court-free statutory amalgamation procedure, in addition to the existing court-sanctioned procedure?***

It may be appropriate to have a court-free statutory amalgamation procedure for intra-group transactions but, in relation to public companies, the existing court-sanctioned procedure should be maintained.

21. *If your answer to Question 20 is positive, should the court-free statutory amalgamation procedure be based on the elements outlined in Table A above? If you think that there should be alternative or additional elements, please explain.*

If a court-free statutory amalgamation procedure were to be introduced (for intra group transactions), the elements outlined in Table A above would provide a satisfactory basis for such a procedure.

We thank you for the opportunity to comment and hope you will find our views to be useful.

Yours sincerely,