

Part 1

Preliminary

INTRODUCTION

Part 1 of the new Companies Ordinance (Cap. 622) (“new CO”) is an introductory part that sets out the title of the new CO, its commencement, the interpretation and definitions of various terms and expressions that are used throughout the new CO, including “responsible person”, “subsidiary”, “parent undertaking” and “subsidiary undertaking”, and the types of companies that can be formed under the new CO.

POLICY OBJECTIVES AND MAJOR CHANGES

2. Part 1 contains initiatives that aim at improving regulation and modernising the law, namely –

- (a) Replacing the formulation of “officer who is in default” with “responsible person” to strengthen the enforcement regime (paragraphs 4 to 7); and
- (b) Streamlining the types of companies that can be formed (paragraphs 8 to 13).

3. Apart from the above changes, Part 1 also provides for the application of the new CO to existing companies and other types of companies (paragraph 14).

Replacing the formulation of “officer who is in default” with “responsible person” to strengthen the enforcement regime (section 3)

Position under the Companies Ordinance (Cap. 32) (“Cap. 32”)

4. A number of offence provisions under Cap. 32 punish not only a company but also officers of the company who are in default. The formulation of “officer who is in default” in Cap. 32 is defined as meaning an officer or shadow director of a company who “knowingly and wilfully authorises or permits the default, refusal or contravention”. However, the “knowingly and wilfully” threshold renders prosecution against officers difficult.

Position under the new CO

5. In the new CO, a new formulation of “responsible person” is adopted to replace “an officer who is in default”, with the aim to enhance enforcement by extending the scope to cover reckless acts / omissions of officers.

Key provisions in the new CO

6. **Section 3(2)** defines a “responsible person” of a company or non-Hong Kong company as an officer or shadow director of the company or non-Hong Kong company who “authorises or permits, or participates in, the contravention or failure”¹.

¹ C.f. section 1121(3) of the UKCA 2006 which defines that “an officer is “in default” ...if he authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention”.

7. **Section 3(3)** extends the scope of a “responsible person” to cover an officer or shadow director of a body corporate that is an officer or shadow director of a company or non-Hong Kong company. As a result, an officer or shadow director of the body corporate who caused the default will also be liable as a “responsible person” of the company.

Streamlining the types of companies that can be formed (sections 7 – 12)

Position under Cap. 32

8. Under Cap. 32, eight different types of companies can, in theory, be formed according to their capacity to raise funds from outside sources, the ability of members to freely transfer their shares and the methods by which the liability of members is determined. They are –

- (a) private companies limited by shares;
- (b) non-private companies limited by shares;
- (c) private companies limited by guarantee without a share capital;
- (d) non-private companies limited by guarantee without a share capital;
- (e) private unlimited companies with a share capital;
- (f) non-private unlimited companies with a share capital;

- (g) private unlimited companies without a share capital; and
- (h) non-private unlimited companies without a share capital.

Position under the new CO

9. To streamline the types of companies that can be formed, the following changes are made –

- (a) unlimited companies without a share capital (whether private or non-private, i.e. (g) and (h) in paragraph 8 above) are obsolete and are abolished because it is very unlikely that such type of companies will be formed in the future and there is currently no such company on the Companies Registry’s register;
- (b) companies limited by guarantee without a share capital (whether private or non-private, i.e. (c) and (d) in paragraph 8 above) have become a separate category of companies. They are generally treated in a manner similar to public companies with appropriate modifications. For example, like public companies, all guarantee companies will be required to file audited accounts; and
- (c) non-private companies are expressly referred to as “public companies” which are defined to mean companies other than private companies or guarantee companies.

10. As a result, the types of companies that may be formed under the new CO are reduced to five. Sections 7 to 12 provide for the definitions whereas section 66 in Part 3 sets out the types of companies that may be formed under the new CO, namely –

- (a) private companies limited by shares;
- (b) public companies limited by shares;
- (c) private unlimited companies with a share capital;
- (d) public unlimited companies with a share capital; and
- (e) companies limited by guarantee without a share capital.

Key provisions in the new CO

11. **Sections 7 and 10** provide that a limited company is a company limited by shares or by guarantee, and an unlimited company is a company with no limit on the liability of its members. **Section 8** provides that a company is a company limited by shares if the liability of its members is limited by the company's articles to any amount unpaid on the shares held by the members.

12. **Sections 11 and 12** provide for the definitions of private and public companies. The required characteristics of a private company are the same as those currently provided under section 29 of Cap. 32 (i.e. a company is a private company if its articles restrict members' rights to transfer shares, limit the number of members to 50, and prohibit any invitation to the public to subscribe for any shares or debentures.) A company is a public company if it is not a private company or a company limited by guarantee.

13. **Section 9(1)** provides that a company is a company limited by guarantee if it does not have a share capital and if the liability of its members is limited by the company's articles to the amount that the members undertake to contribute to the assets of the company in the event of its being wound up. **Section 9(2)** makes it clear that a company limited by guarantee and having a share capital formed under Cap. 32 before 13 February 2004 (i.e. the date when such type of company was abolished under section 4(4) of Cap. 32), will be regarded as a guarantee company under the new CO although it has a share capital.

Application of the new CO to existing companies and other types of companies

Key provisions in the new CO

14. **Sections 17 and 18** provide that the new CO applies to an existing company (i.e. a company formed and registered under a former Companies Ordinance) and an unlimited company registered as a limited company pursuant to Cap. 32 or section 58 of Companies Ordinance 1911. The new CO also applies to companies registered but not formed under a former Companies Ordinance (**Section 19**).