

# **New Companies Ordinance**

## **Briefing Notes on Part 19**

### **Investigations and Enquiries**

#### **INTRODUCTION**

Part 19 (Investigations and Enquiries) of the new Companies Ordinance (“new CO”) contains provisions that deal with investigations and enquiries into a company’s affairs.

#### **POLICY OBJECTIVES AND MAJOR CHANGES**

2. Part 19 mainly reorganises the provisions<sup>1</sup> in the Companies Ordinance (Cap. 32) (“Cap. 32”) relating to the appointment of an inspector by the Financial Secretary (“FS”) to investigate the affairs of a company; and the power of the FS (or someone authorized by him) to inspect books and papers of a company, which will be rephrased in the new CO as a power to “enquire into a company’s affairs” to better describe the nature of the power (“the enquiry power”).

3. It is noteworthy that many of the previous investigations undertaken by inspectors involved listed companies or their related companies. The last appointment of an inspector was made in 1999, while the power to inspect books and papers (i.e. the “enquiry power” in the new CO) has never been invoked. The absence of investigation by inspectors since 1999 is mainly due to developments in the regulatory framework for listed companies, namely, (a) the coming into operation of the Securities and Futures Ordinance (Cap. 571) (“SFO”) in April 2003 which empowered the Securities and Futures Commission with greater authority to investigate into market misconduct involving listed companies; and (b) the establishment of the Financial Reporting Council in 2006 which conducts independent investigations of possible auditing and reporting irregularities in relation to listed companies.

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<sup>1</sup> Sections 142 to 152F of Cap. 32.

4. Notwithstanding the above, the possibility of the FS using the investigatory and enquiry powers in future cases where there are sufficient grounds to do so cannot not be ruled out. Therefore, the provisions are retained in the new CO as “reserve” or “last resort” powers as a supplement to the powers contained in other Ordinances, including the SFO and the Financial Reporting Council Ordinance (Cap. 588) (“FRCO”).

5. Part 19 also introduces modifications to the provisions in Cap. 32 concerning these “reserve” or “last resort” powers by making reference to similar provisions on investigations under the SFO and FRCO, which are more up-to-date. These modifications aim at ensuring better regulation by:-

- (a) Enhancing the investigatory powers of an inspector (paragraphs 7 to 8 below);
- (b) Providing better safeguards for confidentiality of information and protection of informers (paragraphs 9 to 11); and
- (c) Providing a new power for the Registrar of Companies (“the Registrar”) to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the new CO has taken place (paragraphs 12 to 13).

6. Details of the above proposals in Part 19 are set out in paragraphs 7 to 13 below.

### **Enhancing the investigatory powers of an inspector (Sections 846 to 850)**

#### Position under Cap. 32

7. Sections 142 to 151 of Cap. 32 deal with investigations of a company’s affairs by independent inspectors appointed by the FS. The FS may appoint an inspector on application by the members (100 members or members holding not less than 10% of the shares issued) or a company by special resolution or on his own initiative where there is fraud or mismanagement involved. The FS must appoint an inspector upon an order made by the court. The inspector is vested with a range of investigatory powers. At the end of the investigation the inspector is required to make a report to the FS.

### Position and key provisions in the new CO

8. **Sections 846 to 850** of the new CO set out the inspector's powers. New powers are given to the inspector, for example to require a person to preserve records or documents before production to the inspector (**section 846(1)(b)**), and to require a person to verify by statutory declaration any answer or explanation given to the inspector (**section 848(2)**). Criminal sanctions are introduced for non-compliance with a request made by an inspector (**section 863**). **Section 864** introduces an express provision to allow the court to order compliance with a request made by an inspector, not just to punish for the non-compliance. These powers are necessary and incidental to the proper conduct of an investigation by the inspector and will not change the nature of the investigations. The powers under **sections 848<sup>2</sup>, 863<sup>3</sup> and 864<sup>4</sup>** are based on similar powers found in the SFO and FRCO.

### **Providing better safeguards for confidentiality of information and protection of informers (Sections 880 to 885)**

#### Position under Cap. 32

9. Cap. 32<sup>5</sup> provides for secrecy of information in respect of documents relating to a company obtained under the provisions relating to inspection of companies' books and papers in an enquiry, or seized by search warrant, but there are no confidentiality or "statutory gateway" provisions concerning information obtained by an inspector in an investigation, nor is there any provision dealing with the protection of an informer's identity.

### Position and key provisions in the new CO

10. **Sections 880 to 882** contain confidentiality provisions relating to information obtained in both investigations of a company's affairs by an inspector under the provisions set out in Division 2 of Part 19, and enquiry into a company's affairs by the FS under the provisions set out in Division 3. **Section 880** imposes a statutory obligation to preserve secrecy and **section 881** defines expressly how such information may be disclosed to other regulatory

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<sup>2</sup> Sections 183(2) and (3) of the SFO; Sections 28(3) and (4) of the FRCO.

<sup>3</sup> Sections 184(1) to (4) of the SFO; Section 31 of the FRCO.

<sup>4</sup> Section 185(1)(a) of the SFO; Section 32(2)(a) of the FRCO.

<sup>5</sup> Section 152C of Cap. 32.

authorities through the introduction of a statutory regime similar to the provisions in the SFO<sup>6</sup>, FRCO<sup>7</sup> and the Banking Ordinance (Cap. 155)<sup>8</sup>. **Section 882** creates an offence for breach of the secrecy provisions.

11. Provisions to encourage persons to volunteer information to facilitate investigations and enquiries are included in the new CO. **Section 884**<sup>9</sup> introduces provisions to provide protection (by granting immunity from liability for disclosure) to persons who volunteered information to facilitate an investigation of a company's affairs or enquiry into a company's affairs. **Section 885**<sup>10</sup> gives additional protection by expressly stating that the identity of an informer should be kept anonymous in civil, criminal or tribunal proceedings. These sections are also applicable to the new power for the Registrar to obtain documents, records and information (see paragraph 12 below).

**Providing a new power for the Registrar to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the new CO has taken place (Sections 873 to 876)**

Position and key provisions in the new CO

12. **Section 873** gives the Registrar a new power to require production of records or documents, to make copies of the records or documents and to require information or explanations in respect of the records or documents, for the purposes of ascertaining whether any conduct that would constitute an offence under **section 750(6)** or **section 895(1)** relating to the giving of false or misleading information in documents delivered to the Registrar has taken place. **Section 875** provides criminal sanctions for non-compliance with the Registrar's request.

13. This new power will help safeguard the integrity of the companies register and the quality of information disclosed to the public and will strengthen enforcement, thus ensuring better regulation.

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<sup>6</sup> Section 378 of the SFO.

<sup>7</sup> Section 51 of the FRCO.

<sup>8</sup> Section 120 of the Banking Ordinance.

<sup>9</sup> Section 884 of the new CO is based on section 448A of the UKCA 2006.

<sup>10</sup> Section 885 of the new CO is based on section 52 of the FRCO.

## **TRANSITIONAL AND SAVING ARRANGEMENTS**

14. The major changes described in these Notes apply to activities carried out after the commencement date of the new CO. For activities started pursuant to the provisions under Cap. 32 and in progress when the new CO commences, Cap. 32 provisions will continue to apply (**sections 142 to 148 of Schedule 11** to the new CO).

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