

CHAPTER 4

CORPORATE DIRECTORSHIP

Background

- 4.1 The SCCLR has recommended that corporate directorship for all companies incorporated in Hong Kong should be prohibited, subject to a reasonable grace period.
- 4.2 Since March 1985, all public companies and private companies which are members of a group of companies of which a listed company³⁹ is a member have been prohibited from appointing a body corporate as their director, whereas other private companies can continue to have corporate directors⁴⁰. In its *Report on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance* published in February 2000, the SCCLR noted that one feature of corporate directorship was that the delegate might change from time to time, making it very difficult to know who was responsible for the conduct of the business of a company. Furthermore, as the delegate of a corporate director was not personally a director of that company, his duties were not owed to the company and it would be difficult to attach liability to him for acts or omissions prejudicial to the company⁴¹. The SCCLR, therefore, recommended that in the interest of improving corporate governance which stressed a high degree of disclosure and transparency, corporate directorship should be prohibited, subject to a grace period of two years.
- 4.3 In view of the SCCLR's recommendation, in 2002, the Government consulted a number of professional bodies and stakeholders on the proposal to abolish corporate directorship. Over half of the respondents supported the proposal on, inter alia, the grounds that it would help enhance accountability, transparency, and corporate governance. However, there were concerns that the proposal would drive away many private companies established in Hong Kong and would have adverse implications for business, in particular, the ability to incorporate companies quickly and the flexibility provided by corporate directorship in the management of companies set up purely for asset holding purpose.

³⁹ "Listed company" means a company which has any of its shares listed on recognized stock market (sections 2(1) and 154A(3) of the CO).

⁴⁰ Section 154A(3) of the CO.

⁴¹ Available at [http://www.cr.gov.hk/en/standing/docs/Rpt_SCCLR\(E\).pdf](http://www.cr.gov.hk/en/standing/docs/Rpt_SCCLR(E).pdf). See Recommendation 43 at page 66 and paragraphs 6.19 and 6.22 in particular.

In view of such concerns and having regard to the economic climate at that time, it was considered not opportune to introduce the proposal then.

Recent Developments in Other Jurisdictions

4.4 Corporate directorship has been abolished in many other common law jurisdictions, such as Australia, Singapore, Canada, New Zealand, Malaysia and the US (under its Model Business Corporations Act). However, it is still retained in the UK and a number of offshore jurisdictions like the Cayman Islands and the British Virgin Islands. The UK has once considered to abolish corporate directorship in its recent Company Law Review in view of the difficulties in determining who was actually controlling a company and applying sanctions against corporate directors, but was concerned that an outright ban of corporate directors might harm those companies which made use of the current flexibilities in corporate directorship for entirely legitimate reasons. Nevertheless, in order to improve the enforceability of directors' obligations and to avoid the difficulties in pursuing corporate directors, the CA 2006 now requires that every company must have **at least one director who is a natural person** so that someone may, if necessary, be held accountable for the company's actions⁴².

Considerations

4.5 The SCCLR has recently revisited the issue of corporate directorship. While legitimate reasons may be found in some cases for corporate directorship, for example, a parent company may like to be a corporate director of its subsidiaries to facilitate group cohesion, the SCCLR recommended that the appointment of corporate directors to private companies should be prohibited in Hong Kong, subject to a reasonable grace period to allow for the phasing out of corporate directorships. The proposal is expected to improve the accountability and transparency of company operations and the enforceability of directors' obligations. It would also help address the concern of the Financial Action Task Force⁴³ ("FATF") over the lack of transparency of legal persons and arrangements which could be used as a vehicle for money laundering and terrorist financing.

⁴² Section 155(1) of the CA 2006, which, according to the implementation timetable, will commence operation on 1 October 2008. See also paragraph 3.3 at page 24, *Company Law Reform White Paper* published by the UK Department of Trade and Industry in March 2005.

⁴³ The FATF is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

- 4.6 As at the end of December 2007, some 42,890 companies out of a total of 655,038 companies incorporated in Hong Kong have corporate directors. While the percentage of companies having corporate directors is less than 10 percent, the Government is mindful of the need to ensure that the abolition of corporate directorship would not undermine Hong Kong's attractiveness as a place for doing business.
- 4.7 We would like to hear the views of the public before taking a final view on this matter.

Question 5

- (a) **Do you agree that corporate directorship should be abolished altogether in Hong Kong, subject to a reasonable grace period?**
- (b) **If your answer to Question (a) is in the negative, do you agree that the UK approach (i.e. a company should be required to have at least one natural person as its director), subject to a reasonable grace period, should be adopted?**
- (c) **If your answers to both Questions (a) and (b) are in the negative, do you have any suggestion on how to improve the enforceability of directors' obligations and to solve the difficulty of pursuing corporate directors?**