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FINANCIAL INSTITUTIONS (RESOLUTION) ORDINANCE (CAP.628)

COMMENTARY AND ANNOTATIONS

SECOND EDITION

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PRINT + PROVIEW EBOOK

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(k) by a resolution authority with the consent of—

(i) the person from whom the information was obtained or received; and

(ii) if the information does not relate to that person, the person to whom it relates; or

(l) that has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this subsection or section 175.

(4) Subsection (3)(k) does not require the resolution authority to disclose in or in relation to any civil proceedings any information that it may disclose, or has disclosed, under that subsection.

(5) Except as may be necessary for a purpose mentioned in subsection (6), a person who, in the course of performing a function under this Ordinance, receives information or any record, report, return or other document is not required—

(a) to divulge that information in any court;

(b) to produce that record, report, return or other document to any court; or

(c) to divulge or communicate to any court any matter or thing that came to the person's knowledge in the course of performing a function under this Ordinance.

(6) The purpose is—

(a) a prosecution for an offence;

(b) a winding-up by the Court under section 122 of the Banking Ordinance (Cap. 155), Part VI of the Insurance Companies Ordinance (Cap. 41) or section 212 of the Securities and Futures Ordinance (Cap. 571);

(c) an application to the Court for a clawback order; or

(d) an appeal to the Court of Appeal from a determination of the Resolution Compensation Tribunal or Resolvability Review Tribunal.

(7) If information is disclosed in any of the circumstances mentioned in subsection (3)(a) to (k), the following persons must not disclose the information, or any part of it, to any other person except with the consent of the resolution authority—

(a) the person to whom the information is disclosed;

(b) any other person obtaining or receiving the information, whether directly or indirectly, from the person mentioned in paragraph (a).

(8) However, subsection (7) does not require the Financial Secretary, as a person to whom that subsection applies, to obtain the consent of

the resolution authority before disclosing to any other person any information covered by that subsection if, in the opinion of the Financial Secretary, the disclosure is necessary in the interests of promoting and maintaining the stability and effective working of the financial system of Hong Kong.

(9) A resolution authority, in disclosing any information in any of the circumstances mentioned in subsection (3) or in granting any consent un- der subsection (7), may impose any condition that it considers appropriate.

(10) A person who contravenes subsection (1) or (7) or who fails to comply with a condition imposed under subsection (9) commits an offence and is liable—

(a) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

COMMENTARY

Maintaining secrecy

Section 173 sets out a statutory requirement for the maintenance of secrecy. It is broadly comparable with the secrecy requirements contained in section 378 of the Securities and Futures Ordinance (Cap. 571), section 53A of the Insurance Companies Ordinance (Cap. 41), and section 120 of the Banking Ordinance (Cap. 155). [173.001]

Information to be kept secret

The requirement to maintain secrecy applies to knowledge which arises out of the performance or assisting with the performance of functions under this Ordinance. [173.002]

The maintenance of secrecy includes exemptions from disclosure in court pursuant to subsections 173(4) – 173(6). [173.003]

Section 10 entity

The requirement of secrecy is imposed upon all persons listed in subsection 173(2), which includes various persons employed or appointed by resolution authorities or in connection with functions under this Ordinance. Pursuant to this subsection 173(2), a section 10 entity is an entity appointed by a resolution authority to assist with functions under this Ordinance. [173.004]

Other persons under requirement

[173.005] The requirement of secrecy is extended to persons receiving the information under subsection 173(3).

Disclosure gateways

[173.006] Various exceptions to the requirement of secrecy are set out under subsection 173(3), creating gateways for disclosure of secret information in the circumstances or to the persons or institutions set out in that subsection. The making of such disclosure may be subject to conditions set by the relevant resolution authority.

[173.007] A further exception is created in respect of the Financial Secretary under subsection 173(8) of this Ordinance.

Criminal offence

[173.008] It is a criminal offence to breach the requirement of secrecy under subsection 173(1), or the extended requirement of secrecy under subsection 173(7) of this Ordinance.

174. Confidentiality on the part of financial institutions etc.

(1) An entity or person to whom this subsection applies—

(a) must preserve, and aid in preserving, secrecy with regard to any matter that comes to the knowledge of the entity or person—

(i) in the course of performing a function under, or carrying into effect, any provision of this Ordinance; or

(ii) in the course of assisting another person to perform a function under, or carry into effect, any provision of this Ordinance;

(b) must not communicate a matter mentioned in paragraph (a) to any person other than the person to whom it relates; or

(c) must not suffer or permit any person to have access to any record or document that has come into the possession of the entity or person because of a circumstance mentioned in paragraph (a).

(2) Subsection (1) applies to—

(a) an entity that is or has been a within scope financial institution;

(b) an entity that is or has been a group company of an entity mentioned in paragraph (a); or

(c) a person who is or has been a member, officer, employee or agent of, or a consultant or advisor to, an entity mentioned in paragraph (a) or (b).

(3) Subsection (1) does not prevent an entity or person to whom that subsection applies from disclosing a matter mentioned in that subsection—

(a) for a purpose permitted by section 173(3) in the case of that entity or person; or

(b) with the consent of the resolution authority of the entity if it is or has been a within scope financial institution or of the within scope financial institution of which the entity is or has been a group company, to a body corporate that is a member of the same group of companies as the entity.

(4) If information is disclosed in reliance on subsection (3), the following persons must not disclose the information, or any part of it, to any other person except with the consent of the resolution authority—

(a) the person to whom the information is disclosed;

(b) any other person obtaining or receiving the information, whether directly or indirectly, from the person mentioned in paragraph (a).

(5) A resolution authority, in granting any consent under subsection (3)(b) or (4), may impose any condition that it considers appropriate.

(6) A person who contravenes subsection (4) and at the time of disclosure knew or ought reasonably to have known that the information, or the part of it, was previously disclosed to the person in reliance on subsection (3) commits an offence unless the person proves that the per- son had reasonable grounds to believe that the disclosure by the person was—

(a) with the consent of the resolution authority;

(b) for seeking advice from, or the giving of advice by, counsel or a solicitor or other professional advisor acting or proposing to act in a professional capacity in connection with a matter arising under this Ordinance; or

(c) of information that was available to the public.

(7) An entity or person that contravenes subsection (1) or fails to comply with a condition imposed under subsection (5) commits an offence.

(8) An entity or person that commits an offence under subsection (6) or (7) is liable—

(a) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

COMMENTARY

Maintaining confidentiality

[174.001] Where section 173 above sets out secrecy requirements in respect of persons in connection with or receiving information from resolution authorities, this section sets out the requirement of confidentiality imposed on within scope financial institutions and connected entities. Its structure largely reflects section 173 above.

Information to be kept secret

[174.002] The requirement to maintain confidentiality applies to knowledge which arises out of the performance or assisting with the performance of functions under this Ordinance.

Persons under confidentiality requirement

[174.003] The requirement of secrecy is imposed upon all persons listed in subsection 174(2), which includes various entities and persons connected with a within scope financial institution.

Other persons under requirement

[174.004] The requirement of confidentiality is extended to persons receiving the information under subsection 174(3).

Disclosure gateways

[174.005] The exceptions to the requirement of confidentiality are set out under subsection 174(3), including the gateways for disclosure of confidential information in the circumstances or to the persons or institutions set out in subsection 173(3) above. The making of such disclosure may be subject to conditions set by the relevant resolution authority.

Criminal offences

[174.006] It is a criminal offence to breach the requirement of confidentiality under subsection 174(1) or to breach conditions imposed on disclosure under subsection 174(5).

[174.007] It is also a criminal offence to breach the extended requirement of secrecy under subsection 174(4), but a defence lies in subsection 174(6) for such persons where they had reasonable grounds to believe that the disclosure was made with the consent of the resolution authority, or for the purposes of seeking legal or professional advice, or if the information disclosed was available to the public.

175. Disclosure of information to authorities in other places

(1) A resolution authority may disclose information to a non-Hong Kong resolution authority if in the opinion of the resolution authority—

(a) the non-Hong Kong resolution authority is subject to adequate secrecy provisions in the non-Hong Kong jurisdiction; and

(b) either—

(i) it is desirable or expedient that information should be so disclosed in the interests of furthering the resolution objectives (in so far as Hong Kong is concerned); or

(ii) the disclosure will enable or assist the non-Hong Kong resolution authority to perform its functions and it is not contrary to the interests mentioned in subparagraph (i) that the information should be so disclosed.

(2) If information is disclosed under subsection (1), the following entities must not disclose the information, or any part of it, to any other person except with the consent of the resolution authority—

(a) the non-Hong Kong resolution authority to which the information is disclosed;

(b) any other person obtaining or receiving the information, whether directly or indirectly, from that non-Hong Kong resolution authority.

(3) A resolution authority, in disclosing any information under subsection (1), may impose any condition that it considers appropriate.

COMMENTARY

Disclosure to overseas authorities

Under the Key Attributes in respect of the "Legal framework conditions for cross-border cooperation", KA 7.6 states "The resolution authority should have the capacity in law, subject to adequate confidentiality requirements and protections for sensitive data, to share information … with relevant foreign authorities …". The complete copy of the Key Attributes as revised on 15 October 2014 is provided as part of our ProView e-Book exclusive content. [175.001]

Section 175 empowers resolution authorities to make disclosures of information to resolution authorities outside of Hong Kong. It may be compared with the power of disclosure and requirements under section 378(3) of the Securities and Futures Ordinance (Cap. 571) in respect of the Securities and Futures Commission, section 53B of the Insurance Companies Ordinance [175.002]

(Cap. 41) in respect of the Insurance Authority, and section 121 of the Banking Ordinance (Cap. 155) in respect of the Hong Kong Monetary Authority.

Conditions for disclosure

[175.003] The conditions for disclosing information to non-Hong Kong resolution authorities are set out under subsection 175(1). Where those conditions are satisfied and information disclosed, it must not be further disclosed by recipients without the consent of the resolution authority. The disclosure to non-Hong Kong resolution authorities may be subject to any conditions the resolution authority considers appropriate.

Non-Hong Kong resolution actions

[175.004] It should be noted that this power of disclosure may be exercised independently of the recognition of non-Hong Kong resolution actions under Part 13 below, and does not require any recognition instrument under that Part nor the notification of the taking of a non-Hong Kong resolution action before disclosure may be made.

Part 12

RESOLUTION FUNDING ARRANGEMENTS

Background

The events of the Financial Crisis, in particular, the cost of the bailouts of investment and depository banks by governments, highlighted the risk of systemically important financial institutions to public monies.

The "Key Attributes of Effective Resolution Regimes for Financial Institutions" (KA) published by the Financial Stability Board (FSB) in 2011 deals with this issue under "Funding of firms in resolution", the starting point of which is "Jurisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms" (KA 6.1). The complete copy of the Key Attributes as revised on 15 October 2014 is provided as part of our ProView e-Book exclusive content.

The Key Attributes suggest that where temporary public funding is required for resolution purposes, those funds should be recoverable from shareholders and creditors, subject to the principle of "no creditor worse off than in liquidation", and the wider financial system (KA 6.2), through an *ex post* levy (KA 6.3). Such temporary public funding should be subject to strict conditions in order to minimize the risk of moral hazard, including whether or not such temporary funding is necessary for orderly resolution and private sources of funding cannot achieve the same, and the allocation of losses to shareholders, creditors, and the wider financial system (KA 6.4). The FSB subsequently published further guidance under the "Guiding Principles on the Temporary Funding Needed to Support the Orderly Resolution of a Global Systemically Important Bank", which deal with the risk of banks lacking sufficient liquidity to maintain critical operations during resolution, and the availability of temporary funding without a public sector bailout.

This Part implements the Key Attributes in respect of resolution funding arrangements. It includes statutory provisions for the recovery of costs by a resolution authority or the Financial Secretary from a financial institution, the matters to be considered before resolution funding is provided, restricts the purposes for which resolution funding may be used, the repayment of such resolution funding, the imposition of resolution levies, and the auditing of accounts in relation to resolution funding.

176. Interpretation

In this Part—

proceeds of resolution (處置收益) means any money payable to the Government as a shareholder of an entity (including a bridge institution, asset management vehicle or TPO company) as a result of, or in connection with, the making of a Part 5 instrument;

public money (公帑) means money in an account that is—

- (a) public moneys as defined by section 2 of the Public Finance Ordinance (Cap. 2); or
- (b) any other money under the control of the Government or a public officer;

resolution funding account (處置資金帳户) means the account into, and out of which, any of the following are paid—

- (a) resolution funds;
- (b) proceeds of resolution;
- (c) costs recovered under section 177;
- (d) any remuneration provided to a resolution authority under section 147(2);
- (e) any interest or fees received in respect of the use of money standing to the credit of the resolution funding account for a purpose mentioned in section 178(4)(a) or (b);
- (f) any other money received in respect of a use of money standing to the credit of the resolution funding account, including a repayment of money lent as mentioned in section 178(4)(b);

resolution funds (處置資金) means public money paid into the resolution funding account;

resolution levy (處置徵費) means a levy imposed under section 180;

surplus (餘款), in relation to the resolution funding account, means any money standing to the credit of that account after all resolution funds have been repaid, and interest payable in respect of them has been paid, under section 179.

COMMENTARY

Definitions

This section sets out the definitions of phrases used in this Part, including monies derived from various provisions under this Ordinance. [176.001]

Public moneys

Public moneys are defined under section 2 of the Public Finance Ordinance (Cap. 2) as: [176.002]

"(a) the general revenue;
(b) any moneys which are accounted for in the books or records of account of the Director of Accounting Services; and
(c) any other moneys which the Chief Executive may declare in writing to be public moneys for the purposes of this Ordinance"

177. Recovery of costs following application of stabilization option

(1) This section applies if conditions 1, 2 and 3 are met in the case of a within scope financial institution and, as a result, a stabilization option is applied to it or to a holding company or affiliated operational entity of it.

(2) The resolution authority that applied the stabilization option or the Financial Secretary may charge to the financial institution or, if a stabilization option has been applied to a holding company of the financial institution, to both the financial institution and the holding company, all reasonable costs properly incurred by the resolution authority or the Financial Secretary, as the case requires, in or in connection with a matter mentioned in section 178(1)(a) or (b).

(3) However, the resolution authority or the Financial Secretary must not charge costs under subsection (2) if, or to the extent that, the charging of the costs might, in the opinion of the resolution authority or the Financial Secretary (having consulted the resolution authority), undermine the meeting of the resolution objectives.

(4) Any costs charged to an entity under subsection (2) may be recovered from the entity as a civil debt due to the resolution authority

or the Government, as the case requires, in any court of competent jurisdiction.

(5) Any money received in respect of costs charged to an entity under subsection (2) (including under subsection (4)) must be paid into the resolution funding account.

COMMENTARY

Costs

[177.001] Where a stabilization option has been applied to a within scope financial institution or its holding company, this section empowers the Financial Secretary or the resolution authority to charge for the costs incurred in respect of the matters under section 178(1) below – preparation and making of a resolution instrument under Part 5 of this Ordinance or compensation and valuation under Part 6 of this Ordinance.

[177.002] Such costs, however, should not be charged if they undermine the meeting of the resolution objectives under section 8 of this Ordinance.

Civil debt

[177.003] Costs under this section may be recovered as a civil debt, due to the Government of the Hong Kong SAR, in a competent civil court.

178. Payment from resolution funding account

(1) Subject to subsection (6), money standing to the credit of the resolution funding account may only be used by—

(a) a resolution authority in, or in connection with—

(i) preparing for the making of a Part 5 instrument in respect of an entity that, in the opinion of the resolution authority, is likely to be an entity in resolution;

(ii) the making of a Part 5 instrument in respect of an entity; or

(iii) the resolution of an entity, including payment of any compensation due under Part 6 and any associated costs; or

(b) the Financial Secretary in, or in connection with, the appointment of an independent valuer to perform functions under Part 6.

(2) Money standing to the credit of the resolution funding account may not be used to meet—

(a) expenses incurred by a resolution authority in performing functions under, or otherwise carrying out, Division 1 of Part 3 or Part 10; or

(b) general operational expenses incurred by a resolution authority unrelated to a matter mentioned in sub- section (1)(a).

(3) Before a resolution authority may use money standing to the credit of the resolution funding account in applying a stabilization option to an entity, it must have regard to the extent to which the entity's own resources can be utilized, including the extent to which—

(a) liabilities of the entity can be written off or converted to enable it to absorb losses and re-establish its capital position;

(b) assets of the entity can be sold; or

(c) private sector funding can be obtained by the entity.

(4) Without limiting subsection (1)(a), the purposes for which money standing to the credit of the resolution funding account may be used by the resolution authority include—

(a) providing a guarantee or indemnity in respect of the assets or liabilities of an entity in resolution, a group company of an entity in resolution, a bridge institution, an asset management vehicle or a TPO company;

(b) lending money to an entity in resolution, a group company of an entity in resolution, a bridge institution, an asset management vehicle or a TPO company; and

(c) if necessary, providing, or underwriting the provision of, capital to an entity in resolution, a group company of an entity in resolution, a bridge institution, an asset management vehicle or a TPO company.

(5) Without limiting subsection (1)(b), the purposes for which money standing to the credit of the resolution funding account may be used by the Financial Secretary include—

(a) the payment of professional fees and expenses in connection with the appointment of an independent valuer to perform functions under Part 6; and

(b) the payment of any fees or other costs properly incurred by the independent valuer in connection with performing those functions.

(6) Any money standing to the credit of the resolution funding account that neither the resolution authority nor the Financial Secretary intends to use for a purpose mentioned in subsection (1) must be used to repay resolution funds and, to that end, must be paid—

(iv) all clients of participants mentioned in subparagraph (i), (ii) or (iii) or a class of such clients;

(d) if the entity in resolution is a recognized exchange company—

(i) all participants of the recognized exchange company or a class of such participants;

(ii) all participants of other recognized exchange companies designated under section 6(1)(b) as within scope financial institutions or a class of such participants;

(iii) all participants of financial market infrastructure that are within scope financial institutions or a class of such participants; or

(iv) all clients of participants mentioned in subparagraph (i), (ii) or (iii) or a class of such clients.

(4) Any payment of resolution levy received by the Government (including under section 183) must be paid into the account out of which the unrepaid resolution funds, or the unrepaid resolution funds to which the interest relates, were paid into the resolution funding account and if unrepaid resolution funds were paid into the resolution funding account out of more than one account, in proportion to the amounts paid out of those accounts.

COMMENTARY

Scope of levies

[180.001] KA 6.3 states that: "Jurisdictions should have in place privately-financed deposit insurance or resolution funds, or a funding mechanism with ex post recovery from the industry of the costs of providing temporary financing to facilitate the resolution of the firm". The complete copy of the Key Attributes as revised on 15 October 2014 is provided as part of our ProView e-Book exclusive content.

[180.002] This section sets out the entities on whom a resolution levy may be imposed, and the extent of such a levy – the extent of public money not being fully recovered on completion of the resolution, and the interest under previous section 178(8) repayable under section 179 above.

Civil debt

[180.003] The resolution levy under this section may be recovered as a civil debt, due to the Government of the Hong Kong SAR, in a competent civil court under section 183 below.

181. Regulations

(1) The Financial Secretary may make regulations for or with respect to the imposition of a levy in connection with the resolution of a particular entity.

(2) Without limiting subsection (1), regulations made under that subsection may—

(a) specify the entities or classes of entities by which the levy is payable;

(b) make different provision for different classes of entities, or for different entities within a class of entity;

(c) set out the methodology for the assessment of the amount of levy payable by a particular entity or class of entity including the factors on which the methodology relies such as—

(i) the size or quantum of the activities of the entity, or of any group company of the entity, measured on the basis of on and off balance sheet assets and liabilities, transaction volumes or other values;

(ii) the risks posed by the non-viability of the entity, or of any group company of the entity, to the stability and effective working of the financial system of Hong Kong, based on any factors that the Financial Secretary considers relevant which may include—

(A) financial condition;

(B) market share;

(C) substitutability;

(D) stability and variety of sources of funding;

(E) structural complexity and resolvability; and

(F) interconnectedness within the sector or across sectors; or

(iii) the extent to which the entity, or any group company of the entity, has benefitted, or would likely benefit, from the orderly resolution of the entity to which a stabilization option has been applied;

(d) prescribe the manner and timing of payment in respect of the levy;

(e) prescribe the circumstances in which, and the period for which, payment of the levy may be deferred; or

(f) prescribe any other matter relating to the levy or the obligations of entities, or classes of entities, liable to pay it.

(3) Regulations made under this section may make different provision according to when a financial institution by which a levy is payable became, or ceased to be, a within scope financial institution.

(4) Before making regulations under subsection (1), the Financial Secretary must consult—

(a) each sector likely to be affected by the levy;
(b) each resolution authority; and
(c) the general public.

(5) Regulations made under subsection (1) may not come into operation earlier than one month after the day on which they are published in the Gazette.

COMMENTARY

Regulations in respect of levy

[181.001] This section empowers the Financial Secretary to make regulations in respect of imposing resolution levies, including the entities covered by such levies, the methodology for assessing the levies payable by entities or classes of entity. Before the Financial Secretary makes such regulations, each sector and resolution authority affected and the general public must be consulted.

182. Rate of levy

(1) The Legislative Council may, on the recommendation of the Financial Secretary, by resolution prescribe the rate of a resolution levy in accordance with the regulations made by the Financial Secretary under section 181.

(2) A resolution made under subsection (1) may not come into operation earlier than one month after the day on which it is published in the Gazette.

COMMENTARY

Prescription by LegCo

[182.001] This section empowers the Legislative Council to prescribe a rate of the resolution levy imposed under previous section 180, pursuant to the regulations made by the Financial Secretary under section 181 above, which shall be published in the Government Gazette.

183. Recovery of levy

Any amount of levy that is due and payable by an entity mentioned in section 180(3) may be recovered from the entity as a civil debt due to the Government in any court of competent jurisdiction.

COMMENTARY

Civil debt

This section provides that a resolution levy may be recovered as a civil debt, [183.001]
due to the Government of the Hong Kong SAR, in a competent civil court.

184. Distribution of surplus

(1) The Financial Secretary may make regulations with respect to how any surplus is to be distributed.

(2) Without limiting subsection (1), regulations made under that subsection may—

(a) specify who is entitled to any share of the surplus;
(b) specify how the share of any person is to be calculated; or
(c) provide for any dispute relating to the distribution of the surplus to be determined by the Resolution Compensation Tribunal.

COMMENTARY

Regulations in respect of surplus

This section empowers the Financial Secretary to make regulations in respect [184.001]
of the distribution of surplus remaining in a resolution fund account upon the completion of the resolution of a within-scope financial institution.

185. Audit regulations

(1) The Financial Secretary may make regulations—

(a) for or with respect to providing for the auditing of the accounting records and financial statements of any entity in so far as those records or statements relate to payments into or out of the resolution funding account; or
(b) for connected purposes.

(2) Regulations made under this section may—

(a) apply generally or be limited in their application by reference to specified exceptions or factors; or
(b) apply differently according to different factors of a specified kind.

(3) Regulations made under this section may prescribe offences in respect of contraventions of the regulations, and may provide for the