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SECURITIES & FUTURES ORDINANCE (CAP.571)

COMMENTARY AND ANNOTATIONS

2025

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Part I

PRELIMINARY

Long Title

Overview of the Securities and Futures Ordinance

The Securities and Futures Ordinance came into effect on 1 April 2003.

The Securities and Futures Bill was published on 7 April 2000 and consolidated 10 ordinances relating to the securities and futures industry at the time, which included:

(1) Securities and Futures Commission Ordinance (Cap.24) (enacted 1989);

(2) Commodities Trading Ordinance (Cap.250) (enacted 1976);

(3) Securities Ordinance (Cap.333) (enacted 1974);

(4) Protection of Investors Ordinance (Cap.335) (enacted 1974);

(5) Stock Exchanges Unification Ordinance (Cap.361) (enacted 1980);

(6) Securities (Insider Dealing) Ordinance (Cap.395) (enacted 1990);

(7) Securities (Disclosure of Interests) Ordinance (Cap.396) (enacted 1988);

(8) Securities and Futures (Clearing Houses) Ordinance (Cap.420) (enacted 1992);

(9) Leveraged Foreign Exchange Trading Ordinance (Cap.451) (enacted 1994); and

(10) Exchanges and Clearing Houses (Merger) Ordinance (Cap.555) (enacted 2000).

The above repealed ordinances were considered complex and cumbersome by the government and their regulatory approaches inadequate for investor protection. The Bill aimed to enshrine a user-friendly regulatory regime for the development of a fair, orderly, and transparent market that would be competitive internationally as well as attractive to investors, issuers, and intermediaries. Specifically, it sought to create a modern legal framework that:

(1) promoted market confidence;

(2) secured appropriate investor protection;

(3) reduced market malpractice and financial crimes; and

(4) facilitated innovation and competition.

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Definition guidance

The reader of this Ordinance must be careful about the definitions of various terms. Schedule 1 to this Securities and Futures Ordinance (Cap.571) (the Ordinance or SFO), sets out all definitions which have general application across this Ordinance. The opening Division of a Part within the main body of the Ordinance sets out definitions of terms that are specific to that particular Part. Definitions of terms that are solely used in a single provision are found in the last subsection of each section. For example, "financial product" is defined in Sch.1 for the purpose of this Ordinance generally. But this term is again separately defined in Sch.9 to the Ordinance to have a different meaning in the context of insider dealing.

Long Title

An Ordinance to consolidate and amend the law relating to financial products, the securities and futures market and the securities and futures industry, the regulation of activities and other matters connected with financial products, the securities and futures market and the securities and futures industry, the protection of investors, and other matters incidental thereto or connected therewith, and for connected purposes.

[1 April 2003] *L.N. 12 of 2003*

(Enacting provision omitted—E.R. 2 of 2012)
(Originally 5 of 2002)
(*Format changes—E.R. 2 of 2012)

1. Short title

(1) This Ordinance may be cited as the Securities and Futures Ordinance.
(2) (*Omitted as spent—E.R. 2 of 2012*)

COMMENTARY

[1.01] Enactment history
The White Bill for the consultation of the SFO was published in the Gazette on 7 April 2000 (Special Supplement No 5 of the same date) and the Blue Bill was published in the Gazette on 24 November 2000.

The first reading in the Legislative Council took place on 29 November 2000. A Bills Committee was formed in December 2000 to study both the Securities and Futures Bill and the Banking (Amendment) Bill 2000.

The SFO was subsequently passed by the Legislative Council on 13 March 2002 and came into force on 1 April 2003, repealing and replacing the Securities (Disclosure of Interests) Ordinance and many other pieces of securities-related legislation in existence at that time.

2. Interpretation

(1) Schedule 1 contains interpretation provisions which apply to this Ordinance in accordance with their terms.
(2) Individual Parts and provisions of this Ordinance contain interpretation provisions which have application in accordance with their terms.
(3) The Commission may, by notice published in the Gazette, amend Parts 2, 3, 4 and 5 of Schedule 1.

COMMENTARY

[2.01] Overview
The interpretation of the SFO is based upon a number of important definitions. The interpretative provisions, given their extensive volume and importance, are primarily set out in Part 1 to Sch.1 of the SFO.

While these general definitions are found in Part 1 to Sch.1, *specific definitions applicable to particular Parts of the SFO* are found in the opening provision of the relevant Part. In addition, definitions of terms relevant to a single section (or multiple sections) within a Part of the SFO are often provided at the end of that relevant section.

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Part II

SECURITIES AND FUTURES COMMISSION

Background of Part II

Part II provides for the proceedings and the operation of the Securities and Futures Commission (SFC) and its constitutional framework.

Part II governs the SFC, its creation, regulatory functions, objectives, powers, and duties. It also describes the constitution and procedures of the SFC including some important accountability measures, such as (i) restrictions on the delegation of various functions; (ii) the power of the Chief Executive to issue directions to the SFC; (iii) the obligation of the SFC to give certain information to the Financial Secretary on request; and (iv) budgetary, financial reporting, audit and investment requirements. These provisions are supplemented by more detailed procedures relating to the SFC's corporate governance in Part 1 of Sch.2 of the Securities and Futures Ordinance (SFO) and a list of SFC functions that the SFC board of directors may not delegate as prescribed in Part 1 of the Sch.2 of the SFO. Part II of the SFO changed little from the previous arrangements in the repealed Securities and Futures Commission Ordinance (Cap.24).

Division 1—The Commission

3. Securities and Futures Commission

(1) Notwithstanding the repeal of the Securities and Futures Commission Ordinance (Cap. 24) under section 406, the body established by section 3 of that Ordinance as the Securities and Futures Commission shall continue in existence in its original name as a body corporate with power to sue and be sued in that name.

(2) Subject to the provisions of this Ordinance, the corporate identity of the Commission, and the rights, privileges, powers, obligations and liabilities of the Commission and those of others in relation to the Commission, are not affected by the repeal of the Securities and Futures Commission Ordinance (Cap.24) under section 406, and any reference to the Commission (whether by reference to that Ordinance or otherwise) in any Ordinance or any instrument, record or document, or in or for the purposes of any proceedings, agreement or arrangement (whether in writing or not) shall be construed accordingly.

(3) The receipts of the Commission are not subject to taxation under the Inland Revenue Ordinance (Cap. 112).

(4) Part 1 of Schedule 2 contains provisions relating to the constitution and proceedings of and other matters relating to the Commission.

COMMENTARY

[3.01] Enactment history
Section 3 has no predecessor provision. It came into effect on 1 April 2003.

[3.02] Overview
The SFC was established in 1989 in the wake of the stock market crash in October 1987. It was established according to the recommendations of a report by the Securities Review Committee (*The Operation and Regulation of the Hong Kong Securities Industry*, popularly known as the *Hay Davison Report*) in 1988.

The closure of the stock exchange in the aftermath of Black Monday led to the appointment of the Securities Review Committee on 16 November 1987 by Hong Kong's former Governor, Sir David Wilson. The Committee, chaired by Ian Hay Davison, was asked to review the constitution, powers, management, and operation of the Stock and Futures Exchanges and their regulatory bodies.

The above report was presented to the government on 27 May 1988, recommending major reforms, including a fundamental revision of the internal constitution of both the Stock and Futures Exchanges and the establishment of a single independent statutory body outside the Civil Service, the SFC, to regulate and supervise the securities and futures industry.

The SFC was originally established under s.3 of the repealed Securities and Futures Commission Ordinance (Cap.24). The provisions relating to the constitution and proceedings of the SFC are now set out in Part 1 of Sch.2 of SFO (previously contained in s.5 of the repealed Securities and Futures Commission Ordinance (Cap.24)).

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[3.03] Constitutional framework of the SFC

Part II and Sch.2 of the SFO provide for the operations of the SFC and its constitutional framework. The previous constitutional framework of the SFC (ie before the current SFO came into effect) remains essentially unchanged, but some notable changes have been made to provide clarity and, where necessary, an appropriate degree of flexibility. All of these reflect the need to clarify the objectives and functions of a modern securities regulator. There are three notable changes, which are briefly discussed below:

(1) the introduction of a new Cl.4 setting out the regulatory objectives which the SFC is to pursue. This has no counterpart in the repealed Securities and Futures Commission Ordinance (Cap.24);
(2) a new provision, Cl.6, which sets out the general duties of the SFC under the SFO; and
(3) the terminology used to delineate the ambit of the SFC's jurisdiction has been revised to better reflect the exact parameters and nature of its role.

[3.04] Schedule 2 to the SFO

Part 1 of Sch.2 to the SFO sets out the constitution and proceedings of the SFC. It stipulates the number of chairman, chief executive officer (CEO), and other members of the SFC, and it also stipulates the appointment of the deputy chairman and vacancies in the office of chairman or deputy chairman, etc. It also sets out the functions and office of members, and regulates the conduct of meetings and passing of written resolutions, etc. This part of the schedule also stipulates the setting up and composition of the advisory committee of the SFC.

Part 2 of Sch.2 to the SFO sets out SFC's non-delegable functions. This list of non-delegable functions has been greatly expanded so as to encompass matters of broad market impact and any functions which require consultation with the Financial Secretary.

[3.05] The split model

The split model was introduced by the Securities and Futures (Amendment) Ordinance 2006. It proposes that the SFC be led by a chairman whose role is separated from the executive arm, while the executive arm is headed by a CEO.

Since both the international and the local best governance practices tend to separate the roles and responsibilities of the *chairman* and *chief executive* of a public body, the government considered that SFC as the market regulator should implement such practice and set exemplary standard for others to follow. That would also be in line with the corporate governance practice of other public corporations in Hong Kong, such as: (i) the Hong Kong Exchange and Clearing Limited; (ii) the Airport Authority; and (iii) the Mandatory Provident Fund Schemes Authority, etc.

The government therefore proposed that the role of the Chairman of the SFC should be separated from that of the CEO. The Chairman would focus on: (i) the establishment and development of an effective governing body; (ii) setting agenda and priorities, (iii) facilitating effective contribution of non-executive directors (NEDs); and (iv) representing SFC publicly and liaising with local and international financial institutions and organizations and other stakeholders.

The CEO now has the executive responsibility for the day-to-day running of SFC. His key responsibilities include: (i) reporting to the governing body of SFC regularly with appropriate, timely, and quality information; (ii) informing and consulting the Chairman

on all matters of significance to the SFC; (iii) developing and delivering the strategic objectives agreed with the governing body; (iv) overseeing the day-to-day operation and regulatory work of the SFC; and (v) ensuring that the SFC is equipped with the necessary staffing and financial and risk management systems for its mission.

The Amendment Ordinance 2006 amended Part 1 of Sch.2 of the SFO to the effect that:

(1) s.1(b) is replaced so that the number of SFC NEDs shall exceed the number of SFC executive directors (EDs);
(2) s.2 is repealed so that the Chairman of the SFC shall no longer be regarded as an ED of the SFC;
(3) ss.4, 6, and 7 are amended so that an SFC NED may also be appointed as the deputy chairman of the SFC (DC/SFC) or be designated to act as the Chairman;
(4) the Chief Executive may appoint an SFC ED to be the CEO of the SFC; and
(5) a new s.9A is added so that the Chairman of the SFC, the DC/SFC, and the CEO shall have such functions as are assigned to them by the SFC.

[3.06] Chairman of the SFC

The role of the Chairman of the SFC (Chairman) is pivotal in leading the SFC governing body in setting the overall direction, policies, and strategies of the SFC and monitoring the performance of the executive arm in implementing the objectives set by the governing body. Given the importance of the role and in line with the trend of good governance practice, the role of the Chairman was separated from that of the executive arm to further enhance the internal checks and balances of the SFC. This creates the conditions for enhancing the independence of the governing body and hence its ability to discharge its supervisory functions over senior management.

The idea is that the role of the Chairman should be clearly separated from that of the CEO and should focus on the following responsibilities:

(1) establishing and developing an effective governing body;
(2) setting agenda and establishing priorities;
(3) facilitating effective contribution of NEDs; and
(4) representing the SFC publicly, in liaison with local and international financial institutions and other stakeholders.

The Chairman will not be involved in the day-to-day regulatory work (eg reviewing individual listing applications and investigating possible breaches of the SFO).

[3.07] CEO of the SFC

The CEO carries the executive responsibility for the day-to-day running of the SFC. He should implement the objectives, policies, and strategies agreed by the SFC governing body and facilitate the effective functioning of the governing body. The key responsibilities include:

(1) reporting to the governing body regularly with appropriate, timely, and quality information;
(2) informing and consulting the chairman on all matters of significance to the SFC;
(3) developing and delivering the strategic objectives agreed with the governing body; and
(4) overseeing the day-to-day operation and regulatory work of the SFC and ensuring that the SFC is equipped with the necessary staffing and financial and risk management systems for its mission.

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[3.08] Independence of Chairman of SFC

The government has stated clearly at the consultation stage, that it was a fundamental policy objective of the government to preserve the independence of the SFC. In selecting the Chairman of the SFC, the government would be keenly aware that he/she should be, and be perceived to be, independent from external influence so as to preserve the integrity, reputation, and image of the independent regulator under the three-tier regulatory system.

The government considered that the above can be achieved through:

(1) application of the current provisions in the SFO concerning avoidance of conflict of interests; and
(2) application of the SFC's internal Code of Conduct which requires the highest standards of integrity and conduct from its directors (Chairman and NED included) and staff in carrying out their work properly, impartially, and free from any suggestion of improper influence.

In addition, given public expectation on the independence of the post of Chairman, it is the government's policy intention that during the tenure of the office of Chairman, he should not:

(1) be a director of any listed company in Hong Kong; or
(2) have any material interest in any principal business activity of or is involved in any material business dealing with a listed company, or any person or institution engaged in activities regulated by the SFC.

The potential Chairman of the SFC will be required to agree to comply with the above requirements before his/her appointment takes effect.

While it was the government's policy intention that the Chairman should be non-executive, the government did not recommend stipulating this rigidly in the legislation since it might be problematic to delineate in law the distinction between executive and non-executive duties and might impose unnecessary inflexibility on the future set up of the SFC. The government made reference to the Financial Services and Markets Act (UK) and pointed out that it also did not make such stipulation.

According to the papers submitted to the LegCo, the remuneration package for the CEO would be similar to that of the then executive Chairman while remuneration for the non-executive Chairman would be lower than that of the CEO since the Chairman's appointment was regarded as a service to the community, not an employment with the SFC. The government did not expect the financial implications to be significant relative to the overall budget of the SFC. In deciding the appropriate level of remuneration for Chairman of SFC, the government also draws reference from the remuneration for non-executive Chairmen of other public bodies in Hong Kong and relevant regulatory bodies overseas, as well as the remuneration for SFC's existing NEDs.

[3.09] Safeguards against conflict of interests

Concerns were expressed by the lawmakers as to whether adequate safeguards were in place to avoid any real or perceived conflict of interests between the roles of the future SFC Chairman and his/her past or current employment/connections with listed or private companies. The government has assured lawmakers that it attached great importance to the independence of the Chairman from any perceived or real conflict of interests.

On statutory safeguards, ss.378 and 379 of the SFO govern the preservation of secrecy and avoidance of conflict of interests, respectively. The relevant provisions in the Prevention of Bribery Ordinance (Cap.201) are also applicable to all members (including Chairman, EDs, and NEDs) and staff of the SFC. Moreover, the SFC's internal code of conduct which sets out the requirements on confidentiality, conflict of interests, personal investments, and prevention of bribery will continue to apply to the Chairman, EDs, and NEDs and staff of the SFC under the split model.

There have also been additional requirements on the SFC Chairman that he should not be a director in any listed company in Hong Kong and should not have any material interest in any principal business activity or be involved in any material business dealing with any persons or institution regulated by SFC.

According to the government, an example of "having a material interest" would be shareholder status or directorship of the SFC Chairman in a listed company/licensed intermediary. For a listed company, the holding of about 5% shares may be regarded as material. As regards being "involved in any material business dealing with a listed company/licensed intermediary", an example is where the SFC Chairman or a company in which he holds shares or is a director, has business dealings with the listed company or licensed intermediary.

Where the proposed SFC Chairman is a partner of a law firm whose clients are listed companies regulated by SFC, the government takes the view that there is a risk that a potential or real conflict of interest may arise if the proposed candidate is appointed as Chairman of SFC. Hence, as a condition for appointment, the candidate will be required to resign from the law firm. During the term of appointment, he should not have any direct or indirect interest in the law firm.

Concern has been raised about the efficacy or otherwise of the additional safeguards as they are only administrative, not statutory, requirements and carry no sanction against non-compliance. The government's intention was to include them in the terms of appointment of the prospective Chairman. In accepting the appointment, the candidate will be required to agree to comply with these requirements. The government did not consider it necessary to include the additional safeguards in the law as ss.378 and 379 of the SFO already provide criminal sanctions against any person who breaches the secrecy and avoidance of conflicts requirements under these two sections.

[3.10] SFC's participation in the International Organization for Securities Commissions

During the legislative stage, it was noted that a former Chairman of the SFC had chaired the Technical Committee of International Organization for Securities Commissions (IOSCO). Lawmakers were concerned as to whether the appointment of a non-executive Chairman might have adverse implications on the SFC's future international status and affect its participation in IOSCO. They also noted from the SFC's written submission that the securities regulators, which were members of the Technical Committee, were all headed by executive chairmen and that Hong Kong might be denied the opportunity in the future to take up important chairmanship positions in the international community because the executive chairmen might not consider a non-executive chairman as an equal. In this regard, the government has provided for the LegCo Bills Committee's reference the written advice by the Secretary General of the IOSCO that the appointment of the Chairman of the IOSCO Technical Committee would be a personal appointment based

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on the recognised experience and authority of the appointee, rather than on the executive nature or otherwise of the post held by the person.

To assess further the impact of the splitting proposal on Hong Kong's standing in the IOSCO Technical Committee, the Bills Committee has consulted the Chairman of the Executive Committee of IOSCO and the Deputy Chairman of the Technical Committee of IOSCO on their views. In the opinion of the former, the IOSCO principles are sufficiently broad to be adapted to domestic contexts and to provide some flexibility with respect to the governance structures of securities regulators. As such, there will be no bar to participation in IOSCO by a non-executive chairman. Nevertheless, in the selection of the Chairman of the Technical Committee, other executive chairmen may well not be confident in appointing a person who is not having detailed technical knowledge and experience normally gained from the day-to-day work as a securities regulator. The Deputy Chairman of the Technical Committee has advised that each regulatory body is responsible for appointing its representative to IOSCO. Active participation in discussions and chairmanship of various committees may hinge on the level of authority the representative can command. However, to the best of his knowledge, every member of the Executive Committee of IOSCO or of the Technical Committee is an executive chairman.

Notwithstanding that there has not been any explicit comment on the desirability of a non-executive chairman of a securities regulator to chair committees of IOSCO, lawmakers noted that relevant professional knowledge and experience possessed by the person in question are key factors for consideration. The government has also advised that in actual practice, participation and chairmanship at the committees of IOSCO are not restricted to executive chairmen of securities regulators. Note that Ashley Alder, the CEO of the SFC, was appointed as the Chairman of IOSCO Board in May 2016. His position as a Chairman was then taken over by Mr Jean-Paul Servais, the Chairman of Belgium's Financial Services and Markets Authority, on 21 October 2022.

[3.11] The SFC's power to ratify its action

In *Securities and Futures Commission v A*, HCMP 1407/2007 (reported as *Re A* [2007] HKEC 2266), the board of directors of the SFC authorised the application for an injunction in respect of the amount of any profit made from the sale of the defendant's shares in other companies. Subsequently, the board of the SFC passed a fresh board resolution stating, among other things, that for avoidance of doubt it ratified the earlier application for an injunction.

Counsel for the defendant submitted that the Court had no jurisdiction to entertain the application for an interim injunction as it was ultra vires, in that the board of directors of the SFC had failed to authorise the application to be brought.

The Court disagreed and held that [15]:

The SFC is a body corporate by virtue of s.3 of Cap.571, and can ratify its actions as in the case of any other body corporate. The board of a corporation, whether statutory or otherwise, can ratify its acts by subsequent resolutions and the ratification would have retrospective effect (*Pennington's Company Law*, 8th Ed, pp.153–154; *Poon Yee Kan Andrea Eleanor v New Paradigm E-Technology Ltd* [2004] HKCU 1068; (HCMP 3682/2003, Reyes J, 14 September 2004, unreported), para 84; *Fong Poh Yoke & Ors v The Central Construction Co (Malaysia) Sdn Bhd* [1998] MLJU 478, [*70]–[*73]).

4. Regulatory objectives of Commission

The regulatory objectives of the Commission are—

(a) to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;
(b) to promote understanding by the public of financial services including the operation and functioning of the securities and futures industry; *(Replaced 9 of 2012 s. 30)*
(c) to provide protection for members of the public investing in or holding financial products;
(d) to minimize crime and misconduct in the securities and futures industry;
(e) to reduce systemic risks in the securities and futures industry; and
(f) to assist the Financial Secretary in maintaining the financial stability of Hong Kong by taking appropriate steps in relation to the securities and futures industry.

COMMENTARY

[4.01] Enactment history

Section 4 came into effect on 1 April 2003. It has no equivalent provision in the repealed Securities and Futures Commission Ordinance (Cap.24).

This provision sets out the regulatory objectives which the SFC is to pursue and confines its jurisdiction to the securities and futures industry.[1] This section was newly introduced to the SFO in 2003 and it has no counterpart in the repealed Securities and Future Commission Ordinance (Cap.24). It was introduced so that the management of the SFC would be expressly in line with the IOSCO standard.

IOSCO was established in 1983. Its membership regulates more than 95% of the world's securities markets in more than 130 jurisdictions, and securities regulators in emerging markets account for 75% of its ordinary membership. The *IOSCO Objectives and Principles of Securities Regulation* have been endorsed by both the G20 and the Financial Stability Board as the relevant standards in this area.

In October 1998, members of the IOSCO agreed that the core objectives of securities regulation are:

(1) the protection of investors;
(2) ensuring that markets are fair, efficient, and transparent; and
(3) the reduction of systemic risks.

IOSCO also emphasised as a principle of securities regulation that the responsibilities of the regulator should be clear and preferably set out by law, and that the regulator's exercise of powers and discharge of functions should be comprehensible and transparent to the public.

[1] Definition of "securities and futures industry" can be found in Sch.1 to the SFO.

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The United Kingdom quickly followed the same lines as IOSCO by spelling out the objectives of the Financial Services Authority (FSA) (since renamed as the Financial Conduct Authority (FCA) in 2013).

Following international practice, the Hong Kong government introduced s.4 in the SFO. Additionally, the provisions relating to the SFC's functions (s.5) have also been revised to better reflect and facilitate the need to fulfil the regulatory objectives stipulated in this provision.

[4.02] The UK development

Reference may be drawn to the relevant sections of the comparable legislations in the United Kingdom. The United Kingdom has undergone significant changes in securities and futures regulatory system in recent years. The Financial Services Act 2012 (UK) introduced amendments to the original regulatory structure, and the FSA was renamed the FCA on 1 April 2013.

The regulatory objectives of the FCA are slightly different from those of the abolished FSA, emphasising consumer protection and the enhancement of competition in the markets. The FCA's statutory regulatory objectives set out below were further amended on 29 August 2023 by the introduction of the Financial Services & Markets Act 2023 (amending the 2020 Act). These objectives include:

(1) the consumer protection objective (securing an appropriate degree of protection for consumers);
(2) the integrity objective (protecting and enhancing the integrity of the UK financial system);
(3) the competition objective (promoting effective competition in the interests of consumers in the markets for regulated financial services or services provided by a recognised investment exchange in carrying on regulated activities); and
(4) the competitiveness and growth objective (facilitating, subject to aligning with relevant international standards, (i) the international competitiveness of the economy of the United Kingdom (including in particular the financial services sector) and (ii) its growth in the medium to long term) (introduced by the FSMA 2023 on 29 August 2023).

[4.03] Objectives and public interest

These regulatory objectives, such as to ensuring protection of the interests of the investing public, have been reiterated in CFA decision; see *Securities and Futures Commission v Pacific Sun Advisors Ltd* [2015] 2 HKC 595, [37]. In *Re China Metal Recycling (Holdings) Ltd* [2015] HKCU 501, s.4 was considered when the SFC presented a petition to seek a winding-up order against the company under provisions of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) and s.212(b) of the SFO, which provides that if it appears to the SFC that it is desirable in the public interest that the corporation should be wound up, the SFC may present a petition for the corporation to be wound up under that SFO on the ground that it is just and equitable that the corporation should be so wound-up.

In the course of making a decision, the Court drew reference to s.4 of the SFO when it elaborated on the meaning of "public interest". The Court was of the opinion that the expression "public interest" was not defined in the relevant statutes in Hong Kong. In ascertaining contextually what the expression meant, it was instructive to consider at the outset the regulatory objectives and functions of the SFC as set out in ss.4 and 5 of the

SFO. The Court cited the UK authority of *Re Inertia Partnership LLP* [2007] Bus LR 879, in which the Court accepted that a winding-up order would satisfy the SFA statutory objectives by maintaining confidence in the financial system, promoting public awareness of the financial system, protecting consumers, and reducing financial crime. The Hong Kong Court accepted the UK's analogy and ruled that it was clearly in the public interest that, where necessary, the SFC seeks orders from the court to advance and achieve the regulatory objectives.

In *A v Securities and Futures Commission* [2015] 1 HKLRD 47 some respondents in the disciplinary proceedings before the Takeover and Mergers Panel applied to the Court, by way of judicial review, for a stay of these disciplinary proceedings, because the respondents were also defendants in criminal trial scheduled to be heard in the High Court. They applied for a stay so that the disciplinary proceedings would only continue after the completion of the criminal trial. Their main argument was that in order to answer the allegation in the disciplinary proceedings, they had to disclose substantially their defence in relation to the criminal charges. This infringed their right to silence and privilege against self-incrimination.

When considering the case, the Court described the SFC's duties set out in s.4 as "very onerous":

> Their duties include maintaining the fairness, transparency and competitiveness of the securities and futures industry. Most importantly to minimize crime and misconduct in the industry. As Rogers JA stressed in *Nomura* ... "These are important functions and they relate to the integrity of the Hong Kong securities industry ... It has to be appreciated that it is a public body, undertaking public duties, in the public interest. To stop that body conducting what are indisputably proper functions is thus a serious matter. The court has no business in preventing such a body carrying out its statutory and public duties unless there are clear and strong grounds for doing so."

The Court was satisfied that there was no real risk of prejudice to the criminal trial given the Chairperson of the Takeover and Mergers Panel was prepared to conduct the hearing in private and would consider withholding the decision of the Panel depending on the circumstances.

Note that the Court of Appeal held that the purpose of the SFO is not confined to activities in respect of securities listed in Hong Kong but also to activities in Hong Kong in relation to securities listed elsewhere, and that s.6(2)(a) of the SFO highlights the point that the SFC shall have regard to the international character of the securities and futures industry and the desirability of maintaining the status of Hong Kong as a competitive international financial centre; see *Securities and Futures Commission v Young Bik Fung* [2018] 1 HKC 246, [70].

When considering the scope of power of the SFC under s.181 of the SFO to require and compel a person to provide information including potentially self-incriminating materials in *AA v Securities and Futures Commission (No 2)* [2019] 2 HKLRD 16, [101], Zervos JA also took into consideration s.4 of the SFO which states the regulatory objectives of the SFC.

The regulatory objectives have also been considered by the Court in a judicial review application against the SFC's decision to not take a complaint made by the applicant company any further; see *Waddington Ltd v Securities and Futures Commission* [2018] HKCFI 2544, [79].

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[4.04] The 2012 Amendment—Investor and Financial Education Comm...

Section 4 was amended by the Securities and Futures (Amendment) Ordinance ... to introduce a new s.4(b). Section 4(b) states that one of the objectives of the SFC is "to promote understanding by the public of financial services including the operation and functioning of the securities and futures industry". This amendment enabled the SFC to establish the cross-sectoral Investor Education Council (IEC) in 2012.

In light of the launch of more complex and varied financial products that cut across traditional boundaries of banking, insurance, and securities markets, and the ... trend of more retail investors entering the markets, the government proposed ... amendments, among other tasks, to enable the SFC to establish a cross-sectoral ... holistically oversee the needs of investor education and delivery of related ... The IEC aims to influence the financial attitude and behaviour of the general public ... improving financial literacy and capability.

The IEC was renamed to Investor and Financial Education Council (IFEC) ... 17 January 2019. The IFEC is governed by an independent Board of Directors ... prises the Chairman, who is a NED of the SFC, and representatives of the four ... cial regulators—the Hong Kong Monetary Authority (HKMA), Insurance Auth... Mandatory Provident Fund Schemes Authority and SFC. It also includes representa... from the education and finance sectors, as well as the General Manager of the IFEC.

5. Functions and powers of Commission

(1) The functions of the Commission are, so far as reasonably practicable—

(a) to take such steps as it considers appropriate to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;

(b) to supervise, monitor and regulate—

(i) the activities carried on by recognized exchange companies, recognized clearing houses, recognized exchange controllers or recognized investor compensation companies, or persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions; and

(ii) such of the activities carried on by registered institutions as are required to be regulated by the Commission under any of the relevant provisions;

(c) to promote and develop an appropriate degree of self-regulation in the securities and futures industry;

(d) to promote, encourage and enforce the proper conduct, competence and integrity of persons carrying on activities regulated by the Commission under any of the relevant provisions in the conduct of such activities;

(e) to encourage the provision of sound, balanced and informative advice regarding transactions or activities related to financial products;

(f) to take such steps as it considers appropriate to ensure that the relevant provisions are complied with;

(g) to maintain and promote confidence in the securities and futures industry in such manner as it considers appropriate, including by the exercise of its discretion to disclose to the public any matter relating or incidental to the performance of any of its functions;

(h) to co-operate with and provide assistance to regulatory authorities or organizations, whether formed or established in Hong Kong or elsewhere;

(i) to enhance the understanding and knowledge of members of the public of financial services including—

(i) the operation and functioning of the securities and futures industry; and

(ii) the benefits, risks and liabilities associated with purchasing financial services including investing in financial products; *(Replaced 9 of 2012 s. 31)*

(j) to encourage the public to appreciate the relative benefits of purchasing different types of financial services including investing in financial products through persons carrying on activities regulated by the Commission under any of the relevant provisions; *(Amended 9 of 2012 s. 31)*

(k) to promote understanding by the public of the importance of—

(i) making informed decisions regarding the purchasing of financial services and transactions and activities related to financial products; and

(ii) taking responsibility for those decisions; *(Replaced 9 of 2012 s. 31)*

(l) to secure an appropriate degree of protection for members of the public investing in or holding financial products, having regard to their degree of understanding and expertise in respect of investing in or holding financial products;

(m) to promote, encourage and enforce—

(i) the adoption of appropriate internal controls and risk management systems by persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions; and

(ii) the adoption of appropriate internal controls and risk management systems by registered institutions in the conduct of activities regulated by the Commission under any of the relevant provisions;

(n) to suppress illegal, dishonourable and improper practices in the securities and futures industry;

(o) to take appropriate steps in relation to the securities and futures industry further to any requirement of the Financial Secretary for the purpose of providing assistance in maintaining the financial stability of Hong Kong;

(p) to recommend reforms of the law relating to the securities and futures industry;

(q) to advise the Financial Secretary on matters relating to the securities and futures industry and provide him with such information in relation thereto as it considers appropriate; and

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(r) to perform functions conferred or imposed on it by or under this or any other Ordinance.

(2) Subsection (1)(c) does not limit or otherwise affect any other function of the Commission.

(3) The Commission, in performing any of its functions in relation to—

(a) any authorized financial institution as a registered institution or as an associated entity of an intermediary; or

(b) any person as an associated entity of an authorized financial institution that is a registered institution,

may rely, in whole or in part, on the supervision of such authorized financial institution or person (as the case may be) by the Monetary Authority.

(4) For the purposes of this Ordinance, the Commission may—

(a) acquire, hold and dispose of property of any description;

(b) make contracts or other agreements;

(c) receive and expend moneys;

(d) with the approval of the Financial Secretary, borrow money on security or other conditions;

(da) establish a wholly owned subsidiary of the Commission to facilitate the performance of functions under subsection (1)(i), (j) and (k); *(Added 9 of 2012 s. 31)*

(e) publish or otherwise make available materials (however described) indicating to persons who are, or who carry on activities, regulated by the Commission under any of the relevant provisions and, where the Commission considers appropriate, to any other persons the manner in which, in the absence of any particular consideration or circumstance, the Commission proposes to perform any of its functions; and

(f) publish or otherwise make available materials (however described) indicating to the public any matter relating or incidental to the performance of any of the functions of the Commission.

(5) Materials published or otherwise made available under subsection (4)(e) or (f) are not subsidiary legislation.

COMMENTARY

[5.01] Enactment history

Section 5 came into effect on 1 April 2003. Section 5(1) was based on s.4 of the repealed Securities and Futures Commission Ordinance (Cap.24). Paragraphs (a), (g), (i), (j), (k), (m), and (o) of s.5(1) are new additions with no counterpart in the repealed Securities and Futures Commission Ordinance. Sections 5(2), 5(3), and 5(5) also have no equivalent in the repealed Securities and Futures Commission Ordinance (Cap.24). Section 5(4) was taken from s.8 of the repealed Securities and Futures Commission Ordinance (Cap.24). Sections 5(1)(e) and 5(1)(f) are new additions developed from para.(e) of s.8 of the repealed Securities and Futures Commission Ordinance (Cap.24).

The Securities and Futures (Amendment) Ordinance 2012 repealed the existing s.5(1)(i) and 5(1)(k) and substituted new s.5(l)(i) and 5(1)(k) for the purposes of enhancing investor education. The Bill also amended s.5(l)(j) and added a new s.5(4)(da).

[5.02] Overview

This provision sets out the functions and powers of the SFC. All of the specific terms are defined in Sch.1 to the SFO.

Section 5 of the SFO is often cited by the Court as a reference point when it needs to determine the meaning and construction of other sections of the SFO. For example, Zervos J had referred to s.5 in *AA v Securities and Futures Commission* [2016] 4 HKC 515 where he dealt with an application for leave to judicial review took out by a licensed corporation and its responsible officer against the SFC's decision to transmit compelled answers, testimony, and documents to certain Japanese regulators empowered under s.181 of the SFO. He stated in [11] granting leave to the applicants that:

> 11. The statutory functions and duties of the Commission are set out in sections 5 and 6 of the SFO respectively. A key part of its functions is to cooperate with and provide assistance to regulatory authorities or organisations, whether formed or established in Hong Kong or elsewhere. A key part of its duties is to have regard to the international character of the securities and futures industry and the desirability of maintaining the status of Hong Kong as a competitive international financial centre as well as the importance of acting in a transparent manner, having regard to its obligations of preserving secrecy and confidentiality.

In *Securities and Futures Commission v Qunxing Paper Holdings Co Ltd (No 2)* [2018] 1 HKLRD 1060, Godfrey Lam J made reference to s.5 of the SFO when he analysed the nature of "s.213 Remedy" (eg requiring the defendant to pay damages to the public shareholders) empowered by the SFO. See also *Securities and Futures Commission v Tiger Asia Management LLC* [2012] 2 HKLRD 281, [35] and *AA v Securities and Futures Commission (No 2)* [2019] 2 HKLRD 16 for similar analysis.

Furthermore, note the Court of Appeal held that the purpose of the SFO is not confined to activities in respect of securities listed in Hong Kong but also to activities in Hong Kong in relation to securities listed elsewhere, and that s.6(2)(a) highlights that the SFC shall have regard to the international character of the securities and futures industry and the desirability of maintaining the status of Hong Kong as a competitive international financial centre, see *Securities and Futures Commission v Young Bik Fung* [2018] 1 HKC 246, [70].

[5.03] *No private right of action under s.5*

The court held in *Koo Ming Kown v Securities and Futures Commission* (HCA 2599/2016, [2017] HKEC 1512) that there can be no specific statutory duty that could give rise to a private right of action under s.5. Section 5(1) sets out the general functions of the SFC and the SFC has discretion in the exercise of the functions in that the SFC is only required to carry out the functions "so far as reasonably practicable".

[5.04] *SFC's power to rely on the Hong Kong Money Authority*

The SFO also introduced a new provision (s.5(3)) which provided that the SFC may rely upon the HKMA to conduct supervision, regulation, and surveillance of exempt authorised financial institutions. As one might note, the SFC's jurisdiction is confined to the securities and futures industry. However, the activities of authorised institutions (also referred to as "authorised financial institutions") under the Banking Ordinance (Cap.155) in the securities industry may be caught under more than one regulatory net, that of the

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