

Twenty-third Schedule

[ss. 2B & 360]

Parent and Subsidiary Undertakings

(Twenty-third Schedule added 12 of 2005 s. 18)

(Format changes—E.R. 1 of 2014)

1. Interpretation

- (1) For the purposes of the provisions specified under section 2B(3) of this Ordinance and this Schedule—

parent company (母公司) means a parent undertaking which is a company;

parent undertaking (母企業) shall be construed in accordance with section 2;

shares (股、股份) shall be construed as a reference to—

- (a) in relation to an undertaking with a share capital, the allotted shares;
- (b) in relation to an undertaking with capital in the form other than share capital, the rights to share in the capital of the undertaking; and
- (c) in relation to an undertaking without any capital, the interest—
 - (i) conferring any right to share in the profits or liability to contribute to the losses of the undertaking; or
 - (ii) giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up;

undertaking (企業) means—

- (a) a body corporate;
 - (b) a partnership; or
 - (c) an unincorporated association carrying on a trade or business, whether for profit or not.
- (2) In construing any references to an undertaking which is not a company for the purposes of this Ordinance, other expressions appropriate to companies shall be construed, in relation to that undertaking, as references to the corresponding persons, officers, documents or organs, as the case may be, appropriate to undertakings of that description.

2. Parent undertaking and subsidiary undertaking

- (1) An undertaking is a parent undertaking (**parent undertaking**) in relation to another undertaking (**subsidiary undertaking**) if—
- (a) (i) in the case where both the parent undertaking and the subsidiary undertaking are bodies corporate, the subsidiary undertaking is a subsidiary of the parent undertaking by virtue of section 2(4), (5), (6) and (7) of this Ordinance; or
 - (ii) in any other case, the parent undertaking—
 - (A) holds a majority of the voting rights in the subsidiary undertaking;
 - (B) is a member of the subsidiary undertaking and has the right to appoint or remove a majority of its board of directors; or
 - (C) is a member of the subsidiary undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the subsidiary undertaking; or
 - (b) the parent undertaking has the right to exercise a dominant influence over the

subsidiary undertaking by virtue of—

- (i) the provisions contained in any document constituting or regulating the subsidiary undertaking; or (*Amended 28 of 2012 ss. 912 & 920*)
 - (ii) a control contract.
- (2) For the purposes of subsection (1)(a)(ii), an undertaking shall be treated as a member of another undertaking (*the relevant undertaking*), if—
 - (a) any of its subsidiary undertakings is a member of the relevant undertaking; or
 - (b) any shares in the relevant undertaking are held by a person acting on behalf of the first-mentioned undertaking or any of its subsidiary undertakings.
- (3) An undertaking shall be treated as the parent undertaking of another undertaking if a subsidiary undertaking of the first-mentioned undertaking is, or is to be treated as, the parent undertaking of that other undertaking; and references to a subsidiary undertaking of the first-mentioned undertaking shall be construed accordingly.
- (4) Sections 3 to 10 contain provisions explaining expressions used in this section and otherwise supplementing this section.

3. Voting rights in undertaking

- (1) For the purposes of section 2(1)(a)(ii)(A) and (C), the references to the voting rights in an undertaking shall be construed as references to the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters.
- (2) For the purposes of subsection (1), where an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, the references to holding a majority of the voting rights in the undertaking shall be construed as references to having the right under the constitution of the undertaking to direct the overall policy of the undertaking or to alter the terms of its constitution.

4. Right to appoint or remove majority of directors

For the purposes of section 2(1)(a)(ii)(B)—

- (a) the reference to the right to appoint or remove a majority of the board of directors shall be construed as a reference to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters;
- (b) an undertaking shall be treated as having the right to appoint to a directorship if—
 - (i) a person's appointment to it follows necessarily from his appointment as a director of the undertaking; or
 - (ii) the directorship is held by the undertaking itself; and
- (c) a right to appoint or remove a directorship which is exercisable only with the consent of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

5. Right to exercise dominant influence

For the purposes of section 2(1)(b)—

- (a) an undertaking shall not be regarded as having the right to exercise a dominant influence over another undertaking unless it has a right to give directions with respect to the operating and financial policies of that other undertaking which the directors are, or a majority of the directors is, obliged to comply with whether or not they are for the benefit of that other undertaking; and

- (b) a **control contract** (控制合約) means a contract in writing conferring such a right which is—
 - (i) of a kind authorized by any document constituting or regulating the undertaking in relation to which the right is exercisable; and (*Amended 28 of 2012 ss. 912 & 920*)
 - (ii) permitted by the law under which that undertaking is established.

6. Rights exercisable only in certain circumstances

- (1) For the purposes of this Schedule but without prejudice to subsection (2), rights which are exercisable only in certain circumstances shall be taken into account only—
 - (a) when the circumstances have arisen, and for so long as they continue to obtain; or
 - (b) when the circumstances are within the control of the person having the rights.
- (2) Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

7. Rights held by one person on behalf of another

For the purposes of this Schedule—

- (a) rights held by a person in a fiduciary capacity shall be treated as not held by him;
- (b) rights held by a person as nominee for another shall be treated as held by the other; and
- (c) rights shall be treated as held as nominee for another if they are exercisable only on his instructions or with his consent.

8. Rights attached to shares by way of security

Where any rights referred to in this Schedule are attached to shares held by way of security, the rights shall be treated as held by the person providing the security, if—

- (a) apart from the right to exercise them for the purpose of preserving the value of the security, or of realizing it, the rights are exercisable only in accordance with his instructions; or
- (b) the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realizing it, the rights are exercisable only in his interests.

9. Rights attributed to parent undertaking

- (1) For the purposes of section 2, rights shall be treated as held by a parent undertaking if they are held by any of its subsidiary undertakings.
- (2) Nothing in section 7 or 8 shall be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings.
- (3) For the purposes of section 8, rights shall be treated as being exercisable in accordance with the instructions of or in the interests of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking.
- (4) In this section, **group undertaking** (企業集團), in relation to an undertaking (**relevant undertaking**), means an undertaking which is—
 - (a) a parent undertaking or subsidiary undertaking of the relevant undertaking; or
 - (b) a subsidiary undertaking of any parent undertaking of the relevant undertaking.

10. Supplementary

References in any provision of sections 7, 8 and 9 to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those sections but not rights which by virtue of any such provision are to be treated as not held by him.
