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Discussion Paper for the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive

Application of the Prevention of Bribery Ordinance to the Chief Executive

Introduction

At the meeting on 21 July 2005 of the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive, it was agreed that a paper be prepared to facilitate further discussion on the application of the Prevention of Bribery Ordinance (Cap. 201) (POBO) to the Chief Executive (CE).

2. The Panel on Constitutional Affairs (the Panel) has been provided over a period of time with various papers by the Administration briefing the Panel on the issues identified in the latter's review of the application of certain provisions of POBO to the CE and progress on the review. With reference to the salient points made in those papers, our views based on an analysis of the relevant provisions of POBO are set out below for members' consideration.

Scope of POBO

3. In a paper for the information of the Panel on 7 May 2001 (CB(2)1448/00-01(02) or Appendix IV to CB(2)1091/04-05(01)), the Administration stated that "[W]e are looking into the feasibility and implications of creating separate legislative provisions to set out the bribery offences for exclusive application to the CE, making reference to similar standards and definition of bribery prevention as currently applicable to government officers under existing law" (para. 12). In a subsequent information paper for the Panel on 21 January 2002 (CB(2)921/01-02(05) or Appendix V to CB(2)1091/04-05(01)), it was supplemented that "[S]ubject to the final form of the legislative provisions, we would consider whether the legislative provisions for exclusive application to the CE should be given effect through amendments to the POBO which is premised upon the principal-agent relationship or other legislative vehicles" (para. 7).

4. It is worth noting that the long title of POBO provides as follows :-

"To make further and better provision for the prevention of bribery and for purposes necessary thereto or connected therewith".

As is evident, the long title does not seek to restrict POBO to bribery prevention in any particular area of activities.

5. Existing provisions of POBO are mainly focused on bribery prevention in the public sector in so far that they are targeted at :-

- (a) “prescribed officers” (mainly Government servants but including principal officials, the Monetary Authority, Chairman of the Public Service Commission, members of staff of the Independent Commission Against Corruption and judicial officers), as receivers of bribes;
- (b) employees (and certain persons in other specified capacity) of a list of named public bodies, also as receivers of bribes; and
- (c) the persons bribing them.

The only offence-creating provisions that apply generally are sections 6 (Bribery for procuring withdrawal of tenders for any contract with a public body), 7 (Bribery in relation to auctions by or on behalf of a public body) and 9 (Corrupt transaction with agents).

6. The inclusion of bribery prevention provisions aimed at the CE in POBO would not only seem to be a viable option but may also be a logical choice. Whether other legislative vehicles would be equally or more appropriate would depend on more details of the proposed provisions being formulated. There may also be drafting considerations in deciding the final form of the legislative provisions required.

CE’s unique constitutional status

7. In paragraph 3(a) of the paper (CB(2)1091/04-05(02)) issued for information of the Panel on 21 March 2005, the Administration expressed the following view :-

“(a) The CE’s unique constitutional status

Under the Basic Law (BL), the CE is appointed by the Central People’s Government (CPG) (see BL Articles 15 and 45). The BL does not confer any power on the Hong Kong Special Administrative Region Government (HKSARG) in the appointment or removal of the CE to/from his office. Under BL Article 60(1), the CE is the head of the HKSARG, and under BL Articles 43(2), he is accountable to the CPG and the HKSAR in accordance with the provisions of the BL. Any proposal to extend the general standard of bribery prevention applicable to “prescribed officers” under the POBO for application to the CE must take into account the CE’s unique constitutional position in the HKSAR”.

8. Despite the emphasis on the CE’s unique constitutional status, paragraph 3(c) of the same paper admitted that :-

“(c) The CE is already bound by the common law offence of bribery of public officer

It is already a common law offence for a “public officer” to accept a bribe and for anyone to bribe a “public officer”. Legal advice is that the CE may fall within the meaning of “public officer” under the common law and would be liable to prosecution if he accepts a bribe even without amendment to the POBO. According to section 101I(1) of the Criminal Procedure Ordinance, Cap. 221, the maximum penalty for this common law offence is 7 years imprisonment and a fine of an unlimited amount”.

9. Additionally, in an earlier information paper (CB(2)168/99-00(03) or Appendix II to CB(2)1091/04-05(01)) for the Panel on 25 October 1999, the Administration agreed that “the CE is not subject to those provisions of the POBO that are only applicable to “government officer” or “public servant” under the POBO (i.e. section 3, 4(2), 4(3), 5(2), 10, 12 (other than sections 12(1)(a)(ii) and (iii) and 12(1)(b)(ii)), 12AA and 16 of the Ordinance). The CE like all other citizens of Hong Kong is subject to various other provisions of the POBO (i.e. sections 4(1), 5(1), 6, 7, 8, 9, 11, 12(1)(a)(ii) and (iii) and 12(1)(b)(ii), 12A, 13, 13C, 14, 14C, 17, 17A, 17C, 29, 30, 33 and 33A of the Ordinance)”(para. 6).

10. In other words, the CE is at present subject to the common law offence of accepting bribe as a public officer and to offences of bribing a public officer under both the common law and POBO. In respect of these offences, no distinction is drawn between the CE and any other public officer or any ordinary citizen and no concern over CE’s unique constitutional status has been expressed by the Administration. It is not readily clear how the CE’s unique constitutional position should affect the general standard of bribery prevention applicable to “prescribed officers” under POBO.

Principal-agent relationship

11. The Administration has expressed the view in paragraph 4 of its paper for information of the Panel on 25 October 1999 (CB(2)168/99-00(03) or Appendix II to CB(2)1091/04-05(01)) that :-

“4. Currently, the offences of solicitation and acceptance of advantages under the POBO are, generally speaking, premised upon the common law principal-agent relationship. In general, a person will be guilty of an offence if he or she :

- (a) as an agent of a principal, solicits or accepts an advantage without the approval of the principal, as an inducement to or reward for or otherwise on account for his or her acting in a certain manner in relation to his principal’s affairs or business; or

- (b) as a public servant, solicits or accepts without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account for his or her acting in a certain manner in his or her capacity as a public servant”.

12. The only provision premised on a principal-agent relationship is section 9 (referred to in para. 5 above) of POBO. It creates three related offences, namely :-

- (a) an agent soliciting or accepting any advantage as an inducement to or reward for doing or forbearing to do any act in relation to his principal’s affairs or business or showing or forbearing to show favour or disfavour to any person in relation to such affairs or business;
- (b) a person offering any such advantage to an agent;
- (c) an agent using any receipt, account or other document containing erroneous particular to deceive his principal.

13. The other offence referred to in paragraph 4(b) of the Administration’s paper is section 4. There is no premise of a principal-agent relationship in that section, nor is the premise found in any other offence-creating provision which applies to “prescribed officers” or “public servants”.

Lack of proper authority to approve CE’s receipt of advantage

14. One practical difficulty mentioned by the Administration is “that the CE is currently the authority to approve the receipt of advantage by members of the civil service, and there is, at present, no appropriate authority according to the provisions of the POBO to grant approval to the CE for the receipt of advantages himself” (para. 7 of the paper issued for the Panel’s information on 25 October 1999 under CB(2)168/99-00(03) or Appendix II to CB(2)1091/04-05(01)). The following concern has also been expressed in another information paper for the Panel on 15 May 2000 (para. 3(a) of CB(2)1929/99-00(04) or Appendix III to CB(2)1091/04-05(01)) :-

- “(a) The offence provisions of the POBO concerning solicitation and acceptance of advantages are drafted in such a way that is either predicated on the absence of the requisite permission or allows a defence of “lawful authority or reasonable excuse”. Given the special constitutional position of the CE and, thus a lack of an appropriate authority in the HKSAR to grant approval to the CE for the receipt of advantages himself, the CE would not be able to avail himself, like other defendants, of the defence”.

15. There exists however some administrative arrangements to ensure transparency and accountability in relation to the acceptance and disposal of gifts to the CE. According to paragraph 8 of the same paper, these are :-

- (a) the CE will declare publicly all the gifts presented to him irrespective of value (this arrangement makes reference to, and complies with the spirit of, the rules applicable to civil servants concerning acceptance of gifts);
- (b) gifts with commercial value will be disposed of through the Treasury and the proceeds will be donated to charitable organisations;
- (c) as regards items which the CE would like to retain, valuations will be obtained from the Treasury and the CE would purchase them. The proceeds will again be donated to charities;
- (d) as regards sponsorship, the CE declares, in an open register, financial sponsorships he receives or overseas sponsored visits he makes like other members of the Executive Council.

16. As the Administration has suggested, the declaration system complies with the spirit of the rules applicable to civil servants concerning acceptance of gifts. Consideration may be given to devise a more comprehensive declaration/registration system that is consistent with the spirit on which the grant of approval for the receipt of advantage is based and to accord the system legislative status so that compliance with it may constitute lawful authority for acceptance of advantage. This may be a way to obviate the need for an approval mechanism.

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