

立法會
Legislative Council

LC Paper No CB(1)2764/10-11
(These minutes have been seen
by the Administration)

Ref : CB1/BC/9/10

Bills Committee on Pyramid Schemes Prohibition Bill

**Minutes of first meeting on
Friday, 24 June 2011, at 10:45 am
in the Conference Room B of the Legislative Council Building**

Members present : Hon Fred LI Wah-ming, SBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Starry LEE Wai-king, JP
Hon CHEUNG Kwok-che
Hon Tanya CHAN

Members absent : Hon Vincent FANG Kang, SBS, JP
Hon Cyd HO Sau-lan
Hon Alan LEONG Kah-kit, SC

**Public Officers
attending** : Agenda item II

Mrs Alice CHEUNG
Deputy Secretary for Commerce and Economic
Development (Commerce and Industry)³

Mr K. C. YAU
Principal Assistant Secretary for Commerce and
Economic Development (Commerce and Industry)
Special Duties

Ms Angie LI
Senior Government Counsel
Department of Justice

Clerk in attendance : Ms Debbie YAU
Chief Council Secretary (1)6

Staff in attendance : Mr Bonny LOO
Assistant Legal Adviser 3

Miss Jacqueline CHUNG
Council Secretary (1)1

Ms Michelle NIEN
Legislative Assistant (1)6

Action

I Election of Chairman

Mr Fred Li, the member who had the highest precedence in the Council among all members of the Bills Committee present, presided over the election of the Chairman of the Bills Committee. He invited nominations for the chairmanship of the Bills Committee.

2. Mr Fred LI was nominated by Miss Tanya Chan and the nomination was seconded by Mr CHEUNG Kwok-che. Mr LI accepted the nomination. There being no other nominations, Mr Fred LI was elected Chairman of the Bills Committee.

II Meeting with the Administration

3. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

(LC Paper No. CB(3)776/10-11 - The Bill

File Ref: CITB CR 05/18/13 Pt. VI - Legislative Council Brief issued by the Commerce and Economic Development Bureau

LC Paper No. LS70/10-11 - Legal Service Division Report

LC Paper No. CB(1)2567/10-11(01) - Assistant Legal Adviser's letter and (02) dated 10 June 2011 to the Administration and the Administration's reply dated 20 June 2011

LC Paper No. CB(1)2567/10-11(03) - Paper on Pyramid Schemes Prohibition Bill prepared by the Legislative Council Secretariat (background brief)

Follow-up actions required to be undertaken by the Administration

4. The Bills Committee requested the Administration to provide the following information in response to members' concerns/requests raised at the meeting –

- (a) pointers, with illustration by local or overseas past cases/examples, for the differentiation of pyramid schemes as defined under the Bill from legitimate multi-level direct marketing schemes;
- (b) information on the government department/public authority/enquiry hotline (if any) to which members of the public may make direct enquiries as to whether a scheme would be considered a pyramid scheme or otherwise;
- (c) the Code of Ethics/Code of Conduct/Practice Guidelines issued by The Direct Selling Association of Hong Kong which stipulate the standards and procedures to be observed by member companies/firms in conducting their respective marketing activities;
- (d) information about the elimination of pyramid selling activities in Macao and relevant enforcement activities undertaken by the Macao authorities subsequent to the amendment of the Proibição da venda «em pirâmide» by the Macao government; and
- (e) details of past cases of unsuccessful prosecution of pyramid selling activities due to insufficient evidence and/or difficulties in establishing constituent elements of "pyramid selling scheme" and/or the offence under the Pyramid Selling Prohibition Ordinance (Cap. 355).

Invitation for views

5. Members agreed to invite relevant organizations and interested members of the public to attend a Bills Committee meeting to express their views and/or provide submissions on the Bill, and to post an invitation notice on the Legislative Council website.

Date of next meeting

6. The Chairman said that he would work out with the Clerk the date of next meeting and members would be informed of the details in due course.

(Post-meeting note: Members were informed vide LC Paper No. CB(1)2604/10-11 on 28 June 2011 that the second meeting of the Bills Committee would be held on 22 July 2011 to meet with deputations and the Administration.)

III Any other business

7. There being no other business, the meeting ended at 12:45 pm.

Council Business Division 1
Legislative Council Secretariat
21 July 2011

**Proceedings of the first meeting of
Bills Committee on Pyramid Schemes Prohibition Bill
on Friday, 24 June 2011, at 2:30 pm
in the Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000157 – 000321	Mr Fred Li Mr Wong Kwok-hing Ms Starry LEE Mr CHEUNG Kwok-che Miss Tanya CHAN	Election of Chairman	
000322 – 000825	Chairman Administration	The Administration briefed members on the Pyramid Schemes Prohibition Bill (the Bill) (CITB CR 05/18/13 Pt. VI).	
000826 – 002207	Chairman Mr WONG Kwok-hing Administration	<p>Mr WONG Kwok-hing welcomed the Bill and supported its early implementation in view of the large number of victims of pyramid schemes. He expressed the following concerns –</p> <ul style="list-style-type: none"> (a) whether an unlimited company would be subject to the regulation of the Bill; (b) how to tackle collaboration between promoters of pyramid schemes and financial institutions to offer loans to participants; (c) whether the Administration would consider imposing a cooling-off period on transactions involved in pyramid schemes; and (d) limitations of the existing Pyramid Selling Prohibition Ordinance (Cap. 355) (the Ordinance). <p>The Administration explained that –</p> <ul style="list-style-type: none"> (a) clause 6 of the Bill provided that if a body corporate or a member of an unincorporated body committed an offence under the Bill, a relevant person of the body was liable to the offence if it could be proved that the offence was committed with his consent or connivance or was attributable to his neglect; (b) existing criminal law could already deal with cases in which participants borrowed substantive sums with the help of forged documents; (c) pyramid schemes were but fraudulent, criminal enterprises. The most effective means to clamp them down was to enact specific legislation; and (d) the current Ordinance implied that the operation of a pyramid scheme had to involve the selling of goods/services, which meant that schemes not 	

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		<p>involving the sale of goods/services would fall outside the scope of the Ordinance. In this light, the definition of pyramid scheme should be revised as currently provided under the Bill such that whether sale of goods/services was involved was not material.</p>	
<p>002208 – 004242</p>	<p>Chairman Ms Starry LEE Wai-king Administration Mr WONG Ting-kwong</p>	<p>Ms Starry LEE welcomed the introduction of the Bill. Referring to clause 5 of the Bill, she was worried that innocent participants might be inadvertently caught. She asked how members of the public could differentiate legitimate multi-level marketing schemes (MLMS) from illicit pyramid schemes as defined in the Bill, and where they could turn to for enquiry if in doubt.</p> <p>Mr WONG Ting-kwong urged for early implementation of the legislation. He expressed concerns about publicity and education, especially among those with little education and experience. He also considered that innocent participants should not be held criminally liable under the Bill.</p> <p>The Administration advised that –</p> <ul style="list-style-type: none"> (a) the Police and the Consumer Council had been undertaking public education initiatives to remind the public to stay away from illicit pyramid scheme; (b) publicity would be stepped up and information would be provided to the public on signs to watch out for e.g. a participant had to pay a huge sum of money for participation in a scheme, a participant's benefit was primarily derived from the introduction of further new participants, and the prices of goods/services sold should be reasonable; (c) under the Bill, participants in a pyramid scheme would commit an offence only if they induced or attempted to induce other persons to take part in that scheme, and knew or ought reasonably to have known that their benefit was entirely or substantially derived from recruiting further participants. Unlike Australia where promotion of a pyramid scheme was a strict liability offence, the Bill required the establishment of a mental element of the aforesaid knowledge; and (d) The Direct Selling Association of Hong Kong (DSA) had issued guidelines to member companies in conducting marketing activities, which might serve as a reference for the general public to differentiate legitimate MLMS from 	<p>The Administration to provide information as requested in paragraphs 4 (a), (b) and (c) of the minutes.</p>

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		illicit pyramid schemes.	
004243 – 005022	Chairman Miss Tanya CHAN Administration	<p>Miss Tanya CHAN expressed similar concerns about innocent participants and the need to step up publicity about pyramid schemes as defined under the Bill among the general public as well as the small and medium-sized enterprises. She opined that past cases/examples should be provided to facilitate understanding on the differences between pyramid schemes and legitimate MLMS.</p> <p>The Administration advised that the revised definition of pyramid schemes was adapted from the legislation in Ireland and Australia. According to the new definition, a participant's benefit in joining the scheme must be entirely or substantially derived from the introduction to the scheme of a further new participant. In such schemes where the sale of goods or services was involved, the selling and buying were only used as a smoke-screen.</p> <p>In response to the Chairman's enquiry on whether a marketing scheme involving selling of goods at unreasonable high prices was a pyramid scheme, the Administration advised that according to the definition of "pyramid selling scheme" under the current Ordinance, a participant received a reward on the introduction of another participant based otherwise than on "the fair market value of goods or services actually sold". However, it was not always easy to determine the fair market value of the goods or services. In this regard, the Bill provided that comparison with market prices was but one of the factors to be taken into account.</p>	
005023 – 005659	Chairman Mr CHEUNG Kwok-che Administration	<p>Mr CHEUNG Kwok-che said that for schemes run by many renowned companies selling insurance and cosmetic products, a participant's major income was derived from the sales of the participants he had recruited rather than from recruiting further participants. As such, participants would aim at recruiting more down-liners to boost sales. He also asked about the views of the industry received during public consultation.</p> <p>The Administration advised that –</p> <p>(a) the mentioned type of business was MLMS (多層式計劃) rather pyramid schemes (層壓式計劃), where participants received benefits only upon the sale of genuine goods or services by their down-liners. On the other hand, pyramid schemes rewarded participants for the introduction of further new participants, and the sale of goods or services was a</p>	

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		<p>smoke screen and genuine business was not involved.</p> <p>(b) DSA was supportive of the Bill for it would be able to eradicate illicit pyramid schemes and help build up public's confidence in legitimate MLMS. However, DSA considered that the proposed definition of pyramid scheme in the public consultation paper was too wide and might have an adverse impact on legitimate MLMS. On "benefit (financial or otherwise) substantially relating to the introduction of further participants" in paragraph 3.2(a)(i) of the consultation paper, DSA raised that the adoption of the phrase "relating to" might be interpreted to cover the commission from sales of goods/services, thereby affecting legitimate MLMS. Having regard to DSA's concern and the legislation in other jurisdictions, the Administration improved the drafting by re-wording the phrase to read "benefit (entirely or) substantially derived from the introduction to the scheme of a further new participant".</p>	
005700 – 010359	Chairman Administration	<p>The Chairman asked about the "financial benefit" and "non-financial benefit" in clause 3(1)(a) of the Bill, and whether a scheme was a pyramid scheme when a participant's reward was earned through the sales of goods by the participant and his/her sales network, while at the same time based on the number of new participants recruited.</p> <p>The Administration explained that –</p> <p>(a) "financial benefit" referred to monetary rewards, while "non-financial benefit" included such non-monetary rewards as a treat; the latter was included to prevent circumvention; and</p> <p>(b) when determining if a scheme was a pyramid scheme, consideration would be given to the fact that a scheme participant's benefit was mainly derived from recruitment of further participants where the sale of good and/or services, if any, was only used as a smoke-screen.</p>	
010400 – 010922	Chairman Mr WONG Kwok-hing Administration	<p>Mr WONG Kwok-hing expressed support for the revised definition in the Bill having regard to the ever-changing mode of operation of pyramid schemes. He enquired whether the Bill was able to hunt down the masterminds of pyramid schemes and considered that the Police should be consulted on the efficacy of the new legislation in eradicating illicit pyramid schemes. The Administration should make reference to the actions taken by the Macao authorities to eliminate</p>	<p>The Administration to provide information as requested in paragraphs 4 (d) of the minutes.</p>

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		<p>pyramid selling activities following their legislative amendments.</p> <p>The Administration responded that the Police had been consulted on the proposals in the Bill which sought to overcome the limitations of the current Ordinance and targeted at the masterminds who established the pyramid schemes as promoters. There was a similarity between the legislative amendments regarding pyramid schemes in Macau and the current Ordinance in Hong Kong. The provisions of the Bill (which were modeled mainly on those in Ireland and Australia) should be more effective in combating pyramid schemes including those involving no sale of goods or services.</p>	
010923 – 011310	Chairman Ms Starry LEE Wai-king Administration	<p>Ms Starry LEE requested the Administration to provide details of past cases of unsuccessful prosecution of pyramid selling activities due to insufficient evidence and/or difficulties in establishing constituent elements of "pyramid selling scheme" and/or the offence under the current Ordinance.</p> <p>To address members' concerns, the Chairman requested that the Police should be invited to attend the next meeting of the Bills Committee to explain to members any difficulties they had encountered in seeking to enforce the Ordinance and their views on the efficacy of the Bill in tackling pyramid scheme.</p>	The Administration to provide information as requested in paragraphs 4 (e) of the minutes.
011311 – 012419	Chairman Mr CHEUNG Kwok-che Administration	<p>Mr CHEUNG Kwok-che referred to time-sharing schemes, and schemes requiring new recruits to pay for training courses at high prices in which the participants received benefits derived from the cost fees of the new recruits.</p> <p>The Administration advised that a scheme with all of the characteristics stipulated in clause 3 of the Bill was a pyramid scheme. The core elements of the new legislation included a participation payment and recruitment payment which hinged primarily on the number of new recruits. When marketing of goods/services was involved, the court would consider whether the participation payment bore a reasonable relationship to the value of the goods or services having regard to the price of comparable goods or services available elsewhere, and whether the emphasis given in the promotion of the scheme was the participants' entitlement to a recruitment payment or the supply of goods or services.</p>	
012420 – 012939	Chairman Miss Tanya CHAN Administration	Miss Tanya CHAN enquired whether those unsuccessful prosecutions against pyramid schemes were due to the difficulty of providing evidence or the	

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		<p>loopholes of the current Ordinance. She said that typical cases in the past should be provided for members' reference.</p> <p>Referring to the decisions of the Court of Appeal in 2003 and 2004 under which the defendants in two cases were acquitted of charges of an offence under the Ordinance, the Administration said that under the current Ordinance, the operation of a pyramid selling scheme had to involve the selling of goods/services by or through participants. Moreover, it was not always easy to determine "the fair market value of goods or services actually sold" which was referred to under the definition of the current Ordinance. The Bill sought to overcome the limitations of the existing legislation. The Bill provided pointers, including the reasonableness of the relationship between the participation payment and the value of the goods or services transacted and the promotional emphasis, for the court to determine if a scheme involving the sale of goods or services was a pyramid scheme. The prosecution might refer to contents of promotional literature and prices of equivalent products in the market in the case presented for the court's consideration.</p>	
012940 – 013534	Chairman Assistant Legal Adviser (ALA) Administration	<p>Referring to his letter dated 10 June 2011 (CB(1) 2567/10-11(01)), ALA drew members' attention to the following which might impede enforcement and undermine the efficacy of the Bill –</p> <p>(a) clause 5(1) of the Bill provided that any person who "knowingly" promoted a pyramid scheme committed an offence. Unlike similar offences in Australia and Ireland where the word "knowingly" was not used, the incorporation of a mental element of knowledge in the clause required a higher burden of proof and might cause difficulties in prosecuting the offence; and</p> <p>(b) according to clause 6(1) of the Bill, the burden of proof was proposed to be reversed so that the prosecution would have to prove the consent, connivance or neglect of the director, partner etc in order to establish an offence under that clause.</p> <p>The Administration referred to its response (CB(1)2567/ 10-11(02)) and advised that –</p> <p>(a) the act of "promoting" a pyramid scheme was fraudulent and archetypically criminal in nature. It was considered appropriate to incorporate a mental element as in the case of similar offences, such as conspiracy to defraud and theft; and</p>	

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		(b) in the current Ordinance, the burden of proof rested with the defendant. Under the Bill, the burden of proof was placed on the prosecution having regard to the principle of presumption of innocence, which was in line with the practices of recent statutory provisions.	
013535 – 014325	Chairman	(a) The Chairman requested the Administration to provide past cases/examples for members' reference. The Police should be invited to exchange views with members. (b) Members agreed to invite deputations' view at the next meeting.	

Council Business Division 1
Legislative Council Secretariat
21 July 2011