

立法會
Legislative Council

LC Paper No. CB(1)46/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/9/10

Bills Committee on Pyramid Schemes Prohibition Bill

**Minutes of second meeting on
Friday, 22 July 2011, at 2:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon Fred LI Wah-ming, SBS, JP (Chairman)
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwok, BBS, JP
Hon Starry LEE Wai-king, JP
Hon Tanya CHAN
- Members absent** : Hon Cyd HO Sau-lan
Hon CHEUNG Kwok-che
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)

Mr YAU Kin-chung
Principal Assistant Secretary for Commerce and
Economic Development (Commerce and Industry)

Ms Angie LI
Senior Government Counsel
Department of Justice

Mr CHEUNG Kwai-kee
Chief Superintendent, Commercial Crime Bureau,
Hong Kong Police Force

Mr HO Ying-foo
Superintendent, Commercial Crime Bureau,
Hong Kong Police Force

Mr NG Kwok-wing
Senior Inspector, Commercial Crime Bureau,
Hong Kong Police Force

Ms MAN Ngar-man
Senior Inspector, Commercial Crime Bureau,
Hong Kong Police Force

**Attendance by
invitation**

: Agenda item II

The Direct Selling Association of Hong Kong
Limited

Ms Angela LAU
President

Consumer Council

Mr Eddie NG
Senior Legal Counsel

Individual

Mr LAM Chung-hoi
Tuen Mun District Council

The Democratic Party

Mr Joseph CHOW Kam-siu
Central Committee Member

The Hong Kong Chinese Importers' & Exporters'
Association

Mr CHEN Jian-wen
Standing Committee Member

The Law Society of Hong Kong

Mr Fred MA
Criminal Law & Procedure Committee Member

Individual

Mr CHAN Chung-yau

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 Confirmation of minutes

(LC Paper No. CB(1)2764/10-11 -- Minutes of meeting held on
24 June 2011)

The minutes of the meeting held on 24 June 2011 were confirmed.

II Meeting with deputations and the Administration

(LC Paper No. -- Submission from The Direct
CB(1)2755/10-11(03) Selling Association of Hong
Kong Limited (English version
only)

LC Paper No. CB(1)2755/10-11(04) -- Submission from Consumer Council

LC Paper No. CB(1)2755/10-11(08) -- Submission from The Law Society of Hong Kong (English version only)

Written submissions from organizations/individuals not attending the meeting –

(LC Paper No. CB(1)2755/10-11(05) -- Submission from Mr YEUNG Wai-sing, Eastern District Councillor (Chinese version only)

LC Paper No. CB(1)2755/10-11(06) -- Submission from Economic Synergy (Chinese version only)

LC Paper No. CB(1)2755/10-11(07) -- Submission from The Chinese Manufacturers' Association of Hong Kong (Chinese version only)

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

3. The Bills Committee agreed to hold the next meeting on 18 October 2011 from 10:45 am to 12:45 p.m.

III Any other business

4. There being no other business, the meeting ended at 4:40 pm.

**Proceedings of the second meeting of
Bills Committee on Pyramid Schemes Prohibition Bill
on Friday, 22 July 2011, at 2:30 pm
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000224 – 000519	Chairman	(a) Opening remarks by the Chairman. (b) Confirmation of minutes of meetings on 24 June 2011 (LC Paper No. CB(1)2764/10-11).	
000520 – 000944	Chairman The Direct Selling Association of Hong Kong Limited (DSA)	Presentation of views (CB(1)2755/10-11(03)). All member companies of DSA were supportive of the Pyramid Schemes Prohibition Bill (the Bill) which should be more effective in curbing illicit pyramid schemes, thereby creating a more favourable operating environment for legitimate multi-level marketing schemes (MLMS). DSA had issued a Code of Conduct for member companies to observe in conducting their respective marketing activities.	
000945 – 001459	Chairman Consumer Council (CC)	Presentation of views (CB(1)2755/10-11(04)). CC rendered full support for the Bill as it would plug loopholes in the existing Pyramid Selling Prohibition Ordinance (Cap. 355) (the Ordinance), and looked forward to its early enactment.	
001500 – 001949	Chairman Mr LAM Chung-hoi, Tuen Mun District Councillor	Mr LAM Chung-hoi welcomed the Bill and suggested imposing a cooling-off period during which participants were allowed to cancel the transactions. He also expressed the following concerns – (a) a company relating to suspected pyramid schemes had operated under the guise of social enterprise; (b) certain financial institutions granted huge sums of loans to participants in the absence of any income proof and the loans went directly to the promoters; and (c) some participants were unable to return unsold goods within the specified timeframe because the sales receipts had been withheld by the company.	
001950 – 002237	Chairman The Democratic Party (DP)	DP was supportive of the Bill and expressed the following views – (a) the definition of "pyramid scheme" provided for in clause 3 of the Bill pinpointed the core nature of pyramid schemes. Participants in pyramid schemes should be held criminally liable as their participation was a must for the operation and proliferation of pyramid schemes; (b) the level of penalty provided for in clause 5 of the Bill	

Time marker	Speaker	Subject(s)	Action required
		<p>was considered a sufficient deterrent; and</p> <p>(c) it was appropriate for clause 6 of the Bill to provide for the liability of a relevant person of a body corporate or an unincorporated body if the body corporate or a person as a member of the unincorporated body committed an offence under the Bill.</p>	
002238 – 000552	Chairman The Hong Kong Chinese Importers' & Exporters" Association (HKCIEA)	HKCIEA supported the Bill but considered that the definition of "pyramid scheme" should be made clearer so as not to confuse the public and affect the conduct of normal business activities. It also suggested that heavier penalties should be imposed on the masterminds of pyramid schemes.	
002553 – 003219	Chairman The Law Society of Hong Kong (LawSoc)	<p>Presentation of views (CB(1)2755/10-11(08)). LawSoc supported the spirit of the Bill and suggested the following for further consideration –</p> <p>(a) the Administration should consider simplifying the definition of "pyramid scheme" and coming up with a clearer definitive description by deleting the words "or substantially" from clauses 3(1)(b) and (c), 4(1) and (2) and 5(2)(b);</p> <p>(b) the reference to "ought reasonably to know" should be deleted from clause 5(2)(b); and</p> <p>(c) the offence under clause 5 be triable summarily or on indictment depending on the seriousness of the case.</p>	
003220 – 003644	Chairman Mr CHAN Chung-yau	Mr CHAN Chung-yau welcomed the Bill which sought to tighten up the regulation on pyramid schemes. He asked whether the level of penalty in clause 5 of the Bill was set by making reference to participants' benefits earned from introducing new recruits and the extent of their involvement. The Bill should also clearly define "benefit" to prevent participants' circumvention. To protect the public and enhance their awareness, he urged the Administration to step up publicity and alert the public to differences between legitimate MLMS and illicit pyramid schemes.	
003645 – 004953	Chairman Administration	<p>The Administration thanked deputations for their views on the Bill. In response to their concerns, the Administration advised that –</p> <p>(a) following the approach adopted in legislation in Australia, Ireland and the United Kingdom (UK), the definition of "pyramid scheme" in clause 3 of the Bill emphasized the substance of pyramid schemes, and was tightly drafted to prevent circumvention. Deleting "substantially" from the definition would</p>	

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		<p>defeat the purpose of the Bill in tackling pyramid schemes. Should the Bill require that the benefit be derived "entirely" from the introduction of new recruits, it would be easy for rogues to get around the law simply by offering a small giveaway as part of a participant's benefit.</p> <p>(b) participants in pyramid schemes would commit an offence if they induced or attempted to induce other persons to take part in the schemes <u>and</u> they had the knowledge that their income was primarily earned through the recruitment of further participants. Mere participation did not in itself constitute an offence;</p> <p>(c) it was considered desirable to set a maximum punishment for the court to determine the appropriate amount of penalty based on factors such as the extent of involvement and the seriousness of the case;</p> <p>(d) the Director of Public Prosecutions (DPP) would decide on the venue of court in accordance with established prosecution policies and practices and in the light of the circumstances of the cases. Trials could already be conducted in the Magistrates' Court or the District Court. For trials in the Magistrates' Court, sections 91 and 92 of the Magistrates Ordinance (Cap. 227) empowered special or permanent magistrates to deal with indictable offences summarily. Hence, existing legislation had already allowed for indictable offences to be tried summarily. Furthermore, it could not be assumed that the penalty handed down in trials in the District Court would necessarily be heavier than that in the Magistrates' Court.</p> <p>(e) clause 5(1) of the Bill provided that "any person who knowingly promotes a pyramid scheme commits an offence". Requiring "actual knowledge", this clause targeted at masterminds of pyramid schemes, who were involved in the design, management and/or operation of such schemes. Evidence that could be collected included information on bank accounts, accounting records and documentations. In this light, the requirement of establishing actual knowledge was considered appropriate;</p> <p>(f) clause 5(2)(b) of the Bill targeted at the act of participants who might not know about the entire operation of the scheme. The requisite "mens rea" referred to the participant's knowledge that the benefit he or she might get was mainly derived from recruiting further new participants (not from the selling of goods/services). It was considered</p>	

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		<p>appropriate to allow "constructive knowledge" under the subclause, so that the court could infer the mental state of a reasonable person in the particular circumstances of the case. The burden of proof still rested with the prosecution, and the standard of proof remained to be "proof beyond reasonable doubt". "Constructive knowledge" was not a new concept but one which was currently adopted in other offences e.g. the offence of dealing with proceeds of indictable offence contrary to the Organized and Serious Crimes Ordinance (Cap. 455); and</p> <p>(g) to protect the public from possible scams, the Administration was committed to stepping up publicity and public education so that the public would be able to better differentiate legitimate MLMS from illicit pyramid schemes as defined under the Bill.</p>	
004954 – 005533	Chairman Mr WONG Kwok-hing DSA CC	<p>Mr WONG Kwok-hing sought the views of DSA and CC on whether the Bill was sufficient to protect consumers without affecting legitimate MLMS.</p> <p>DSA expressed the view that as the Bill clearly defined pyramid scheme, it would help deter illicit activities and better enhance the public's understanding of pyramid schemes. She re-iterated the importance of public education.</p> <p>CC noted that as the selling of goods/services was not material in the determination of whether a scheme was a pyramid scheme as defined under the Bill, the Bill helped plug loopholes in the existing Ordinance. Moreover, clause 4(2) of the Bill allowed the court to consider other relevant matters in determining whether a scheme would constitute a pyramid scheme. CC considered that the Bill was sufficient to protect the interests of consumers and MLMS operators.</p> <p>In response to Mr WONG's further enquiry, CC added that the Bill would be able to hunt down masterminds of pyramid schemes who would be held criminally liable under clause 6 of the Bill. The new legislation would apply to all individuals and legal persons and protect consumers of all kinds.</p>	
005534 – 010126	Chairman Mr WONG Ting-kwong Administration DP	<p>Mr WONG Ting-kwong enquired about –</p> <p>(a) whether the sale of insurance, which involved layers of salespersons whereby those on upper layers would derive their rewards from the sales of down-liners, could amount to a pyramid scheme; and</p> <p>(b) whether a participant in a pyramid scheme, being a</p>	

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		<p>victim of fraud who had never induced or attempted to induce other persons to take part in that scheme, could act as a prosecution witness</p> <p>DP's representative, Mr Joseph CHOW Kam-siu who was engaged in the insurance industry advised that the major income of an insurance agent was derived from the sales by the agent himself and his down-liners, rather than from recruiting further participants. Sometimes, an insurance agent at the bottom level with good sales performance would earn more than his manager, and entitlement to override commission derived from the sales by down-liners diminished drastically down each level.</p> <p>The Administration clarified that clause 5(2) of the Bill provided that participants in a pyramid scheme would commit an offence only if they induced or attempted to induce other persons to take part in the scheme, <u>and</u> knew or ought reasonably to know that their benefit was entirely or substantially derived from recruiting further participants. Enforcement action was taken by the Commercial Crime Bureau of the Police. Subject to individual cases, they would collect all the relevant evidence and arrange witnesses to give evidence in court.</p>	
010127 – 011037	Chairman Mr Vincent FANG Administration	<p>Mr Vincent FANG said that Members belonging to the Liberal Party were in support of the Bill. He agreed that education should be stepped up to enhance the public's understanding of legitimate MLMS vis-à-vis illicit pyramid schemes. To further strengthen consumer protection, the Bill should provide clear pointers to assist the public in differentiating pyramid schemes from MLMS. He proposed that the Bill should include provisions to the effect that a scheme was not a pyramid scheme if it satisfied the following conditions –</p> <ul style="list-style-type: none"> (a) provision for cooling-off period, refund arrangement and policy of goods return; and (b) recruitment payment accounted for not more than, say, 20% of the participant's income. <p>The Administration explained that –</p> <ul style="list-style-type: none"> (a) the Police and CC had been undertaking public education initiatives to remind the public to stay away from illicit pyramid schemes. The Administration would step up public education efforts; (b) to prevent circumvention, the Administration considered it not appropriate to define pyramid schemes arbitrarily by stipulating an amount of participation/recruitment payment in comparison to 	

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		<p>the value of goods/services involved. The issue would become more complicated as a participant's benefit could be in the form of non-tangible benefit while its value was not easy to determine. Seen in this light, clause 4(1) of the Bill provided pointers to be considered by the court in determining whether cases involving marketing of goods/services was a pyramid scheme, while clause 4(2) allowed the court to take into account other relevant matters in determining whether a participation payment was entirely or substantially induced by the prospect held out to a new participant of entitlement to a recruitment payment. The Police would collect all relevant evidence in the course of its investigation for decision of prosecution by DPP. The provisions were deemed adequate to safeguard the interests of genuine business operators; and</p> <p>(c) while DSA did require its member companies to offer customers a cooling-off period and a right of return of goods, neither were defining characteristics of pyramid schemes. The absence of these provisions did not necessarily mean that the scheme was a pyramid scheme. Conversely, a pyramid scheme could well establish a cooling-off period and provide a right of return of goods.</p>	
011038 – 011612	Chairman Ms Starry LEE DSA Administration	<p>Ms Starry LEE welcomed the Bill. However, she was worried that legitimate MLMS would be over-regulated. In reply to Ms LEE's enquiry on any divergent views among DSA members about the Bill, DSA advised that all members of DSA had reached a consensus in support of the Bill, which provided a precise definition of pyramid scheme such that the public would be able to differentiate legitimate MLMS from illicit pyramid schemes.</p> <p>In response to the enquiry of the Chairman and Ms LEE, DSA said that there was no official figure for the total number of direct selling companies in Hong Kong. The eight member companies of DSA represented over 170,000 salespersons. A direct selling company, to be qualified as a member of DSA, was required to satisfy stringent requirements stipulated in the Code of Conduct.</p> <p>Ms LEE asked about the legislation on pyramid schemes in other jurisdictions. The Administration advised that –</p> <p>Australia The offence of participation in a pyramid scheme was of strict liability.</p> <p>Ireland The offence of operating a pyramid scheme was of strict liability, whereas the offence of participation required proof of mens rea.</p>	

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		<p>Singapore A total ban on MLMS except those registered.</p> <p>Macao Participants who induced other persons to take part in a pyramid selling scheme committed an offence.</p> <p>UK Any person who established, operated or promoted a pyramid scheme committed an offence.</p>	
011613 – 012344	Chairman Mr WONG Ting-kwong Administration DSA	<p>Mr WONG Ting-kwong enquired about the difference between direct selling (傳銷) and direct marketing (直銷). DSA explained that direct selling referred to person-to-person selling whereas direct marketing was a broader term that referred to a form of retail business without the involvement of intermediaries.</p> <p>Mr WONG brought up a case in which a participant in a scheme had introduced a new recruit to take part in that scheme. The new recruit was required to purchase a certain amount of products on which his recruiter earned a commission. Given the transactions allowed for a cooling-off period and goods return policy, he enquired whether the scheme was a pyramid scheme.</p> <p>The Administration responded that the right of return of goods was not a determining factor since it might be used as a smoke-screen. When marketing of goods/services was involved, the court in accordance with clause 4 of the Bill would consider whether the participation payment bore a reasonable relationship to the value of the goods/services that participants were entitled to be supplied with, 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. Under clause 4(2), the court might take into account other relevant matters including the details of cooling-off period and arrangement of goods returns. The Police would look into the whole operation of the scheme during investigation.</p>	
012345 – 013149		Break	
013150 – 014722	Chairman Mr WONG Kwok-hing Administration	<p>Mr WONG Kwok-hing expressed grave concern about the efficacy of the Bill and sought the Police's views on whether the Bill would facilitate their enforcement action against masterminds of pyramid schemes.</p> <p>The Police advised that –</p> <p>(a) the limitations of the existing Ordinance were addressed in the Bill, i.e. whether a scheme involved the selling of goods/services was no longer material;</p>	

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		<p>(b) clause 4 of the Bill provided pointers to be considered by the court in determining whether a scheme involving marketing of goods/services was a pyramid scheme. This would serve as useful guidance on the types of evidence that might be collected by the Police as well;</p> <p>(c) clause 5(2) of the Bill was considered effective to deter participation and hence prevent expansion of pyramid schemes;</p> <p>(d) uplifting the maximum imprisonment term from 3 to 7 years should be a sufficient deterrent;</p> <p>(e) since 2008, a total of 148 complaint cases on malpractices of MLMS had been received which mainly involved participants who were –</p> <ul style="list-style-type: none"> (i) misled into purchasing a bulk quantity of products; (ii) persuaded into forging documents in order to secure loans for the purchase of products; and (iii) not able to return goods within the specified timeframe because their receipts had been withheld; <p>(f) among the 114 complainants referred to the Police by Hon Albert HO in 2008, 64 of them refused to assist in further investigation, 28 were out of contact while the Police had successfully interviewed the remaining 22 complainants one of whom was suspected of being involved in deception but investigation was suspended due to insufficient evidence;</p> <p>(g) in June/July of 2009, Hon WONG Kwok-hing referred eight complainants to the Police. Among those complaints, three cases were found to involve the offence of fraud, use of forged documents and causing wasteful employment of the Police. Seven distributors had been arrested for possible prosecution pending Department of Justice's advice.</p> <p>In response to Mr WONG's further enquiry on whether unlimited companies would be subject to the regulation of the Bill, the Administration explained that 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.</p> <p>Addressing Mr WONG's concern about the return of goods,</p>	

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		<p>the Police advised that a distributor might commit an offence involving a dishonest act if he withheld the receipts of his down-liners to prevent the return of goods. In fact, some MLMS companies now permitted goods returns without a receipt.</p>	
014723 – 015316	<p>Chairman Mr Vincent FANG Administration</p>	<p>While expressing support for the Bill, Mr Vincent FANG said that a reasonable arrangement for goods return would protect both consumers and lawful retailers. It was hoped that the Bill would better facilitate the enforcement actions and evidence collection by the Police to substantiate prosecution.</p> <p>The Administration assured that the Bill would be able to eradicate illicit pyramid schemes and protect legitimate MLMS. Pyramid schemes were sustained by high participation payments made by new recruits. Even when marketing of goods/services and a return policy were in place, they were used as smoke-screens.</p> <p>The Police advised that, in the course of investigations on illicit pyramid schemes, consideration would be given to other possible criminal offences e.g. fraud, conspiracy to defraud and using false instrument in the application for loans.</p>	
015317 – 020919	<p>Chairman Mr WONG Ting-kwong Ms Starry LEE Administration</p>	<p>Mr WONG Ting-kwong sought Police's views on the inadequacy of the Bill, if any, in eradicating pyramid schemes. Ms Starry LEE and the Chairman asked about the number of past cases that could have been brought to prosecution if the Bill had been in place and the number of participants who would likely have been held liable.</p> <p>The Police explained that –</p> <p>(a) referring to two relevant cases before the Court of Appeal in 2003 and 2004, the Bill sought to overcome the limitations of the existing Ordinance. The definition of pyramid scheme was revised in the Bill such that whether it involved the sale of goods/services was not material. As such, the Bill was considered sufficient to tackle illicit pyramid schemes which had been taking advantage of the loopholes in the existing Ordinance;</p> <p>(b) among the total number of complaints received since 2008, there were eight cases relating to pyramid schemes. These eight cases involved eight companies, 66 persons and some \$13 million. The Police had arrested 22 persons in respect of four cases out of which one case was heard in court in May 2011. A mastermind was convicted of an offence of fraud and sentenced to imprisonment of 3 years and 8 months. The remaining three cases were under investigation,</p>	

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		<p>which involved a case of cash-planting scheme (種金) (eight complainants involving \$470,000, with one person arrested), a case involving health food (27 complainants involving some \$10 million, with six persons arrested) and a case involving skin care products (seven complainants involving \$2 million). Investigation for the remaining four cases had been suspended due to insufficient evidence.</p> <p>The Administration added that investigations of past cases and gathering of evidence had been carried out in accordance with the requirements stipulated in the then prevailing Ordinance. Reviewing past cases for evidence relevant to the new constituent elements provided in the Bill would not be practicable.</p> <p>Mr WONG further enquired whether a participant in a legitimate scheme would commit an offence under the Bill if he had withheld the receipts to prevent his down-liners from returning the goods. The Administration advised that the participant might commit other offences e.g. theft and fraud.</p>	
020953 – 021239	Chairman Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong urged the Commerce and Economic Development Bureau to work closely with the Police to plug any possible loopholes in the Bill.</p> <p>The Administration advised that the Bill sought to overcome the limitations of the existing legislation. Flexibility had been allowed for in the Bill to address potential grey areas. Most importantly, the Bill described the core elements of pyramid schemes rather the mode of operation as provided in the Ordinance.</p>	
020920 – 020952	Chairman	<p>Members agreed to schedule the next meeting on 18 October 2011 from 10:45 am to 12:45 p.m. The Administration's responses to issues raised at the meeting held on 24 June 2011 would be considered at the next meeting.</p>	