

立法會
Legislative Council

LC Paper No. CB(1)802/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/9/10

Bills Committee on Pyramid Schemes Prohibition Bill

Minutes of third meeting on
Tuesday, 18 October 2011, at 10:45 am
in Conference Room 2B of the Legislative Council Complex

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

Clerk in attendance : Mr Derek LO
Chief Council Secretary (1)6

Staff in attendance : Mr Bonny LOO
Assistant Legal Adviser 3

Mr Ken WOO
Council Secretary (1)6

Ms Michelle NIEN
Legislative Assistant (1)6

Action

- I Confirmation of minutes**
(LC Paper No. CB(1)46/11-12 — Minutes of meeting held on 22 July 2011)

The minutes of the meeting held on 22 July 2011 were confirmed.

- II Meeting with the Administration**
(LC Paper No. CB(1)2755/10-11(01) — List of follow-up actions arising from the discussion at the meeting on 24 June 2011
LC Paper No. CB(1)2755/10-11(02) — Administration's response to CB(1)2755/10-11(01))

Clause-by-clause examination of the Bill

- (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 dated 10 June 2011 to the Administration
LC Paper No. CB(1)2567/10-11 (02) — Administration's response to CB(1)2567/10-11(01))

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

3. The Administration was requested to –

- (a) provide a comparison of the constituent elements (including *mens rea*) of relevant offences under the pyramid schemes legislation in different jurisdictions, including Australia, Ireland, the United Kingdom, Singapore, Macau, etc.;
- (b) propose a Committee Stage amendment to the English text of clause 1(2) to add the words "by notice published in the Gazette";
- (c) consider replacing the term "著墨" in the Chinese text of clause 4(1)(b) and rewriting the clause in a more intelligible way; and
- (d) consider replacing "by comparison with" with "as opposed to" or other appropriate language in the English text of clause 4(1)(b) or to enhance the clarity of the clause, or rewriting the clause in such a way as to require consideration of the relative importance of the two "emphases" as stated in the clause.

4. The Bills Committee agreed to hold the next meeting on 3 November 2011 from 10:45 am to 12:45 pm.

III Any other business

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

**Proceedings of the third meeting of
Bills Committee on Pyramid Schemes Prohibition Bill
on Tuesday, 18 October 2011, at 10:45 am
in Conference Room 2B of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
<i>Agenda Item I - Confirmation of minutes</i>			
000345 – 000407	Chairman	Minutes of the meeting held on 22 July 2011 (LC Paper No. CB(1)46/11-12) were confirmed.	
<i>Agenda Item II - Meeting with the Administration</i>			
000408 – 001115	Chairman Administration	Briefing by the Administration on its response to the follow-up actions arising from the discussion at the meeting on 24 June 2011 (LC Paper No. CB(1)2755/10-11(02)).	
001116 – 002204	Chairman Mr Vincent FANG Administration	<p>Mr FANG's views –</p> <p>(a) the Bill should not have the effect of fettering the normal business operations of legitimate multi-level marketing schemes (MLMS) as the relevant sector employed some 170 000 salespersons nor should it have the effect of deterring foreign entities from starting relevant business in Hong Kong; and</p> <p>(b) the Bill should set out the criteria (e.g. the right of return of goods) by which the public and business entities could easily differentiate pyramid schemes from legitimate MLMS.</p> <p>Administration's response -</p> <p>(a) the Administration had consulted the Direct Selling Association of Hong Kong Limited (DSA) and a multi-national company which operated MLMS in a number of jurisdictions on the Bill. Both had expressed full support for the Bill on the ground that it helped combat objectionable pyramid schemes operated under the guise of legitimate MLMS;</p> <p>(b) the Administration would publicize in layman terms the relevant legal requirements after the enactment of the Bill in order to enable the general public to understand them better; and</p> <p>(c) in accordance with clause 4(1) of the Bill, to determine whether a scheme that involved the marketing of goods or services was a pyramid scheme, the court must consider (i) whether the participation payment bore a reasonable relationship to the value of the goods or services that participants were entitled to be supplied with, and (ii) whether the</p>	

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		<p>emphasis given in the promotion of the scheme centered on the participants' entitlement to a recruitment payment or the supply of goods or services. The Bill did not specify the lack of the right of return of goods as a defining characteristic of pyramid schemes because with ingenious modifications, it could easily be used as a smoke-screen by objectionable pyramid schemes. However, as stated in clause 4(2), clause 4(1) did not stop the court from considering other relevant matters, such as the arrangements for the return of goods or cooling-off period.</p>	
002205 – 003035	<p>Chairman Ms Starry LEE Administration Assistant Legal Adviser 3 (ALA3)</p>	<p>Ms LEE's enquiry on whether participants to pyramid schemes could plead in defence their innocence in good faith as the reason for participation in such schemes.</p> <p>Administration's explanation –</p> <p>(a) under the Bill, participants in a pyramid scheme would commit an offence only if they (i) induced or attempted to induce other persons to take part in that scheme, and (ii) knew or ought reasonably to have known that their benefit was entirely or substantially derived from recruiting further participants. The burden of proof still rested with the prosecution; and</p> <p>(b) unlike the situation in Australia where the participation in a pyramid scheme was a strict liability offence, the Bill required the establishment of a mental element of the aforesaid knowledge.</p> <p>Ms LEE's request for a comparison of the constituent elements (including <i>mens rea</i>) of relevant offences under the pyramid schemes legislation in different jurisdictions, such as Australia, Ireland, the United Kingdom, Singapore and Macau.</p> <p>ALA3's remark that the word "knowingly" was not used in relation to the offence of establishing, operating or promoting a pyramid promotional scheme under section 65(1) of the Consumer Protection Act 2007 of Ireland, but was used in relation to the offence of participating in such a scheme under the same subsection which also provided for a separate offence of inducing or attempting to induce another person to participate in such a scheme. In order to commit an offence under clause 5(2) of the Bill, however, a participant must induce or attempt to induce another person to participate in a pyramid scheme with the knowledge (actual or deemed) that any benefit he might get from participating in the scheme would be entirely or substantially derived from the introduction of new participants to the scheme. This should be noted when comparing regulatory regimes in other jurisdictions.</p>	<p>The Administration to provide information as requested in paragraph 3(a) of the minutes.</p>

Time marker	Speaker	Subject(s)	Action required
003036 – 003300	Chairman Mr Vincent FANG Administration	<p>Mr FANG's view that as many of those engaging in direct marketing activities were homemakers whose education attainment was not high, it was important to target the publicity of the enacted ordinance at this group of people in society.</p> <p>Administration's response that it would step up publicity to help the public differentiate between legitimate MLMS and illicit pyramid schemes.</p>	
003301 – 003400	Chairman Administration	<p><u>Clause-by-clause examination of the Bill</u></p> <p><u>Examination of the object of the Bill</u></p> <p>Members had no comments.</p>	
003401 – 003457	Chairman Administration	<p><u>Examination of clause 1 – Short title and commencement</u></p> <p>Administration's indication that it would propose a Committee Stage amendment to add the words "by notice published in the Gazette" to the English text of clause 1(2).</p>	The Administration to provide information as requested in paragraph 3(b) of the minutes.
003458 – 004754	Chairman Mr Alan LEONG Administration ALA3 Mr Vincent FANG	<p>Mr LEONG's enquiries –</p> <p>(a) whether consideration had been given to introducing amendments to the existing Pyramid Selling Prohibition Ordinance (the existing Ordinance) (Cap. 355) instead of repealing it and enacting a fresh piece of legislation; and</p> <p>(b) whether past cases relating to the existing Ordinance would be applicable to cases under the future ordinance.</p> <p>Administration's response –</p> <p>(a) as the existing Ordinance would have to be amended almost completely to give the same effect of the proposed clauses in the Bill, a new piece of legislation was thus proposed instead; and</p> <p>(b) the revised definition of a pyramid scheme under the Bill was adapted from the relevant legislation in Australia and Ireland, and the cases in these jurisdictions rather than those related to the existing Ordinance would be more relevant to the future ordinance.</p> <p>ALA3's remark that the definition of a pyramid scheme was intended to be much broader in the Bill than in the existing Ordinance.</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Administration's explanation in response to Mr FANG that the definition of a pyramid scheme had been revised in the Bill so that it would not be material whether the sale of goods and/or services was involved or not. The revised definition would help plug the loopholes in the existing Ordinance by focusing on the substance of a pyramid scheme instead of the smoke-screen behind which such a scheme hid and which could change frequently.</p> <p>Administration's response to the Chairman that the future ordinance would come into operation as soon as possible upon the passage of the Bill.</p>	
004755 – 004916	Chairman Administration	<p><u>Examination of clause 2 – Interpretation</u> Members had no comments.</p>	
004917 – 010503	Chairman Administration Mr Vincent FANG Mr Alan LEONG ALA3	<p><u>Examination of clause 3 – What is a pyramid scheme</u></p> <p>Administration's response to Mr FANG that the giving of a recruitment payment to a new participant was, inter alia, a characteristic of a pyramid scheme, and that recruitment payment included financial as well as non-financial benefits such as waiving the participation fees for club membership.</p> <p>Mr LEONG's enquiry about whether the word "substantially" was necessary in clause 3(1)(c) which, in including "recruitment payment" as a defining characteristic of a pyramid scheme, stated that the recruitment payment was "entirely or substantially derived from the introduction to the scheme of a further new participant".</p> <p>Administration's explanation that the inclusion of the word "substantially" was to prevent operators of pyramid schemes from getting around the law simply by offering a small giveaway as part of a participant's benefit. The Administration cited the concerns of DSA and foreign companies in the sector about the use of the alternative "in relation to" as adopted in some overseas legislation which would result in a very broad definition of a pyramid scheme that could unintentionally catch legitimate MLMS, and thus adopted "substantially derived from" in clause 3(1)(c).</p> <p>ALA3's remark that the word "substantially" as used in clause 3(1)(b) was adopted from the relevant section in the Australian Consumer Law. The Australian courts had held that "substantially" in that context meant "predominantly", "essentially", "primarily" or "in the main". The word "substantial" also appeared in Part XI of the Fair Trading Act 1973 of the United Kingdom (which dealt with pyramid selling and similar trading schemes) and had been used in other contexts in the laws of Hong</p>	

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		Kong.	
010504 – 011327	Chairman Administration Mr Vincent FANG	<p><u>Examination of clause 4 – Matters to be considered by court in schemes involving marketing of goods or services</u></p> <p>Mr FANG's concern that the court might have difficulty determining whether a scheme that involved the marketing of goods or services was a pyramid scheme because it was not always easy to determine the fair market value of goods and services.</p> <p>Administration's response that the court would not just consider the market prices or value of the goods and services involved in a scheme but would also have regard to the relative emphasis given to the new participant's entitlement to the supply of goods or services and to a recruitment payment in the promotion of the scheme as well as other factors that the court might consider relevant.</p>	
011328 – 012645	Chairman Mr Alan LEONG Ms Cyd HO Administration	<p>Mr LEONG's and Ms HO's request that the Administration consider replacing the term "著墨" in the Chinese text of clause 4(1)(b) and rewriting the clause in a more reader-friendly way. Administration's undertaking to consider members' suggestions.</p> <p>Mr LEONG's request that the Administration consider replacing "by comparison with" with "as opposed to" or other appropriate language in the English text of clause 4(1)(b), or rewriting the clause altogether to enhance the clarity of the clause Administration's undertaking to consider the suggestion.</p>	<p>The Administration to provide information as requested in paragraph 3(c) of the minutes.</p> <p>The Administration to provide information as requested in paragraph 3(d) of the minutes.</p>
012646 – 013607	Chairman Mr WONG Ting-kwong Administration	<p>Mr WONG's referral to clause 4(2) and enquired whether the introduction of new members in response to a trade association's call for a "member recruitment campaign" would be in breach of the future ordinance.</p> <p>Administration's explanation that as the facts might indicate that the payment of membership fees was not induced substantially by the prospect of receiving benefits which were derived substantially from the introduction of further new members, the association was not a pyramid scheme as defined.</p>	
013608 – 014425	Chairman Ms Cyd HO Administration	Ms HO's expression of support for the Bill and the concern that, as in the case concerning Lehman Brothers-related minibonds and structured financial products, some members of the public, in particular those with little education and experience, might inadvertently join a pyramid scheme and become liable for prosecution as knowing participants under the law.	

Time marker	Speaker	Subject(s)	Action required
		<p>Administration's response –</p> <p>(a) 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, <u>and</u> knew or ought reasonably to have known that their benefit was entirely or substantially derived from recruiting further participants;</p> <p>(b) unlike the situation in Australia where participating in a pyramid scheme was a strict liability offence, the Bill required the establishment of a mental element, i.e. the aforesaid knowledge; and</p> <p>(c) the Bill also provided safeguards for innocent participants since the burden of proof rested with the prosecution and the standard of such proof ("beyond reasonable doubt") was high.</p> <p>Ms HO's request to put on record her call for the enforcement agency to give due consideration to the social background of the elderly and those with little formal education in case they were prosecuted for they might easily fall prey to pyramid schemes.</p>	
014426 – 014841	Chairman Administration Mr Vincent FANG	<p><u>Examination of clause 5 – Offences in relation to pyramid scheme</u></p> <p>Mr FANG's expression of support for the Bill, but concern about the difficulty in prosecuting operators of pyramid schemes who could always change their tactics and guises in operating the schemes.</p> <p>Administration's response that since the Court of Appeal quashed the convictions of conspiracy to promote a pyramid scheme in two cases in 2003 and 2004, no charges had been brought under the existing Ordinance. If the Bill was enacted, defendants in circumstances similar to those of the two cases stood a much greater chance to be convicted.</p>	
014842 – 015035	Chairman Mr Alan LEONG Administration	<p>Mr LEONG's suggestions –</p> <p>(a) the English text of clause 4(1)(b) might be amended to read "when promoting the scheme, whether emphasis is on (i) the supply of goods or services; or (ii) the new participant's entitlement to a recruitment payment."; and</p> <p>(b) the Chinese text might be amended to read correspondingly as "在推廣該計劃時，是對(i)新參與者有權獲得供應貨品或服務；或(ii)新參與者有權獲得招募得益，以作招徠。"</p>	

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		Administration's undertaking to consider the above suggestions.	
015036 – 015206	Chairman Administration	<u>Examination of clause 6 – Liability of directors, partners, etc.</u> Members had no comments.	
015207 – 015435	Chairman Administration Mr WONG Ting-kwong Mr Alan LEONG	<u>Examination of clause 7 – Power to award compensation</u> Administration's response to Mr WONG that under clause 7 the court might order the person convicted of an offence to pay an amount of compensation to a person who had suffered financial loss and so it was not necessary for the latter to institute civil proceedings to recover any financial loss. Administration's explanation to Mr LEONG that the aforesaid amount of compensation ordered by the court was recoverable as a civil debt.	
015436 – 015517	Chairman Administration	<u>Examination of clause 8 – Saving of rights and claims</u> Members had no comments.	
015518 – 015534	Chairman Administration	<u>Examination of clause 9 – Pyramid Selling Prohibition Ordinance repealed</u> Members had no comments.	
015535 – 015728	Chairman Administration	Discussion on the legislative timetable. Members agreed to hold the next meeting on 3 November 2011 from 10:45 am to 12:45 pm.	