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工商及旅遊科



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Dear Mr Loo,

Pyramid Schemes Prohibition Bill

Thank you for your letter of 10 June 2011. We set out in the following paragraphs our responses to the questions you raised under respective headings in your letter.

Paragraph (a)

2. Clause 5(1) of the Pyramid Schemes Prohibition Bill (“the Bill”) provides that any person who “knowingly” promotes a pyramid scheme commits an offence. You asked what a person must know under the clause and whether the clause covers also “constructive knowledge”.

3. The mental element of the offence under clause 5(1) is that the defendant knows that the act in question is “promoting” and that he knows that the object he is promoting is a “pyramid scheme”, as defined in clause 3. The clause requires “actual knowledge”, i.e. “constructive knowledge” is not covered. The clause is targeted at the “masterminds” of pyramid schemes. They are persons who are involved in the design, management and/or operation of pyramid schemes. In this light, we consider that the requirement for

establishing actual knowledge is appropriate and will not undermine the efficacy of the provisions.

4. Clause 5(2)(b) is, on the other hand, targeted at the act of participants inducing others to join pyramid schemes. The clause does not require proof of the defendant's knowledge that the scheme is a "pyramid scheme"; it requires only proof of his knowledge that the prospective benefits he may get are mainly from recruiting further new participants. This knowledge requirement is to target at the core vice associated with participating in pyramid schemes, i.e. inducing others to join. We note however that when inducing others to join, participants are likely to emphasize the income receivable by the prospective new participants rather than that by themselves; requiring proof of actual knowledge may hence not enhance the efficacy of the provisions. We consider it appropriate to allow constructive knowledge under the clause, so that we can infer the mental state of a reasonable hypothetical person in the particular circumstances of the case.

Paragraph (b)

5. You asked why we propose to cast the proposed offence of "promoting" a pyramid scheme as an offence incorporating a mental element of knowledge, having regard to the fact that a similar offence in Australia is of a strict liability nature. You also asked whether the requirement for the prosecution to prove a mental element of knowledge will impede enforcement and prejudice the efficacy of the provisions.

6. We consider that the act of "promoting" a pyramid scheme as defined under the Bill is fraudulent and archetypically criminal in nature. While the prosecution indeed has to prove a mental element of knowledge, we believe that as a matter of policy, it is appropriate to incorporate a mental element as in the case of similar offences, such as conspiracy to defraud and theft.

Paragraph (c)

7. You pointed out that in the consultation paper issued in December 2010, we mentioned our intention to provide appropriate defences for publishers who innocently published advertisements promoting pyramid schemes, and that in the paper for the Economic Development Panel in October 2010, we stated that we intended to provide what could be called due diligence defences for defendants in general. You asked why the Bill does not contain those defences.

8. The Bill currently provides that both the proposed offences of promoting a pyramid scheme and participating in a pyramid scheme require the establishment of a mental element of knowledge. It is for the prosecution to prove the defendant's knowledge, rather than for the defendant to invoke the defence that he has taken all necessary precautions or exercised due diligence. Provisions providing for the innocent publication and due diligence defences are thus not necessary.

Paragraph (d)

9. In the paragraph, you asked for the rationale for the arrangements for establishing subsidiary criminal liability of defined persons in a body corporate or unincorporated body, vis-à-vis the arrangements stated under section 4(2) of the existing Pyramid Selling Prohibition Ordinance (Cap. 355).

10. Clause 6 provides that if a body corporate or a person as a member of an unincorporated body commits an offence, a director or holder of other senior offices of the body corporate, or a partner or office holder in or a fellow member or manager of the unincorporated body, also commits the offence if it is proved that the offence has been committed with his consent or connivance or is attributable to his neglect. The burden of proof is placed on the prosecution. In proposing this arrangement, we have had regard to the principle of presumption of innocence. We have been adopting this formulation in more recent statutory provisions, such as section 64B of the Employment Ordinance (Cap. 57), section 44 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and section 51 of the Entertainment Special Effects Ordinance (Cap. 560).

Paragraph (e)

11. Clause 7 empowers the court to make orders, when it convicts a person of an offence under the Bill, requiring the convicted to compensate other persons who have suffered financial loss arising from the offence. You asked what factors the court will take into account in exercising the power to make such a compensation order.

12. The factors which the court will take into account in exercising its power to make a compensation order have been considered in many cases and are well developed.

13. In *HKSAR v Chan Nai Keung* (CACC 284/2006), the Court of Appeal set out the following points mentioned in *R v Miller* [(1979) 68 Cr App R 56]:

- (a) a compensation order is not an alternative to a sentence;
- (b) a compensation order in terms of money should be made only where the legal position is quite clear;
- (c) in making a compensation order the court must have regard to the means of the defendant;
- (d) a compensation order must be precise. It must be related to an offence in respect of which the defendant has been convicted or to an offence which he has asked to have taken into account. It must specify the amount and if there is to be payment by instalments, it must specify the instalments. It is inappropriate to order the accused to pay the compensation if he is still in custody (*HKSAR v Lai Ho Kit* (HCMA 35/2009) at para 18);
- (e) a compensation order must not be oppressive. The court has to bear in mind that a prisoner who has just been discharged from jail is very often short of money. He must not be tempted to commit further offences to provide cash in order to bring his compensation order up to date;
- (f) on the other hand, there may be good moral grounds for making a compensation order including the order for payment by instalments to remind the defendant of the evil he has done. This may apply particularly in the case where a non-custodial penalty is imposed and the compensation which is appropriate is a sum which is not too great; and
- (g) a compensation order must be realistic. An order for payment by instalments over a long period is to be avoided.

14. Applying the principles laid down by the court, we consider that in the making of a compensation order, no account should be taken of the profits made by the promoter or other parties over and above the participation fee. A compensation order is to *compensate the loss of the victim* and so principally will be the amount of the participation fee, plus if appropriate reasonable interests thereon.

Paragraph (f)

15. Clause 8 provides that the Bill after enactment will not affect any rights or claims that any person may have. You ask what rights or claims are contemplated by the clause.

16. The rights or claims referred to in the clause are to cover all civil rights or claims that may subsist. For illustration purposes, they include the right to take out or continue proceedings against persons who used to promote or participate in pyramid schemes on causes of action under the law of contract (e.g. on breach of contract terms on services quality) or the law of negligence (e.g. when a product sold subsequently causes personal injury).

Paragraph (g)

17. You suggested that “by notice published in the Gazette” be inserted in clause 1(2) of the English text so as to achieve consistency with the Chinese text. We are grateful for the suggestion, and subject to views of the Bills Committee, we will propose amendments at Committee Stage to add the phrase in question.

Paragraph (h)

18. You asked if in the definitions of “participation payment” and “recruitment payment”, the uses of the phrases “see section 3(1)(a)” and “see section 3(1)(b)” are appropriate.

19. The two definitions are “signpost” definitions which direct readers to relevant provisions of the Bill for the meaning of the two terms. We consider that this kind of signpost definitions is helpful to readers. They will be adopted in appropriate cases. You may wish to know that similar signpost definitions are adopted in section 2 of the Minimum Wage Ordinance (Cap. 608) (definitions of “exempt student employment”, “hours worked” and “wage period”) and the Companies Bill (e.g. definitions of “special resolution”, “special notice” and “financial year”).

Paragraph (i)

20. You asked if the Chinese rendition “參與費” for “participation payment” can cover payment of a non-financial nature.

21. While “費” usually refers to monetary payments, it is not necessarily so according to usage. Furthermore, “參與費” is a defined term under the Bill: clause 3(1)(a) provides that “參與費” includes a financial benefit as well as a non-financial benefit. Its adoption is therefore consistent with our policy intention that participation payments can be in the form of financial as well as non-financial benefits.

Paragraph (j)

22. With reference to the words “(指與新參與者有權在該計劃之下獲供應的貨品或服務相若的貨品或服務)” in the Chinese text of clause 4(1)(a), you asked if there is any discrepancy between the English and Chinese texts.

23. The apparent discrepancy between the two language texts of clause 4(1)(a) is due to the syntactic difference between the two languages. In the Chinese text, “相若貨品或服務” is mentioned at the beginning of the paragraph. Without the words in brackets, readers might not know clearly what comparable goods or services are. In the English text, the corresponding sentence (“having regard to the price of comparable goods or services available elsewhere”) comes last in the paragraph. The context is clear that the comparable goods or services refer to goods or services comparable to the goods or services that the new participant is entitled to be supplied with under the scheme. Therefore we consider that the meaning delivered by the English text is the same as that by the Chinese text.

Yours sincerely,



(K.C. Yau)

for Secretary for Commerce and Economic Development