

Investigation report on the granting of loans to Viva Macau Limited by the Industrial and Commercial Development Fund

Introduction

On 26th July 2018, during the meeting with the representatives of the SAR Government, the Follow-up Committee on Public Finance Affairs suggested that the Administrative Council of the Industrial and Commercial Development Fund (FDIC) transfer the case concerning its five interest-free loans totalling MOP212 million granted to the airline Viva Macau Limited (hereinafter “Viva Macau”) to the Commission Against Corruption (CCAC), so that the CCAC may study from different perspectives if there was any illegal transfer of assets by the company after obtaining the loans, if there were any other facts possibly involving fraud and if the vetting and approval of the loans and the subsequent recovery procedures were legal.

On the following day, the Administrative Council of the FDIC transferred the related information of the case concerning Viva Macau to the CCAC.

On 30th July 2018, the CCAC conducted an inquiry according to the *Organic Law of the Commission Against Corruption*.

To carry out an objective and impartial analysis, the CCAC requested the Civil Aviation Authority (AACM) to provide the operating information for the period between 2008 and 2010 of two local airlines, which were Air Macau Company Limited (hereinafter “Air Macau”) and Viva Macau. It also borrowed from the Court of First Instance the court file of Viva Macau’s bankruptcy proceedings opened in April 2010 as well as the execution against the loan guarantor – the Hong Kong-based Eagle

Airways Holdings Limited. In addition to sorting out a total of 94 case files and 145 boxes of documents as well as making in-depth analysis and comparison of them, the CCAC also listened to the testimonies of a few persons who involved in the loan approval processes, including the then President and members of the Administrative Council of the FDIC and the personnel of the Economic Bureau (DSE), the AACM and the Office of the Secretary for Economy and Finance.

According to the information obtained, Viva Macau was registered and established on 11st December 2004. The controlling shareholder was the Hong Kong-based Eagle Airways Holdings Limited that held 99.992% shares of the company.

Eagle Airways Holdings Limited was registered and established in Hong Kong on 12th March 2004. The corporate capital was directly or indirectly held by some companies established by different people and entities, including a company held by an American fund named MKW and other persons (72.75%), a company held by Ngan In Leng and other persons (17.27%) and a company held by Ho Kevin King Lun and other persons (9.98%).

According to Article 2, Article 4 and Paragraph 1 of Article 5 of Administrative Regulation no. 8/2003, the FDIC is managed by an administrative council and is subject to the supervision of the Chief Executive. It was provided with administrative and technical support by the Economic Bureau (DSE). In exercising his supervisory powers, the Chief Executive shall, among others, approve, revise and change the FDIC's private budget, define guidelines and issue directives with a view to pursuing the objectives of the FDIC and authorise expenses needed for the performance of the FDIC's duties, the amounts of which being higher than the legally established the Administrative Council may authorise.

To respond to the relevant requirements and expectations, the CCAC consolidated the relevant facts after in-depth investigation and analysis of the evidence. It also sought to identify the criminal, disciplinary and other liabilities of Viva Macau and its shareholders, executive members, members of the Administrative Council of the FDIC, other public servants and official involved with a view to ascertaining if there was any illegal transfer of assets by the company in question after obtaining the loans and if there were any other facts involving fraud.

Furthermore, based on the facts investigated, the CCAC will, in this report, give explanations and make profound analysis from the perspective of its powers and functions, legislation and policy making with a view to performing the duties of reviewing and supervising the legality and legitimacy of administrative acts and procedures vested by the law, particularly the legality of loan approval and the subsequent recovery procedures. It will also put forward appropriate improvement suggestions.

Part I: The granting of loans by the FDIC to Viva Macau

(1) Operation of Macao's aviation industry and requests for assistance between 2008 and 2009

1. The financial crisis of 2008 coupled with the high fuel prices had caused the aviation industry around the world to face operating difficulties. At that time, Air Macau and Viva Macau sought financial and other kinds of assistance from the Macao SAR Government at the same period to alleviate their operating crisis.
2. In response to the assistance requests, the SAR Government contacted the two airlines in order to understand their respective operating and financial situations and to come up with solutions.
3. As far as Air Macau was concerned, the information showed that the company was operating at a deficit and its net asset value was reduced to less than 50% of the registered capital, which means it was in an urgent need of capital to improve the company's operating and financial situations. Given the Macao SAR Government was one of the shareholders of Air Macau, it was decided that the financial difficulties of the company be eased through capital restructuring and subscription of redeemable preference shares. In 2009, the Macao SAR Government injected a sum of MOP215 million into Air Macau.
4. As far as Viva Macau was concerned, given that the close-down of the privately held company would have negative impact on travellers who had booked tickets with it as well as the tourism as a pillar industry of Macao, the SAR Government decided, at the company's request, to offer interest-free financial aid to it through the FDIC.

5. As the financial crisis of 2008 persistently affected the SMEs of Macao, an extra MOP1.5 billion was allocated to the FDIC to strengthen support for the SMEs.
6. In the budgets for the fiscal years of 2008 and 2009 of the FDIC, there were only “medium-term and long-term loans” under the category of capital expenditure. No “short-term loans” were included.
7. On the premise that the approval of financial assistance under the “SME Aid Scheme” would not be affected, according to Paragraph 1 of Article 21 of Decree Law no. 41/83/M, as amended by Decree Law no. 22/87/M, which provides that “in order to incur unforeseen expenditures that are not foreseen or insufficiently endowed, budgetary revisions or changes may be made”, the FDIC, in addition to mobilising part of the budgets for “medium-term and long-term loans – SME Aid Scheme” (09-01-05-00-01) and “provisional allocation” (05-04-00-00-90), included “short-term loans” (09-01-04-00-00) and “medium-term and long-term loans - others” (09-01-05-00-99) in its budgets, so as to implement the SAR Government’s policy of offering financial aid to Viva Macau.

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(2) The FDIC’s loan provision to Viva Macau

The first loan involving MOP80 million:

1. According to the information, Ho Kevin King Lun and Siew Pek Tho, who were executive members of Viva Macau, the then Secretary for Transport and Public Works and the Director of the AACM had a meeting at 18:30 on 17th September 2008 at the office of the then Secretary for Transport and Public Works, where they discussed the

operating difficulties confronting Viva Macau.

2. On 22nd September 2008, Viva Macau wrote a letter to the AACM stating that a bank based in Australia with which it had business dealings unilaterally withheld its capital, which severely affected its financial operation. It therefore requested the Public Administration to offer it a temporary comprehensive financial aid of USD10 million (equivalent to approximately MOP80 million).
3. In response to the aforesaid request, the AACM wrote an analysis report-proposal, which not only recorded the process of the meeting but also pointed out that, despite that the operation and finance of Viva Macau was in a very negative situation (with a total debt exceeding its total assets, a loss of over USD13 million and a net asset value being less than 50% of its registered capital), given that Viva Macau ran all the exclusive air routes in the region, the close-down of the company would have negative impact on Macao's tourism and travellers. The AACM therefore suggested that the SAR Government consider offering short-term financial aid to Viva Macau.
4. On 26th September 2008, the then Secretary for Transport and Public Works, upon receipt of the aforesaid report-proposal, submitted it to the then Chief Executive, who then issued an order and forwarded it to the then Secretary for Economy and Finance for follow-up work; the then Secretary for Economy and Finance subsequently sent the analysis report-proposal and other related documents to the DSE that is subject to its supervision.
5. On 29th September 2008, upon receipt of the aforesaid report-proposal and the related documents, the then Acting Director

of the DSE ordered the subordinates to conduct analysis of the report-proposal and present a report on the following day (30th September), so that the Administrative Council of the FDIC may be able to deliberate on Viva Macau's application for the temporary financial aid. The report, basically written based on the data in the report-proposal of the AACM, indicated that the granting of financial aid to Viva Macau would meet the objective of the FDIC and thus suggested that the report be sent to the Administrative Council of the FDIC for deliberation.

6. It was also found that on the same day Ngan In Leng lent HKD16 million to Viva Macau in the name of Hang Huo Enterprise Group Limited he held shares in. The repayment date was set as 3rd October 2008.
7. On 30th September 2008, the Administrative Council of the FDIC unanimously agreed on the content and analysis of the aforesaid report of the DSE. It agreed that the close-down of Viva Macau would undermine Macao's image and investors' confidence, which would impact on the region's stable economic development. Given the financial aid was pressing, the members of the Administrative Council suggested providing an interest-free loan of MOP5 million to Viva Macau in advance.
8. Therefore, the then President of the Administrative Council of the FDIC gave some favourable opinions on the report, which were approved by the then Secretary for Economy and Finance by order on the same day.
9. Subsequently, the FDIC issued a check of MOP5 million to Viva Macau.

10. According to the information obtained, on 10th October 2008, Ho Kevin King Lun also lent three loans with a total amount of HKD6 million to Viva Macau in his own name and the repayment periods were 14 days.
11. As a matter of fact, Ngan In Leng and Ho Kevin King Lun provided loans of different amounts to Viva Macau in their own names or in their companies' names several times.
12. On 13th October 2008, the Administrative Council of the FDIC convened a meeting to continue the deliberation on the remaining amount (i.e. MOP75 million) of the financial aid previously requested by Viva Macau.
13. At that time, the Administrative Council of the FDIC agreed on the repayment arrangement proposed by Viva Macau and allowed the company to repay the loan of MOP80 million in three instalments within six months from the receipt of it. It also requested the company to issue a promissory note of the same value.
14. In the end, the Administrative Council of the FDIC prepared a report based on the conclusion of the previous meeting (of 30th September 2008), which was then presented to the superiors in a bottom-up manner. The report suggested that the then Secretary for Economy and Finance and the then Chief Executive approve the granting of an interest-free loan of the remaining MOP75 million to the company.
15. On 15th October 2008, the then Secretary for Economy and Finance agreed on the suggestion in the aforesaid report of the Administrative Council of the FDIC. The then Chief Executive also approved it by order on the same day.
16. On the same day, the FDIC and representatives of Viva Macau

including Siew Pek Tho signed an agreement drafted by the DSE. In addition to the amount of the loan and repayment arrangement, the agreement also set forth that the loan for Viva Macau shall be used to improve the state of operation of the company and that a report specifying the use of the financial aid by the company shall be submitted to the FDIC within 90 days from the receipt of the loan.

17. As far as the loan guarantee was concerned, Siew Pek Tho, the representative of Eagle Airways Holdings Limited, which was the controlling shareholder of Viva Macau, endorsed the aforesaid promissory note. Therefore, Eagle Airways Holdings Limited became the loan guarantor of the aforesaid loan.
18. On 16th October 2008, Viva Macau received the loan of MOP75 million from the FDIC and deposited it.
19. On 20th October 2008, Viva Macau repaid the principal of HKD16 million to Ngan In Leng's Hang Huo Enterprise Group Limited it borrowed from the latter on 29th September 2008. Details of other loans are not going to be discussed here.
20. On 27th October 2008, Viva Macau repaid Ho Kevin King Lun HKD6.1 million borrowed from the latter on 10th October 2008. Details of other loans are not going to be discussed here.

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The second loan involving MOP40 million:

1. On 17th December 2008, Viva Macau, having not repaid the first loan, wrote a letter to the AACM and requested the Government to provide an additional temporary financial aid of MOP40 million.
2. On 19th December 2008, the AACM submitted a report-proposal

indicating that since Viva Macau had yet to provide officially audited accounts and was lacking yearly financial information, it maintained a very negative comment on the operating conditions of the company. It opined that the Government should, via a supervisory mechanism, monitor the use of the loans by the company and its ability to repay the loans on time. It recommended that the Government consider offering an additional loan of MOP40 million to Viva Macau as well as setting up a mechanism to obtain necessary information and monitor the use of the loans and its repayment ability.

3. On 23rd December 2008, the then Chief Executive issued an order and forwarded it to the then Secretary for Economy and Finance for follow-up work. Subsequently, the then Secretary for Economy and Finance made the following order: “Please forward this to the FDIC for following up the additional loan. Part of the loan may be granted in advance to meet the imminent financial need.”
4. On 26th December 2008, the Administrative Council of the FDIC received the report prepared by the DSE based on the aforesaid report-proposal of the AACM, which suggested that an interest-free loan be provided to Viva Macau and a supervisory mechanism be set up according to the opinion of the AACM.
5. On the same day, the Administrative Council of the FDIC reached a unanimous decision that they would provide a loan of MOP5 million to Viva Macau in advance.
6. The then Secretary for Economy and Finance approved the decision by order on the same day.
7. On 29th December 2008, Viva Macau wrote a letter to the DSE requesting to repay the loan in three instalments. It requested that it

would repay MOP10 million in the 1st instalment, MOP10 million in the 2nd instalment and MOP20 million in the 3rd instalment on the 120th day, 150th day and 180th day respectively from the receipt of the remaining loan (MOP35 million).

8. On 2nd January 2009, the Acting Director of the DSE ordered the subordinates to prepare a report where he suggested adopting the repayment arrangement proposed by Viva Macau and providing the remaining interest-free loan amounting to MOP35 million to Viva Macau as requested. The report also set out the condition that tax execution process would be conducted provided that Viva Macau failed to make the relevant repayments within the agreed periods. It also suggested that the FDIC, when entering into a financial aid agreement with Viva Macau, should request the latter to submit a report specifying the use of the loan on the 90th day from the receipt of the last loan and to write a promissory note with Eagle Airways Holdings Limited being the guarantor.
9. On the same day, the Administrative Council of the FDIC received the aforesaid report and held a meeting where the relevant suggestions were unanimously endorsed.
10. On 5th January 2009, the then Secretary for Economy and Finance approved the recommendations by order. The report was then submitted to the then Chief Executive, who also approved them by order on the same day.
11. On 12th January 2009, the FDIC and Viva Macau signed an agreement on the provision of the aforesaid interest-free loan of MOP40 million which included the aforesaid repayment arrangement proposed by Viva Macau; Viva Macau also wrote a promissory note of the same

value to the FDIC, which was endorsed by the legal representatives of Eagle Airways Holdings Limited as the guarantor.

12. On 16th January 2009, the FDIC wrote a letter to Viva Macau notifying the latter to submit reports specifying the use of the first and second loans in January and April respectively. It also specified the repayment dates and amounts of the two loans payable in a total of six installments, as follows:

Financial aid	Loan repayment date	Amount
1 st loan (1 st instalment)	12/02/2009	25,000,000
1 st loan (2 nd instalment)	16/03/2009	25,000,000
1 st loan (3 rd instalment)	13/04/2009	30,000,000
2 nd loan (1 st instalment)	05/05/2009	10,000,000
2 nd loan (2 nd instalment)	04/06/2009	10,000,000
2 nd loan (3 rd instalment)	06/07/2009	20,000,000
Total amount		120,000,000

13. On 21st January 2009, the DSE once submitted a report to the Administrative Council of the FDIC, where it pointed out that owing to the FDIC's lack of professionals with aviation operation knowledge and skills, it was difficult for the FDIC, as suggested by the AACM, to monitor the repayment ability of Viva Macau or to set up a mechanism to obtain the relevant information. It therefore suggested that the AACM take up the supervisory role instead. The FDIC agreed on the report and forwarded it to the then Secretary for Economy and Finance.
14. On 2nd February 2009, the then Secretary for Economy and Finance approved that the FDIC would co-ordinate with the AACM. At that time, the DSE only sent a letter to the AACM to notify the latter about the situation and provided it with the photocopy of the operation

report of Viva Macau.

15. Subsequently, neither the DSE, the FDIC nor the AACM followed up the financial status of Viva Macau or monitored the repayment situation of the company. There was no supervisory mechanism as such set up jointly by the concerned entities to obtain the relevant information from Viva Macau.
16. Between February and April 2009, Viva Macau wrote letters several times to the DSE stating that it was unable to make the repayments in accordance with the aforesaid agreement due to the restriction of the global capital market and thus hoped to adjust the repayment dates and amounts for the first and second loans. The company also proposed a new repayment arrangement and requested to extend the first repayment date to 1st July 2010.
17. In mid-March and early April 2009, the FDIC wrote letters to Viva Macau several times requesting the latter to submit a report that might reflect its recent financial status so that the former would have an idea of the company's financial condition and repayment ability. However, Viva Macau never gave any response or submitted any report concerning the use of the loans as well as necessary financial information.

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The third loan involving MOP56 million:

1. On 26th March 2009, Viva Macau, who had yet to repay any loan, wrote a letter to the then Secretary for Economy and Finance again requesting the Government to provide an emergency financial aid of MOP8 million; on 30th March 2009, the then Secretary for Economy and Finance requested, by order, to forward the relevant request to the

FDIC for follow-up work.

2. On 31st March 2009, the Administrative Council of the FDIC discussed about the report prepared by the DSE on a meeting, where it pointed out that Viva Macau did not mention about any repayment plans or guarantee methods. It also suggested that an interest-free loan of MOP5 million be offered to Viva Macau in advance and a discussion about repayment arrangement be carried out with Viva Macau. It would also continue to stay updated on Viva Macau's state of operation and use of resources with the relevant departments including the AACM and the Financial Services Bureau.
3. Subsequently, the then Secretary for Economy and Finance approved the aforesaid suggestions by order.
4. On 1st April 2009, the FDIC sent a letter to Viva Macau requesting the latter to provide, among others, the latest financial and operation reports as soon as possible.
5. On 6th April 2009, the DSE prepared a proposal again, where it suggested the Administrative Council of the FDIC consider and decide on whether to grant Viva Macau the remaining amount of MOP3 million of the loan the company had applied for.
6. On the same day, Viva Macau wrote a letter to the then Chief Executive requesting the Government to provide an emergency financial aid of MOP48 million to it. The then Chief Executive subsequently issued an order and forwarded it to the then Secretary for Economy and Finance for follow-up work. The then Secretary for Economy and Finance then made the following order: "Please forward this to the FDIC for considering the endorsement."
7. On 7th April 2009, the Administrative Council of the FDIC convened a

meeting to discuss the proposal prepared by the DSE and unanimously suggested that the then Secretary for Economy and Finance may grant the remaining loan amounting to MOP3 million to Viva Macau. It suggested that a discussion be carried out with Viva Macau again on repayment arrangement according to the previous loan conditions. The then Secretary for Economy and Finance approved the suggestion by order on the same day.

8. On the same day, the FDIC wrote a letter to Viva Macau requesting the latter to submit a report specifying the use of the second financial aid.
9. On the same day, Viva Macau wrote a letter to the FDIC requesting to repay, in three instalments, the aforesaid approved loan of MOP8 million and the loan amounting to MOP48 million under application, which added up to MOP56 million, the first repayment date being 1st April 2011.
10. On 8th April 2009, the DSE prepared a report stating that Viva Macau had yet to submit its latest audited balance sheets and profit and loss accounts and those of its guarantor, Eagle Airways Holdings Limited. It also pointed out that, based on the operation report and internal accounting statistics provided by Viva Macau, the loss of the company was worrying. Nevertheless, it still suggested that consideration be given and decision be made on whether to offer the loan to Viva Macau. It also suggested that once the loan was approved, Viva Macau had to enter into an aid agreement with the FDIC, and Eagle Airways Holdings Limited should act as the loan guarantor and write a promissory note. It also set out the condition that tax execution process would be conducted provided that Viva Macau failed to make the relevant repayments within the agreed periods.

11. On the same day, the Administrative Council of the FDIC convened a meeting to discuss the aforesaid report, where they unanimously endorsed the relevant suggestions. On the same day, the report was presented to the then Secretary for Economy and Finance and the then Chief Executive in a bottom-up manner, who approved the provision of a loan of MOP48 million to Viva Macau to tide the company over the liquidity problem.
12. On the same day, the FDIC and Viva Macau entered into an agreement on the provision of an interest-free loan of MOP56 million, where both parties agreed on the repayment arrangement proposed by Viva Macau. Viva Macau also wrote a promissory note of the same value to the FDIC, which was endorsed by the legal representatives of Eagle Airways Holdings Limited.

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(Viva Macau's request of extending the repayment periods for the first and the second loans)

1. On 8th June 2009, the Administrative Council of the FDIC pointed out in a discussion meeting that despite that they might carry out the loan recovery process according to the law owing to Viva Macau's failure in submitting financial reports and making repayments according to the loan agreements, given that the economy had yet to recover, taking recovery action may cause the company to close down, which would have negative impact on the image of Macao as an international tourism city. Therefore it suggested the then Secretary for Economy and Finance give discretionary consideration to and approve the request of Viva Macau of extending the repayment periods for the aforesaid first and second loans totalling MOP120 million.

2. On 12th June 2009, the then Secretary for Economy and Finance endorsed, by order, the suggestion of the Administrative Council of the FDIC and approved that Viva Macau may postpone its repayments according to the aforesaid arrangement.
3. On 17th June 2009, after rounds of meetings and the report vetting process, with the final approval from then Secretary for Economy and Finance, the FDIC wrote a letter to Viva Macau informing the latter that its application for extending the repayment periods for the loans totalling MOP120 million was approved. Details of the new arrangement are as follows:

Financial aid	Repayment date	Amount (MOP)
1 st loan	01/07/2010	40,000,000
	01/09/2010	40,000,000
2 nd loan	01/11/2010	40,000,000

4. The FDIC had, up to that moment, granted three loans to Viva Macau. Moreover, the loans, which had yet to be repaid or were undue, involved a total of MOP176 million.

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The fourth loan involving MOP24 million:

1. On 8th June 2009, Viva Macau wrote a letter to the then Chief Executive again requesting the Government to provide an emergency financial aid of MOP24 million. The then Chief Executive issued an order and forwarded it to the then Secretary for Economy and Finance for follow-up work. Subsequently, the then Secretary for Economy and Finance made the following order: “Please forward this to the FDIC for handling.”

2. On 15th June 2009, Viva Macau also wrote a letter to the FDIC requesting to repay the yet-to-be approved loan totalling MOP24 million in three instalments, the first repayment date being 15th June 2011.
3. On the same day, the Administrative Council of the FDIC reached a consensus at a meeting and prepared a report. In the report, the Administrative Council of the FDIC stated clearly to the then Secretary for Economy and Finance that while Viva Macau had been granted financial aids totalling an amount of MOP176 million, the company had never fulfilled the duty to repay the loans. Therefore, in response to the company's yet another financial assistance application due to temporary cash flow shortfalls, the FDIC opined that the company should improve its operation and management instead of being dependent on the Government's long-term support. Nevertheless, given the need to stabilise the economy, it still suggested that the then Secretary for Economy and Finance give discretionary consideration to the company's application for a financial aid of MOP24 million.
4. The aforesaid report, presented to the superiors in a bottom-up manner, was approved by the then Secretary for Economy and Finance and the then Chief Executive by order respectively.
5. On the following day, the FDIC and the Viva Macau signed an agreement on the provision of an interest-free loan of MOP24 million which included the aforesaid repayment arrangement proposed by Viva Macau; Viva Macau also wrote a promissory note of the same value to the FDIC, which was endorsed by the legal representatives of Eagle Airways Holdings Limited.

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The fifth loan involving MOP12 million:

1. On 16th November 2009, Viva Macau wrote a letter to the then Chief Executive again requesting the Government to provide an emergency financial aid of MOP12 million. The then Chief Executive issued an order and forwarded it to the then Secretary for Economy and Finance for follow-up work. Subsequently, the then Secretary for Economy and Finance made the following order: “Please forward this to the FDIC.”
2. On 18th November 2009, Viva Macau also wrote a letter to the FDIC requesting to repay the yet-to-be approved loan totalling MOP12 million in three instalments, the first repayment date being 15th November 2011.
3. On 19th November 2009, the Administrative Council of the FDIC had a meeting where they discussed the report prepared by the DSE and unanimously agreed that the then Secretary for Economy and Finance consider approving Viva Macau’s application for the financial aid of MOP12 million. Once the application was approved, Viva Macau should be requested to enter into an aid agreement with the FDIC, and Eagle Airways Holdings Limited should act as the loan guarantor and write a promissory note.
4. On the following day, the request was first approved by the then Secretary for Economy and Finance by order and then by the then Chief Executive by order.
5. On 23rd November 2009, the FDIC and the Viva Macau signed an agreement on the provision of an interest-free loan of MOP12 million, which included the aforesaid repayment arrangement proposed by Viva Macau; Viva Macau also wrote a promissory note of the same

value to the FDIC, which was endorsed by the legal representatives of Eagle Airways Holdings Limited.

6. Up till the time the case was referred to the CCAC, Viva Macau had never fulfilled any of the aforesaid loan agreements by repaying the loans to the FDIC.
7. Nevertheless, after analysis of the revenue and expenditure of Viva Macau, particularly the documents of the bankruptcy proceedings, it was found that the company had all along been operating at a substantial loss between 2008 and 2009. While part of the financial aids was used to pay the debts owed to its executive members, the rest of the loans were used on the operating expenditure. There was no indication of willful concealment or transfer of assets of the company.

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(3) Bankruptcy of Viva Macau and loan recovery action taken by the FDIC

1. In April 2010, Viva Macau filed for bankruptcy to the Court of First Instance. As no settlement or agreement had been reached at the meeting of creditors, the judge of the case announced bankruptcy of Viva Macau.
2. After confirmation of the debts and calculation of the involved amounts, Viva Macau's defaulted debts totalled over MOP1.1 billion. Eagle Airways Holdings Limited was the creditor to whom the company owed the largest amount of defaulted debt, which involved over MOP469 million. Second came the FDIC, which involved a total defaulted debt of MOP212 million.
3. After the attached assets of Viva Macau were realised, including

vehicles, baggage trailers, aircraft trolleys and office supplies, the proceeds amounted to MOP98,000. Also, the balance of the frozen bank accounts of Viva Macau amounted to MOP20,759.64. Therefore, the total amount that might be used to repay the debts through the bankruptcy proceedings was MOP118,759.64. However, this was not even enough to pay for the relevant litigation cost (the outstanding litigation cost was MOP62,761.36).

4. Due to the fact that Viva Macau closed down its office in April 2010, filed for bankruptcy to the court and failed to repay the first instalment of the aid on the designated date, the FDIC issued an interpellation to the guarantor Eagle Airways Holdings Limited. However, it still did not receive any repayment. In August 2010, with the five promissory notes serving as an execution title, the FDIC filed for an execution action to the court against Eagle Airways Holdings Limited and requested that the assets of the Eagle Airways Holdings Limited be attached and realised to pay the loans totalling MOP212 million.
5. Subsequently, Eagle Airways Holdings Limited presented a list to the court indicating their assets, which were only two bank accounts opened in Hong Kong - one with a balance of USD47,094.65 and the other with a balance of HKD74,670.65. The total amount was equivalent to some MOP40 million. The company had no assets in Macao.
6. In October 2011, the Court of First Instance, at the request of the FDIC, approved the attachment of the shares held by Eagle Airways Holdings Limited in Viva Macau with par value of MOP24,998,000.
7. In April 2013, the Court of First Instance approved that the aforesaid attached shares might be put on judicial sale at a reserve price of

MOP17,498,600 by a closed tender. However, no one showed any interest in it.

8. Later, the Court of First Instance approved that the aforesaid attached shares be realised through private negotiation instead. However, despite that the court appointed a total of five professionals to seek potential buyers between May 2013 and June 2018, the attempts to sell the relevant shares were futile.
9. The FDIC also entrusted Hong Kong-based professional institutes to find out if there were any other assets of Eagle Airways Holdings Limited in Hong Kong that may be subject to attachment in addition to the aforesaid bank account balances. The attempt was also unavailing. The FDIC also studied the feasibility of filing a lawsuit in Hong Kong to recover the relevant loans, which however did not receive any positive feedback or results.

Part II: Whether any criminal provisions were violated during the granting of loans to Viva Macau by the FDIC

The CCAC, based on the *Penal Code*, carried out in-depth analysis of the acts of Viva Macau as well as its shareholders and executive members so as to ascertain if the relevant acts violated any of the provisions of the aforesaid law, particularly the provisions of fraud, issuance of bad cheque, intentional bankruptcy, unintentional bankruptcy, frustration of credits, favouring of creditors and active bribery. The CCAC also studied whether the acts of the members of the Administrative Council of the FDIC, other public servants of the Public Administration and the involved officials should be considered the constitutive elements of passive bribery, power abuse and dereliction of duty and whether criminal liability should be held against them.

(1) Shareholders and executive members of Viva Macau

After viewing the documents available, particularly the financial reports and accounts of Viva Macau, the CCAC found that Viva Macau operated as usual before and after receiving the loans. It continued to accept flight booking, designate aircrafts and flight attendants for their flights and also pay the operation expenditure, including salary, fuel cost and airport fee.

At the time when Viva Macau applied for the relevant financial aids from the Public Administration, it was well known that the financial crisis was taking toll on the economy and the fuel prices were soaring.

Therefore, in the CCAC's opinion, there was no sufficient indication that the shareholders and executive members of Viva Macau had used contrivance to mislead the FDIC or the Public Administration so that they

would grant the relevant financial aids, which would cause a loss of assets of the Region. Therefore, commission of fraud provided for in and punishable by Article 211 of the *Penal Code* was not found.

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Also, Viva Macau once wrote a total of five promissory notes as guarantee to the FDIC when the loan agreements were entered into, which were endorsed by Eagle Airways Holdings Limited, its controlling shareholding company. After investigation, the relevant promissory notes were found to have met the “requirements of promissory note” provided for in Article 1208 of the *Commercial Code*.

The cheque provided for in Article 1212 of the *Commercial Code* is a constitutive element of the crime of issuance of bad cheque provided for in and punishable by Article 214 of the *Penal Code*.

Therefore, even the promissory notes written by Viva Macau could not be encashed, according to the principle of *nullum crimen sine lege*, it is not possible to impose criminal liability on the company basing on the crime of issuance of bad cheque provided for in and punishable by Article 214 of the *Penal Code*.

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When the CCAC was viewing Viva Macau’s bankruptcy case file, it found that the company did once borrow short-term loans from, among others, its executive members Ngan In Leng and Ho Kevin King Lun and Hang Huo Enterprise Group Limited to pay fuel cost and other operation expenditure, which aimed to temporarily alleviate its liquidity crunch. As a matter of fact, these executive members could have instead chosen to make a direct injection of capital into Viva Macau to increase its share capital for the sake of saving the company.

It was also found that Ho Kevin King Lun, as an executive member of Viva Macau, , once put up the 24 properties owned by Hang Lei Group Limited in which he had shares as collateral for bank borrowings. Judging from this, the management did demonstrate their willingness to improve Viva Macau's situation, despite that the company owed various debts to its executive members and the FDIC eventually.

There has been no strong indication that the shareholders or executive members of Viva Macau willfully led to the company's bankruptcy and maliciously evaded debts through creating the false impression of lacking the solvency for the repayment. Therefore, commission of the offence of intentional bankruptcy provided for in and punishable by Article 223 of the *Penal Code* was not found.

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During the investigation, the CCAC found that the FDIC had requested Viva Macau to submit accounting records for the years of 2007 and 2008 audited by accountants or auditors such as balance sheets. However, Viva Macau had never submitted them.

When viewing the more than 145 boxes of company documents in the bankruptcy case file, the CCAC found that the documents were disorganised and the bank transaction and accounting information was fragmentary. The CCAC only managed to find the unaudited financial reports for 2007 and 2008. No accounting records could be found.

Despite that the information did not show that Viva Macau's bankruptcy was caused by serious negligence, want of caution, prodigality, serious overspending or serious misconduct of its shareholders or executive members, it was found that the people concerned did fail to strictly abide by the law to ensure that their bookkeeping practices and

commercial transactions complied with the relevant rules. They failed to keep well-documented financial reports and accounting records and carry out bookkeeping activities such as preparation or arrangement for preparation of balance sheets. This situation lasted until Viva Macau was declared bankrupt.

Based on Article 235 as well as Articles 42 and 45 of the *Commercial Code*, the CCAC believed that the shareholders or executive members of Viva Macau might have committed the offence of unintentional bankruptcy provided for in and punishable by Paragraph 1 of Article 224 of the *Penal Code*.

However, according to Paragraph 3 of Article 224 of the *Penal Code*, the aforesaid offence shall only be subject to criminal procedures when there is a complaint, and the right of complaint must be exercised within three months from the declaration of bankruptcy. However, since the respective right had never been exercised, it became extinct due to expiry of prescription of the right of complaint.

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Also, after Viva Macau filed for bankruptcy and an execution action was filed against Eagle Airways Holdings Limited, it was not found that the assets of the company had been destroyed, damaged or made disappear with intent to frustrate, totally or partially, the satisfaction of a credit of another person. Therefore, the offence of frustration of credits provided for in and punishable by Article 222 of the *Penal Code* was not applicable.

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According to the information obtained, upon receipt of the financial aids from the FDIC, Viva Macau used part of them to repay the short-term

high-interest loans to Ngan In Leng and Ho Kevin King Lun immediately. Given that these acts took place when the company was still in operation, they could be regarded as a way to improve the liquidity of the company. Most importantly, after the commencement of Viva Macau's bankruptcy proceedings, no one had been found to have, in any way, intentionally repay debts which were not yet due with intent to favour certain creditors in detriment of others. Therefore, the offence of favouring of creditors provided for in and punishable by Article 225 of the *Penal Code* was not found.

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In the end, according to the information gathered by the CCAC, it was not found that someone gave or promised any advantage to the FDIC or other public servants so that Viva Macau could receive the financial aids from the FDIC. Therefore, it is impossible to ascertain that the offence of active bribery provided for in and punishable by Article 339 of the *Penal Code* was committed.

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(2) Members of the Administrative Council of the FDIC, other public servants of the Public Administration and the involved officials

According to the findings, the CCAC could not prove that the FDIC or other public administration authorities or personnel, including the then Chief Executive and the then Secretary for Economy and Finance, once accepted an advantage or a promise of an advantage to act or refrain from acting, which resulted in the granting of the loans totalling MOP212 billion to Viva Macau. Therefore, there has been no indication that the offence of passive bribery to perform licit acts provided for in and punishable by Article 338 of the *Penal Code* was committed.

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During the investigation, the CCAC analysed that the economic environment of 2008 and 2009 was in line with the facts recorded in the FDIC's report on the relevant loan granting. In addition, taking account of the fact that the SAR Government also provided financial aids in different forms to Air Macau during the same period, the CCAC did not find that any members of the Administrative Council of the FDIC or personnel of the DSE or even the then Secretary for Economy and Finance and the then Chief Executive made biased decisions on the granting of financial aids for the relevant industry.

Since it could not be proved that, during the loan approval processes, someone had abused the powers or violated the duties inherent to his functions with intent to obtain himself or a third person an unlawful benefit or to cause damage to another person. Therefore, there is no room to apply the offence of power abuse provided for in and punishable by Article 347 of the *Penal Code*.

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In the process of providing financial aids totalling MOP212 million to Viva Macau, there were indeed indications that someone once took the process forward and made decisions so that the relevant loan granting was successful and smooth. Nevertheless, taking account of the overall situation, including the then economic environment and government policies, specially the fact that the Government also granted different types of aid to Air Macau of the same industry, it could not be ascertained that someone had, with intent to obtain Viva Macau unlawful benefits or to cause damage to the SAR Government, and with the knowledge that the law would be or has been violated, took the relevant process forward or

made the relevant decisions. Therefore, it is not possible to impose criminal liability on the relevant persons basing on the offence of dereliction of duty provided for in and punishable by Article 333 of the *Penal Code*.

Part III: Problems in the process of the grant of loan to Viva Macau by FDIC

In the process of the grant of considerably huge amount of loans to the Viva Macau by the FDIC, although no intentional violation of criminal law has been found, it is necessary to mention that in the course of the investigation, CCAC has verified the existence of some issues that deserve review and reflexion in terms of administrative illegality, administrative irregularity and even concerning the need for legislative improvement.

(1) Lack of concrete legal basis for the grant of considerably huge amount of loans to non-SMEs

In accordance with Articles 1 and 3 of Administrative Regulation no. 8/2003 (*Regulations of the Industrial and Commercial Development Fund*), as a legal person of public law which operates alongside the Economic Bureau (DSE), the FDIC aims to mobilise its resources to offer financial aids for the projects and actions that facilitate the economic development of Macao SAR, especially to those listed in Paragraph 2 of Article 3.

Although Administrative Regulation no. 8/2003 regulates the objectives of the FDIC, it is only the organic law of the FDIC, which mainly regulates its nature and duties, the composition and competence of its Administrative Council and internal management such as financial operation, and it does not regulate the practice of financial aid offering. The CCAC considers that Administrative Regulation no. 8/2003 was not sufficient to cover all matters about the grant of financial aids.

In fact, at the time, other legal bases for the grant of financial aids by the FDIC included Order no. 54/GM/97 and Administrative Regulation no. 9/2003 (*SME Aid Scheme*), under which the FDIC may offer grants or interest-free loans to entities that organise certain activities or directly offer grants or interest-free loans to eligible SMEs.

Regarding the vetting criteria for financial aids for activities organised by non-profit organisations or SMEs, the said regulations have set up relatively clear stipulations between 2008 and 2010:

- 1) In accordance with Order no. 54/GM/97, after assessing the application documents, public departments may offer a gratis lump sum grant to privately owned non-profit organisations aiming at carrying out public welfare activities and private individuals who promote public welfare activities in a non-profit manner for the activities that meet their aim.
- 2) In accordance with Paragraph 1 of Article 5 of Administrative Regulation no. 9/2003 (*SME Aid Scheme*) amended by Administrative Regulation no. 2/2009 and Administrative Regulation no. 14/2006, the SMEs in the situations prescribed by the administrative regulation may apply for an interest-free loan amounting to a maximum of MOP300,000 (before February 2009) or MOP500,000 (between February 2009 and May 2017) from the FDIC for the purpose of improving the operating conditions or relieving financial stress caused by extraordinary situations or force majeure. The beneficiaries shall repay the loans in accordance with the loan agreement.

However, the legal basis for financial support for non-SMEs is still absent.

As a commercially registered limited company, Viva Macau is neither a non-profit organisation nor an individual. The financial aids it applied for and received was not for the purpose of organising public welfare activities. Also, the funds were interest-free loans instead of gratis lump sum grants. Therefore, Order no. 54/GM/97 cannot be the legal basis for the vetting of the applications.

Obviously, Viva Macau was not a SME as prescribed by Administrative Regulation no. 9/2003 (the *SME Aid Scheme*, especially Article 7). The first financial aid that the company applied for amounted to MOP80 million (the financial aids granted amounted to MOP212 million in total), which was far higher than the maximum amounts of the grants provided by the administrative regulation. Therefore, it is impossible that the administrative regulation was applicable to the assessment.

The relevant documents show that when assessing the applications for financial aids made by Viva Macau, both the DSE and the analysis report made by the Administrative Council of the FDIC suggested granting the loans just for the reason that “the grant of interest-free loan to Viva Macau accords with the objectives and duties of the FDIC provided by Administrative Regulation no. 8/2003”. However, in fact, they did not apply any concrete stipulations related to the vetting procedure and criteria for application for such huge amount of loan, let alone there was none applicable.

In accordance with Article 3 of the *Administrative Procedure Code*, the Public Administration shall act in accordance with the law and within the scope of competence it is vested with. The Public Administration shall not carry out any administrative acts or activities unless there is legal basis. Otherwise, it will violate the principle of legality.

This shows that the suggestions made by the relevant members of the DSE and the members of the Administrative Council of the FDIC and the then Secretary for Economy and Finance's and the then Chief Executive's decisions to approve the applications for loan were made merely based on Administrative Regulation no. 8/2003, which has only a nature of organic law which was a situation of insufficient legal basis.

Obviously, given that there was no legal regime that vests the FDIC with the power to grant considerably huge amount of financial aids for non-SMEs and set up the handling procedure, there was lack of concrete and adequate legal basis for the suggestions made by the relevant members of the DSE and the FDIC, the approvals given by the then Secretary for Economy and Finance to the FDIC on 30th September 2008 and 26th December 2008 respectively to grant an interest-free loan amounting to MOP5 million as short-term financial aid for Viva Macau and even the then Chief Executive's later decisions to approve the grant of considerably huge amount of loan.

It is because there was short of concrete and applicable legislation, the relevant authorities could only carry out the vetting procedures in accordance with the related stipulations under the *SME Aid Scheme*, causing various difficulties and confusion to the relevant personnel such as problems concerning their professional skills to deal with the applications, search of documents and examination of the guarantor's background and conditions. The vetting and approval processes were not strict but full of carelessness. Eventually, they were transformed into a mere formality, as the decisions to approve the considerably huge amounts of loan were made without any concrete discussions and analyses.

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(2) Lack of prudence to vet the applications for government grants

In accordance with Paragraph 2 of Article 5 of Administrative Regulation no. 8/2003 (*Regulations of the Industrial and Commercial Development Fund*), the Administrative Council of the FDIC comprises three to five members. The regulation only stipulates that the president of the Administrative Council shall be the Director of the DSE and one of the members shall be a representative of the Financial Services Bureau, but it does not regulate the identity of other members.

Information shows that between 2008 and 2009, when Viva Macau made the five applications for loan, the Administrative Council of the FDIC comprised five members. Apart from the Director of the DSE and a representative of the Financial Services Bureau as prescribed by the regulation, the remaining three members were from the DSE.

Theoretically speaking, the personnel of the DSE who joined the Administrative Council of the FDIC should have adequate and holistic knowledge of local and regional economic situations, which does not necessarily mean that they had an in-depth knowledge of every industry, especially more professional ones such as aviation industry. In fact, all of the then members told the CCAC that they did not have professional knowledge of operation and financial management in the aviation industry.

In the CCAC's opinion, given that there was no legal backing for the FDIC to vet the applications for financial aid for non-SMEs, in practice, it might still refer to the relevant practices prescribed by the *Regulations of the Industrial and Commercial Development Fund* and the *SME Aid Scheme*.

Paragraph 4 of Article 7 of Administrative Regulation no. 8/2003 (*Regulations of the Industrial and Commercial Development Fund*) clearly states that regarding the nature of the issue to be discussed, the president may, on his own initiative or at the request of the Administrative Council, invite persons whose presence is in the interest of meetings to attend the meetings without the right to vote. Meanwhile, Article 8 of Administrative Regulation no. 9/2003 (*SME Aid Scheme*) states that an evaluation committee may be formed to in order to conduct analysis with individuals with professional experience in their respective areas and render suggestion on the decision. Such committees are expected to facilitate the vetting and examination of the applications that involve such huge amounts of loan.

It is a pity that when analysing and vetting the applications from Viva Macau, the then President of Administrative Council of the FDIC believed that Administrative Regulation no. 9/2003 (*SME Aid Scheme*) was not applicable and therefore he did not request to form any evaluation committees as mentioned above.

As to the FDIC, since it received an instruction from some staff member of the Office of the Secretary for Economy and Finance to process the applications for loan made by Viva Macau as quickly as possible, it did not invite professionals who would facilitate the decision making to attend the meetings in order to provide opinions and assistance necessary to the analyses as provided by Administrative Regulation no. 8/2003, such as the leadership of the AACM.

The loans amounting to more than MOP50 million granted by the FDIC to Viva Macau were immediately spent as repayments of the short-term high-interest loans offered by Ngan Yin Leng and Ho Kevin King Lun to the company earlier, instead of being used directly for the

purpose of improving the operation as required by the agreement signed with the FDIC. In addition, the company even failed to submit the loan spending report in time as required by the agreement. These violations of loan agreement may have constituted relevant civil contractual liabilities.

It seems to the CCAC that the said violations of agreement committed by Viva Macau should at least be used as a reason for the Public Administration to discontinue the grant of loan and immediately dun for part of the loans spent improperly. Nevertheless, such problems were not discovered at once just because of the FDIC's and the relevant officials' failure to carry out their supervisory duty and the uncooperativeness of Viva Macau.

It is necessary to point out that for the members of the Administrative Council of the FDIC who participated in the process of vetting the applications for loan made by Viva Macau, there were laws to apply to the search for and implementation of a strict measure on the spending of public fund. However, they did not try to find out and adopt the relevant mechanism in place, which reeked of negligence.

It seems that such negligent attitude was of little avail to the uncooperativeness of Viva Macau, placing the Public Administration in a passive position in the entire incident.

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(3) Inadequate follow-up on and supervision of the grant of loans to Viva Macau

In the course of the investigation, it was found that following the approval of Viva Macau's first application for loan, the company, again and again, ignored the various demands made by the FDIC at each subsequent request, postponing the presentation of accounts and financial

reports audited by auditors or accountants. However, again and again, the FDIC accepted its applications and suggested approving them.

As to the vetting of the guarantor, the FDIC required that Viva Macau should write promissory notes as guarantee and the promissory notes should be endorsed by the main shareholder of Viva Macau – Eagle Airways Holdings Limited as the guarantor.

Base on common sense and logic, it is necessary for the creditor to thoroughly vet the guarantor's financial capacity in order to know if he is able to repay the loan. Without doubt, for such huge amounts of loan, it is necessary to conduct a strict and prudent financial assessment of the company's repayment capacity as the guarantor in order to ensure that the loans will be repaid.

However, both the FDIC and its supervisory body neither carried out such vetting nor gave any prod to such vetting. They never took a serious look at the financial conditions of such a private company established outside the territory of Macao - Eagle Airways Holdings Limited before allowing its representatives to write the promissory notes as the guarantor.

Later, the FDIC made several requests to Eagle Airways Holdings Limited for financial report and accounts but in vain. In fact, it is astonishing to see that every time when granting the loan to Viva Macau, the FDIC insisted in suggesting Eagle Airways Holdings Limited be the guarantor and endorse the promissory notes that guaranteed the repayments. In addition, contrary to normal practice, the FDIC did not require Viva Macau to provide valuable moveable and immoveable properties as part of the guarantee.

Meanwhile, according to the loan agreements, Viva Macau should submit specific reports of the use of the loans so that the authorities could supervise whether the sums were really spent for the purpose of improving the operation.

However, the CCAC considers that the reports submitted by Viva Macau and the information indicated were too simple and superficial, not to mention that there was no record taken in formal accounting manner. In this sense, there was no way to conduct strict supervision.

Obviously, in the vetting and approval processes for the applications for loans made by Viva Macau, there was a serious lack of requirement for and supervision of document searching, analysis and quality of the reports. In other words, there was no effective and close follow-up.

The lack of real supervision led to the result that Viva Macau spent “part of” the loans from the FDIC for repayment of the loans earlier provided by certain executive members of the company.

In addition, regarding the supervision of fulfilment of the repayment agreements, we can see that even for the loans to SMEs, Paragraphs 1 and 2 of Article 9 of Administrative Regulation no. 9/2003 (*SME Aid Scheme*) stipulate that a commercial entrepreneur who intends to apply for another loan should clear the previous loan and present adequate operating condition and good repayment record.

After being granted the first loan amounting to MOP80 million in September 2008 and before reaching the repayment agreement with the FDIC, Viva Macau requested for the second loan amounting to MOP40 million.

It was not until 12th January 2009, after the approval of the second loan of MOP40 million was given, that the FDIC signed a single

repayment agreement with Viva Macau for the loans totalling MOP120 million, which provided that the two loans should be repaid in six instalments and the first repayment should be made on 12th February 2009.

However, in February 2009, Viva Macau wrote several letters to the DSE requesting for adjustment of the repayment period and amount of the aforesaid loans and the first repayment date be delayed to 1st July 2010.

When the request for extension of repayment period was still under assessment, Viva Macau made an application for a loan of MOP8 million to the then Secretary for Economy and Finance on 26th March 2009.

It is unbelievable that the application was taken forward by the Secretary and therefore the FDIC gave positive opinion. Eventually, the loan was fully approved on 7th April 2009.

However, on the previous day (6th April 2009), Viva Macau made another request for an urgent financial aid of MOP48 million to the then Chief Executive, who also took forward the request and assigned the FDIC to commence the necessary procedure.

On 8th April 2009, the request for the loan of MOP48 million was also approved without any obstacles. In addition, Viva Macau was allowed to repay the loans totalling MOP56 million by three instalments, of which the first one shall be paid on 1st April 2011.

It is worth noticing that at that moment, the request for extension of repayment period of the loans previously granted to Viva Macau totalling MOP120 million was still being processed, but the company, without presenting the repayment schedule, was still granted the said loans

amounting to MOP56 million. All the loans it had already received already totalled MOP176 million.

It is astonishing that on 8th June 2009, Viva Macau made another request for an urgent financial aid of MOP24 million to the then Chief Executive. Again, the latter took the request forward and assigned the FDIC to commence the necessary procedure.

Without making any repayment, Viva Macau was granted the loan of MOP24 million on 15th June 2009 and the first repayment date would be two years later (15th June 2011).

It was not until 17th June 2009 that Viva Macau received the notification that the then Secretary for Economy and Finance had approved its request for extension of the repayment period of the loans totalling MOP120 million and the first repayment date be delayed to 1st July 2010, which was one and a half year later than the original date.

On 16th November 2009, Viva Macau, encumbered with loans totalling MOP200 million from the FDIC, made a request for an urgent financial aid of MOP12 million to the then Chief Executive, who also took the request forward and assigned the FDIC to commence the necessary procedure. Two days later, the request was approved and the first repayment date would be two years later (15th November 2011).

Nevertheless, in view of the overall background, especially the global economic environment at that time, the relevant authorities also offered different kinds of financial aid for similar type of enterprises. Also, the CCAC has not found any evidence proving that some persons intentionally favoured Viva Macau or made the SAR Government suffer from loss by taking the requests forward and making the relevant decisions with the knowledge that the law would be or has been violated.

Therefore, the CCAC could not ascertain that whether criminal liabilities should be held against any person.

Although the Government's policies tended to support the aviation industry at that time, concerning the applications for loan made by Viva Macau, no one cared about the procedural prudence, for example, the requirement for complete documents from the company and its repayment capacity. In particular, there was almost no requirement for and supervision of the guarantee for repayment. Such situation went against general commercial practice and the attitude to the handling of loan repayment from SMEs in general.

It is necessary to point out that the lack of concrete and sound laws and regulations applicable to the vetting of application for huge amount of loan made by non-SMEs could not be the excuse for the omission of supervision. The basic legislative rationale for the relevant regulations including the *SME Aid Scheme* certainly can and shall serve as the minimum standard for the handling and supervision of such applications for huge amount of loan.

In fact, in view of the situation, in its analysis of Viva Macau's application, the AACM pointed out that since the financial condition of the company was not satisfactory, it was unable to have an in-depth understanding of its operating situation. In addition, lack of concrete data about the spending of the financial aids would make it difficult for the authorities to supervise the use of the funds and give rise to the risk of timely repayment. Therefore, the AACM suggested establishing a specific supervisory mechanism applicable to the Viva Macau.

However, the FDIC passed the buck to the AACM simply for the excuse that it did not have personnel with professional knowledge in

aviation industry and thus suggesting the then Secretary for Economy and Finance assigning to the AACM the duty of supervising the company's spending of the loans and capacity to repay the loans in time.

The FDIC neither referred to Paragraph 4 of Article 7 of Administrative Regulation no. 8/2003 (*Regulations of the Industrial and Commercial Development Fund*) or Article 8 of Administrative Regulation no. 9/2003 (*SME Aid Scheme*), nor did it invite persons whose presence was in the interest of meetings to attend the meetings and form an evaluation committee with individuals with professional experience in their respective areas. It even shifted the responsibility and never took the responsibility vested by law to supervise how the beneficiary spent the financial aids and how the funds helped improve the company's operation, constituting violation of public servant's duty of zeal.

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(4) The public servants handling the grant of loans to Viva Macau failed in their duties

In the process of handling the grant of the considerably huge amounts of loan to Viva Macau, the Administrative Council of the FDIC, especially the then President (the then Acting Director of DSE) should comply with the general duties of public service personnel. In addition, after Administrative Regulation no. 26/2009 (*Supplementary Provisions of the Statute of Directors and Chiefs*) entered into effect, they should also comply with the special duties provide by its Article 16. In particular, they should abide by the laws, administrative regulations and other normative acts and ensure the conformity of their acts and to promote the conformity of their subordinates' acts to applicable laws.

In accordance with Article 279 of the *Statute of Personnel of the Public Administration of Macao*, public servants shall be exclusively employed in the public interest and shall comply with the functional duties provided by the article, one of which is the duty of zeal, which is to perform their duties efficiently with commitment and, in particular, to understand the legal and regulatory provisions, and to possess and improve their technical knowledge and working methods.

When following up the applications for financial aid by Viva Macau, the Administrative Council of the FDIC, especially the then President of the council clearly knew that they were not applications for subsidy of activities organised by civic association and the company was not eligible for the *SME Aid Scheme*. In fact, there was no legal basis directly applicable to the vetting of the applications. However, in the vetting processes, the then President of the council did not order any legal research and analysis for such purpose but hastily suggested approving the applications merely for the reason that they accorded with the objective of Administrative Regulation no. 8/2003.

Facing the application for aid for the aviation sector, the Administrative Council of the FDIC, especially the then President of the council did not take the initiative to invite or organise persons with relevant professional background to participate in the process.

When dealing with analysis on the financial conditions of non-SMEs, the Administrative Council of the FDIC, especially the then President of the council had a too lenient attitude. Even they needed to take into account the economic environment in an objective way, doing so did not hinder them from raising strict requirements for presenting accounts and financial documents necessary for the vetting of the applications for aid,

through which they would have an idea of the operation prospect and repayment capacity of the company.

Similarly, the Administrative Council of the FDIC, especially the then President of the council also lacked analysis on the financial condition of the guarantor of such considerably huge amounts of loan - Eagle Airways Holdings Limited, which was exactly the key to the FDIC's failure at recovering the repayment from the guarantor after Viva Macau was declared bankrupt.

Facing Viva Macau's repeated failures at fulfilling the promises of repayment and its procrastination on the repayment of the first loan, the Administrative Council of the FDIC, especially the then President of the council still did not take the initiative to collect more financial data about the company for a thorough analysis and study. Moreover, they were not aware of the risk timely and did not take proper measures to ensure effective recovery of the loans.

Following an in-depth investigation, it was unable to find whether the members and the then President of the Administrative Council of the FDIC had accepted an advantage or a promise of an advantage as reward for the said acts in the relevant administrative procedures.

Although the aforesaid imprudent, careless and neglectful acts and omissions carried out by the members and the then President of the Administrative Council of the FDIC did not constitute criminal liability, these persons have obviously violated the special duties provided by Article 16 of Administrative Regulation no. 26/2009 (*Supplementary Provisions of the Statute of Directors and Chiefs*), which requires that they should abide by the laws, administrative regulations and other normative acts, ensure the conformity of their acts and promote the conformity of their subordinates' acts to applicable laws, as well as the

duty of zeal – one of the general duties provided by Article 279 of the *Statute of Personnel of the Public Administration of Macao*. Therefore, their acts could constitute disciplinary liability.

In accordance with Paragraph 1 of Article 289 of the *Statute of Personnel of the Public Administration of Macao*, disciplinary procedure shall prescribe in three years following the date on which the fault was committed.

It was already 30th July 2018 when the CCAC received the relevant information and commenced the inquiry in accordance with the relevant provisions under the *Organic Law of the Commission Against Corruption of the Macao Special Administrative Region*. Also, ever since the day the disciplinary violations were committed, no investigation procedure of any kind has been commenced against the relevant persons and thus there was no suspension of prescription. As a result, the disciplinary liabilities have already been extinguished due to expiry of prescription.

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Following the investigation, it came to light that the then Secretary for Economy and Finance had been participating in the vetting of the applications by Viva Macau for the loans totalling MOP212 million offered by the FDIC.

Apart from approving the reports submitted by the FDIC by orders written on them and passing them to the then Chief Executive for deliberation, the Secretary also directly approved the grant of interest-free loans of MOP5 million (totalling MOP10 million) as short-term financial aids to Viva Macau by orders written on the reports submitted by the Administrative Council of the FDIC on 30th September 2008 and 26th December 2008 respectively.

In accordance with Paragraph 1 of Administrative Order no. 12/2000 and Paragraph 2 of Administrative Order no. 6/2005, the then Secretary for Economy and Finance was delegated the executive power related to all matters in the areas of governance and the relevant departments and entities prescribed by Article 3 of Administrative Regulation no. 6/1999 (*Organisation, Competences and Operation of Public Services and Entities*) as well as the executive power related to the Office of the Secretary for Economy and Finance. In accordance with Annex III prescribed by Paragraph 2 of the same article, the power to supervise the FDIC, which operates with the DSE, has also been delegated to the Secretary for Economy and Finance.

Sub-paragraph 2 of Paragraph 4 of Administrative Order no. 12/2000 also delegates to the Secretary for Economy and Finance the power to approve the expenses of works and purchase of goods and services with an amount of up to MOP6 million.

In accordance with Article 56 of Administrative Regulation no. 6/2006 (*Regime of Public Financial Management*), as a legal person of public law which operates alongside the Economic Bureau (DSE), the FDIC enjoys administrative and financial autonomy and possesses its own properties. Its Administrative Council may approve, in its expenditure budget, expense not exceeding 1% of the total revenue in the initial budget and, under any circumstances, not exceeding MOP500,000. Meanwhile, Paragraph 2 of Article 6 of Administrative Regulation no. 8/2003 (*Regulations of the Industrial and Commercial Development Fund*) stipulates that the President of the Administrative Council of the FDIC has the power to approve expenses not exceeding MOP50,000.

It is worth emphasising that Sub-paragraph 5) of Paragraph 2 of Article 2 of Administrative Regulation no. 8/2003 (*Regulations of the*

Industrial and Commercial Development Fund) states that “approving expenses that fall within the scope of the FDIC's duties with an amount of more than the statutory upper limit which the Administrative Council is entitled to approve” is within the scope of the Chief Executive’s supervisory power instead of the Secretary for Economy and Finance’s.

In other words, neither the Administrative Council of the FDIC nor the then Secretary for Economy and Finance has the power to approve the expenses of the FDIC which exceed MOP500,000. Instead, it is within the scope of the Chief Executive’s supervisory power.

Although the lawmakers have vested the Secretary for Economy and Finance with the power to supervise the FDIC, it does not vest him with the power to approve expenses with an amount of more than the statutory upper limit which the Administrative Council is entitled to approve (MOP500,000) for the reason that the FDIC is a legal person under public law which enjoys administrative and financial autonomy and possesses its own properties. Instead, the power has been directly vested in the Chief Executive.

The then Secretary for Economy and Finance should not and could not mix up the power to approve the expenses of works or acquisition of goods and services (only procurement of construction works, goods and services) with the one to approve financial aids from the FDIC for enterprises, since they are totally different expenses.

Although the then Secretary for Economy and Finance did not clearly state in the reports the legal basis for the approval of the two loans of MOP5 million, he submitted all applications for the loans with an amount of more than MOP6 million and the relevant reports to the Chief Executive for vetting and approval. Based on these actions, one can assume that the Secretary applied Administrative Order no. 12/2000,

Administrative Order no. 6/2005, Administrative Regulation no. 6/1999 and the *Regime of Public Financial Management* as the legal backing of the approval of the expenses of the FDIC with an amount between MOP500,000 and MOP6 million.

Obviously, the Secretary did not submit the two reports to the then Chief Executive for deliberation. Instead, he directly approved the applications for the two loans of MOP5 million offered by the FDIC to Viva Macau by writing the orders in the reports. Such acts were wrong application of law, which violated Sub-paragraph 5) of Paragraph 2 of Article 2 of Administrative Regulation no. 8/2003 (*Regulations of the Industrial and Commercial Development Fund*), as he has wrongly executed the power to approve expense, which is within the scope of the Chief Executive's supervisory power.

In addition, as the chief leader of governance in the areas of economy and finance, it is the responsibility of the then Secretary for Economy and Finance to supervise whether his subordinate departments and entities, including the FDIC, have properly executed their statutory duties.

However, in the process of granting such huge amounts of loan to Viva Macau, even it was necessary to take into account the economic environment in an objective way, doing so did not hinder the Secretary from ordering the FDIC to raise strict requirements for presenting accounts and financial documents necessary for the vetting of the applications, through which they would have an idea of the operation prospect and repayment capacity of the company. In fact, the Secretary never gave such instruction. Even there was information showing that he had requested some staff members of his office to speed up the vetting processes.

The Administrative Council of the FDIC did not analyse the financial condition of the guarantor - Eagle Airways Holdings Limited, resulting in the failure at recovering the loans from the guarantor after Viva Macau was declared bankrupt. In terms of supervision, the then Secretary for Economy and Finance has an unshirkable responsibility for the outcome.

Facing Viva Macau's repeated failures to fulfil the promises of repayment and the procrastination on the repayment of the first loan, the Secretary did not urge the FDIC to proactively follow up on the financial data about Viva Macau. Moreover, he was not aware of the risk timely and did not order to take proper measures to ensure that the FDIC would effectively recover the loans, which has reflected that the Secretary also failed to fulfil his supervisory responsibility and obligation.

Although there was no evidence proving that the Secretary's acts to take forward the processes of the grant of loan to Viva Macau might be considered constitutive elements of crime, the careless and neglectful acts and omissions have turned citizens' expectation about principal officials into disappointment.

The said acts carried out by the Secretary were not subject to the stipulations about principal official's liability for failure at proper execution of supervisory duties provided by Administrative Regulation no. 24/2010 (*Statute of Principal Officials of the Macao Special Administrative Region*) and the *Code of Conduct of Principal Officials of the Macao Special Administrative Region* approved by Administrative Order no. 112/2010, which entered into force on 28th December 2010. However, the Secretary should be accountable to the Chief Executive and should be accountable to the public for his failure to exercise supervisory power in the case of Viva Macau's owing of debts.

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In accordance with Article 124 of the *Administrative Procedure Code*, the then Secretary for Economy and Finance's careless and neglectful acts and omissions might cause defects in all of the vetting processes for the applications for loan offered by the FDIC to Viva Macau and the relevant decisions, which might even end up being revocable procedures and acts.

However, in accordance with Paragraph 2 of Article 25 of the *Administrative Litigation Code*, even if the appellant is the Prosecutor General, the maximum period for appeal against revocable acts is 365 days only.

Between November 2009, when the FDIC signed the last loan agreement with Viva Macau, and 30th July 2018, when the CCAC commenced the inquiry, there was no situation that gave rise to suspension of prescription. As a result, the right to file an appeal against the revocable acts has already expired.

Part IV: Conclusion and suggestions

When the CCAC received the case of FDIC's grant of considerably huge amounts of loan to Viva Macau, the company had already gone bankrupt for a long time. Since the then general manager and chief financial members had already left Macau, it was unable to request for and collect more information from the company. As a result, the investigation works could only be based on the documents provided by the DSE, the AACM and the FDIC, including a comparison of the data about the operation of Air Macau and Viva Macau between 2008 and 2010 and a review of the proceedings of bankruptcy of Viva Macau and execution of Eagle Airways Holdings Limited provided by the Court of First Instance. During the investigation, the CCAC also took testimony from the then members of the Administrative Council of the FDIC and some staff members of the DSE, the AACM and the Office of the Secretary for Economy and Finance, reviewed the loan processes from the perspectives of criminal illegality, administrative illegality and disciplinary liability. In particular, the CCAC has probed into whether Viva Macau had defrauded the FDIC of financial aid and concealed or illegally transferred the assets, whether anyone had committed crimes including issuance of bad cheque, intentional or unintentional bankruptcy, frustration of credit or favouring of creditors and even active bribery, whether the public servants and principal officials involved had committed passive bribery and occupational crimes including power abuse and dereliction of duty. In addition, the CCAC has also reviewed the legality and rationality of the vetting processes for the loans and the subsequent recovery processes, investigated whether there were any administrative illegalities or disciplinary violations involving public

servants regarding the applications for the loans, the vetting of the application, the post-loan supervision and the recovery of the loans.

According to the CCAC's findings, although Viva Macau might have committed the crime of unintentional bankruptcy, which can no longer be prosecuted due to expiry of prescription of the right of complaint, the other acts cannot be prosecuted due to the principle of *nullum crimen sine lege*. Also, the acts carried out by the public servants and principal officials who participated in the processes were not sufficient to be deemed as constitutive elements of crimes. However, in the investigation into the vetting processes for the loans to Viva Macau, the CCAC still can find out many problems that should be taken seriously from the perspective of legislation, administrative illegality, disciplinary liability and policy and regime making.

Pursuant to Article 2 and Sub-paragraph 8) of Article 4 of Law no. 10/2000, the CCAC has already submitted a report to the Chief Executive and rendered the following suggestions, hoping that apart from reflecting on the case, the SAR Government, in the midst of the preparation of recovery of the economy affected by the pandemic, should also speed up the study of adopting necessary measures to reduce and even eradicate the possibility of occurrence of similar cases, prevent the relevant entities and its personnel and officials from repeating the same mistake and establish legal foundations and regimes that will facilitate effective implementation of the relevant policies:

1. It is necessary to speed up the formulation of relevant laws and regulations. Like Administrative Regulation no. 9/2003 (*SME Aid Scheme*) and Administrative Regulation no. 12/2013 (*Aid Scheme for Young Entrepreneurs*), the Government should, in particular, formulate specific regulations of the beneficiaries of grant, the aid scheme, the

vetting standards and criteria, the competence of approval, the obligations of the beneficiaries and the supervisory system so as to prevent reoccurrence of lack of regulations applicable to vetting procedure. Especially, when the amount involved in the application for financial aid is considerably huge, concrete and clear regulations are necessary backing of vetting.

2. The legislation for the supervisory of use of financial aid offered by the FDIC should be promoted and enhanced as soon as possible so as to plug the loopholes in guarantee of loan, repayment scheme and supervisory duties and prevent the problems concerning lack of regulation applicable to similar vetting process. Meanwhile, necessary risk warning and control mechanism should be set up in order to ensure that public funds will not be abused due to loose supervision of credit and to provide better protection for spending and recovery of public funds.
3. It is necessary and reasonable that the Macao SAR Government offer proper assistance to local enterprises due to certain economic conditions, but it should establish a robust loan guarantee mechanism. Through revision of laws or formulation of other normative documents, it should clearly require that loans involving huge amounts should be guaranteed by assets with adequate repayment capacity. The guarantor's assets should be strictly examined in order to ensure that the loan can be repaid with the assets when the debtor is unable to repay the loan by the deadline and to avoid waste of resource to take unsuccessful legal actions to dun for the payments, i.e. recurrence of failure of recovery of debts owed to the government.
4. Although the relevant public servants could not be held disciplinary liable for violation of the duty of zeal due to expiry of prescription,

through the review of the case, the CCAC would like to call public servants', especially leadership's and senior management's attention to the founding aspiration of serving the Macao SAR. They should always remember to timely report to their superiors the loopholes, flaws and problems they have found in the execution of instructions. They should not take an indifferent and passive attitude so that public interests will be upheld and served completely.

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To sum up, through the reflection on the case, all officials and public servants of the Macao SAR should bear in mind that regardless of their ranks and positions, in execution of public duties, they should ensure that the duty of impartiality is carried out effectively in order to uphold the impartial and just image of officials and public servants and contribute to the consolidation of the credibility of the Macao SAR Government.

Macao SAR, 17th September 2020

Commissioner Against Corruption
Chan Tsz King