

LCQ10: Role of DoJ in SFC's process for making prosecution decisions

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Following is a question by the Hon Dennis Kwok and a written reply by the Secretary for Justice, Mr Rimsky Yuen, SC, in the Legislative Council today (May 8):

Question:

Article 63 of the Basic Law provides that "[t]he Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference". Against this constitutional background, the Securities and Futures Commission (the Commission) is rather unique in being empowered, under section 388 of the Securities and Futures Ordinance (Cap. 571) (the Ordinance), to make prosecution decisions and to initiate prosecution "in its own name" for an offence under any of the relevant provisions in the Ordinance which is triable summarily before a magistrate. Also, the Commission is empowered, under sections 252 and 252A of the Ordinance, to "institute proceedings" before the Market Misconduct Tribunal upon obtaining the consent of the Secretary for Justice (SJ). In this connection, will the Government inform this Council:

(a) of the role of the Department of Justice (DoJ) in the Commission's process for making prosecution decisions under section 388 of the Ordinance, including (i) what actual oversight DoJ has over the process, (ii) whether DoJ has reviewed the Commission's internal guidelines (if any) and/or past prosecution decisions to ensure that they are in line with the DoJ's own guidelines on making prosecution decisions, and (iii) how differences in opinion between DoJ and the Commission are to be resolved;

(b) of the statistics on the Commission's seeking SJ's consent to institute proceedings under section 252 of the Ordinance

in the past three years, including (i) the total number of requests made, (ii) the number of cases for which consent had been given, and (iii) the number of those for which consent had not been given (together with the reasons for refusal); and

(c) whether the Government has reviewed the current arrangement for endeavouring to adhere to the basic principle of a separation and independent exercise of investigation powers from prosecution powers, including whether the Government has plans to introduce legislation or enhance its existing policies to ensure that, in line with the constitutional requirement of Article 63 of the Basic Law, DoJ retains the ultimate control over all criminal prosecutions in Hong Kong; if it has, of the outcome and the details of the review; if not, the reasons for that?

Reply:

President,

Section 388(1) of the Securities and Futures Ordinance (Cap. 571) (SFO) provides that the Securities and Futures Commission (SFC) may prosecute in its own name offences created under the Ordinance and some other ordinances where the venue of trial is the Magistracy. However, section 388(3) of the SFO makes it clear that this power does not derogate from the powers of the Secretary for Justice (SJ) in respect of the prosecution of criminal offences.

The Department of Justice (DoJ) is conscious of its constitutional role under section 63 of the Basic Law. It is the position of the DoJ that the SFC should at all times respect section 388(3) of the SFO as well as Article 63 of the Basic Law. For this reason, there have been high-level communications and discussions between the DoJ and the SFC in respect of the latter's cooperation and employment of its powers with respect to the investigation and prosecution of

criminal cases. Throughout these communications and discussions, the DoJ stressed to the SFC that it is always important that: (1) a body with compulsory powers of investigation and a prosecutorial function exercises such function in a proper, fair and responsible manner; (2) there is full and frank accountability and in particular by an investigatory agency with other interested investigatory agencies and the prosecution service; (3) the full ambit of any criminality be fully investigated and dealt with properly; (4) a body with a regulatory and investigatory responsibility should be checked to ensure any prosecution action is done with equal measure and in an evenhanded manner to all. These communications and discussions are ongoing and it is the DoJ's intention to work out a mechanism to ensure that the power under section 388(3) of the SFO will be properly exercised with appropriate check and balance.

As far as market misconduct cases investigated by the SFC are concerned, it is the DoJ and not the SFC which makes the prosecutorial decisions in accordance with the established and published Statement of Prosecution Policy and Practice (the Prosecution Policy). In the legislative process of the Securities and Futures Bill in May 2001, the Administration acknowledged that the SFC would also make the decisions in prosecuting summarily less serious market misconduct before a magistrate in accordance with the Prosecution Policy (Note 1). In practice, the SFC should refer all market misconduct cases to the DoJ for advice on sufficiency of evidence and venue, and the DoJ will then advise the SFC in accordance with the Prosecution Policy. When appropriate, counsel of the DoJ will also conduct the trials and appeals of those cases. Whilst the views of the SFC are taken into account and given their due weight, it is the DoJ's decision which prevails.

Obtaining the SJ's consent is a prerequisite to the SFC's institution of proceedings before the Market Misconduct Tribunal under section 252 of the SFO. This requirement is

stipulated in section 252A(1) of the SFO which took effect in 2012. However, the circumstances in which the SJ can withhold the giving of consent are confined to those set out in section 252A(2) of the SFO. Since then, there has only been one such request. The SJ has provided a reply to the SFC. Due to the sensitive nature of the matter, it is not appropriate to disclose the details of the case or the SJ's reply at this stage.

Note 1: Information paper provided by the Administration on Parts XIII and XIV and Schedule 8 of the Securities and Futures Bill : Paper 12-01 (May 2001)

Ends/Wednesday, May 8, 2013