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New Wave of White Collar Crimes

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When the phrase white collar crime was first coined in the 1930s it was defined as “a crime committed by a person of respectability and high social status in the course of his occupation”. The Federal Bureau of Investigation define it as “lying, cheating and stealing”. That in my view seems to sum it up. And when you consider what white collar criminals really do it seems right – they tell lies, they cheat and they steal, sometimes in grand proportions.

2. The ingenuity of the criminal mind is constantly adapting and creating new forms of white collar crime but whatever it may be it seems to always retain the key features of lying, cheating and stealing with the object to gain or benefit. However, the reality is that the insidious nature of white collar crime renders it hard to detect and investigate, and difficult to prosecute and prove.

3. In examining white collar crime we have to understand it. What it is? How it operates? And who are the likely persons behind and involved in it? This is obvious but essential in order to know how to tackle it – what we need to do to contain it and prevent it from flourishing. However, the difficulty is more a case of dealing with the unknown and anticipating new forms of white collar crime and the circumstances in which it is likely to exist.

4. There are two matters that need to be considered when addressing this issue.

5. First, ensuring we properly and effectively regulate against it. In this sense, I am speaking broadly – that is, how to investigate and prosecute white collar crime. If necessary doing away with civil or disciplinary tribunals if they are an alternative to criminal prosecution. If the conduct amounts to a crime, then it should be prosecuted. We need to guard against over-regulation and keep the rules and the laws straight forward and certain. In other words, keep the processes uncomplicated, prompt, fair and effective.

6. Secondly, in addition to recognizing the international nature of white collar crime which we have done for some time now through mutual legal assistance and extradition, striving to tackle it through an international jurisdiction, where jurisdictional and technical issues will not act as an impediment to investigating and prosecuting white collar crime with an international dimension. It has been a general rule in public international law that action should be taken at a domestic level before taking action at an international level. There are exceptions.

7. Globalization and modern technology, including the internet have had a significant impact on our way of life. And in turn, this has had a profound effect on crime, in particular white collar crime, and the enforcement of it. Globalization has secured a firm footing in trade, commerce and government. As a consequence, there have been calls for global sanctions against financial institutions, securities and related bodies. It makes sense that if they operate globally, then they should be tackled and dealt with globally. There lies the problem. The world is made up of many states which are diverse and different in many ways – a key aspect is the legal system of a state – whilst there are some that are similar, there are many that are different. It would appear that the time has come, if it has not already, to establish an international jurisdiction to investigate and prosecute transnational crime. There are in existence certain international bodies that investigate or assist in the investigation of crime but they are subject to limitations which reduces their effectiveness.

8. It raises the question whether it may be necessary to have an international police force with the powers of the domestic jurisdictions to detect and investigate crime and an international tribunal to try the cases.

9. Over recent times, crime generally has changed. Even with traditional crimes of property and violence, we have seen changes. The seasoned criminal has become aware of modern forensic scientific methods of detection and investigation and has adapted his criminal behaviour accordingly in order to avoid them. We have seen especially in white collar crime the employment of a range of sophisticated tactics and devices, making it hard to detect and investigate. On the other hand, the job of law enforcement is considerably more difficult. A law enforcement officer spends a lot more time trying to scour the maze of obstacles thrown up to conceal transactions and to deal with the increasing number of obligations and requirements which take more time to record and to address.

10. The law has changed as well. It is more complex and complicated. There are greater avenues of challenge which can greatly delay the criminal processes such as stay applications and judicial reviews. This has in some instances adversely affected criminal trials.

11. It is also true that laws and the processes need to be updated to bring about a more efficient and effective legal system.

12. The point I want to make is that the law and the enforcement of it has changed. It is far more complex and comprehensive than it used to be. The changes to our domestic law are to a large extent due to international obligations and responsibilities. They are found in our commitment to multilateral and bilateral treaties and agreements and to an international order.

13. It is important therefore that we respond, effectively and promptly, to the changing face of crime and change the law to keep pace with it.

14. White collar crime invariably involves the making of illicit profit through some criminal act or enterprise. The object is not only to make profit but to keep it – sometimes to further criminal enterprise or to conceal or use it in some other way. White collar crime has become more sophisticated, diverse and global in operation. Sometimes, the nature of the white collar crime or its global operation conceals blatant and crass acts of

dishonesty. Other times, it may involve complicated and technical transactions. What is clear is that it has no fixed characteristics, other than it involves lying, cheating and stealing. It is not confined by domestic requirements and boundaries – it takes optimum advantage of jurisdictional limits, different legal systems and inadequate and fragmented law enforcement.

15. What are the difficulties in combatting white collar crime? White collar crime offers high return with relatively low risk. Detection and investigation of some or all of the criminality is unlikely, as is the prosecution and proof of it. Even if successfully prosecuted the likely penalty will generally be seen as an acceptable risk.

16. White collar criminals know what they are doing and quickly learn the tricks of their trade. They know and understand the rules and the laws and they learn to circumvent and abuse them or use them to their advantage. That is especially the case when the rules and the laws are complicated and technical.

17. Why have we not succeeded in tackling white collar crime? Why has there not been effective enforcement against white collar crime? In a typical case, it is probably due to the following reasons.

18. First, the complexity of the crime. It will invariably involve complex commercial and highly technical matters which are unfamiliar and difficult to understand with investigators ill-equipped or not skilled to deal with it.

19. Second, the enormity of the crime. It will normally be committed on a large scale, involving numerous transactions and dealings or consist of a high volume of material in a jig-saw state.

20. Third, the crime will most likely be transnational, with transactions and dealings and related material and matters (in various forms) transcending a number of jurisdictions.

21. Fourth, it will be difficult to get all the relevant information and evidence relating to the crime and this will mean that you will not have a

complete picture or understand the full extent as to what has happened or be able to prove the entirety of it. That will be because of the enormity of it, the different jurisdictions that are involved and the people who can provide the information and material will most likely be associated with the major miscreants. The nature of the information and material may also create difficulties especially when it is in electronic form or unable to be sourced or obtained.

22. Fifth, the persons and entities involved in the crime can be many and diverse. This will spread and diffuse participation in and responsibility for the criminal conduct and thereby make it difficult to shoot home liability for the crime to the perpetrators. It may involve persons and entities with established reputations and influence, so it will be harder to break through perceptions of respectability and regularity. It may involve a corporation or corporations with an extensive network of subsidiary and associated entities operating worldwide making it hard to trace the persons involved and follow what happened and how.

23. Sixth, the resources available to persons accused of white collar crime is generally substantial and they will take issue with or seek to challenge matters that can frustrate or prevent access to information or hamper, impede or delay an investigation or prosecution. These diversionary tactics drain resources of, and extensively occupy, the investigatory and prosecuting authorities involved.

24. Seventh, the time it sometimes takes to investigate and prosecute due to the nature of the crime and the tactics employed can have an adverse impact on the gathering of evidence and the availability and presentation of it at trial.

25. Finally, the lack of or inadequate response from another jurisdiction or other jurisdictions. This may be due to a lack of provisions or resources to attend to overseas requests; or to a lack of desire or priority to do so; or to issues and problems associated with a different legal system.

26. The global fight against white collar crime requires that we first effectively deal with it on a domestic level. There needs to be an appropriate legal and administrative framework to deal with white collar

crime in its various forms. There should be a full but uncomplicated range of offence, restraint and confiscation provisions with appropriate powers for evidence gathering.

27. Whilst domestic legislation is essential to deal with white collar crime, it requires to be underpinned by appropriate levels of international cooperation and mutual legal assistance. This is particularly important bearing in mind that globalization and modern technology have had a significant impact on the way we live as well as a profound effect on white collar crime including corruption and money laundering.

28. The only effective way to deal with transnational crime is for a global enforcement initiative. This requires each state to have extensive international links and appropriate mutual legal assistance legislation to assist and to be assisted in a collective international fight against corruption. In Hong Kong, international cooperation is facilitated by formal and informal arrangements.

29. There needs to be in place in every state a specialist mutual legal assistance body dedicated to make and receive requests for the obtaining and gathering of information. This body should be able to ensure the prompt and effective response to a request by directing and overseeing the relevant law enforcement agency in relation to it. There also needs to be in place provisions for the taking of evidence in an appropriate way and form to meet the requirements of the requesting state. The use and facilitation of video link for the taking of evidence is an effective means of easing through domestic requirements. The sourcing and verification of documents and records is of particular concern when dealing with transnational crime and provisions should be enacted to more readily facilitate the reception of such evidence in domestic jurisdictions.

30. In Hong Kong, the regulatory controls over white collar crime are scattered and focused on particular types of white collar crime. Specialist bodies have been set up to tackle a particular type of white collar crime, such as the Joint Financial Investigative Unit in relation to money laundering (ML), the Independent Commission Against Corruption (ICAC) in relation to corruption, the Securities and Futures Commission (SFC) in relation to securities.

31. This is a good and a bad thing. Good in that it focuses on tackling a particular type of white collar crime. Bad in that it further fragments the law enforcement initiative. It results in there not being an overall focus on white collar crime in its many facets and width of operation. Nor a preparedness to handle multi-facet and complex cases which require a dedicated and long term commitment. I have seen specialist regulatory bodies when investigating white collar crime narrowly focus only on its area of responsibility and sometimes squabble amongst themselves. Also different regulatory bodies have their own regime of offences and powers to deal with particular forms of offending and tend to have different provisions and requirements for gathering and using evidence. There is a tendency for specialist bodies to be occupied with its own self-promotion and self-interest. (For example, the SFC has the means to deal with a matter by civil action.)

32. There should be in place effective regulation and accountability measures in the conduct of trade, commerce and business. We have to guard against too many laws and over-regulation. The rules and regulations should be co-ordinated, simple and straight forward.

33. Similarly with offence provisions, they should be straight forward and certain. The offence provisions under Part XIV of the Securities and Futures Ordinance, Cap. 571 concerning insider dealing and market misconduct offences are extensive with a range of requirements and alternatives and general defences that are complicated and specific and cover 10 lengthy subsections. In addition, there is an option to deal with offenders by civil means as well as by criminal prosecution and thereby may not be appropriately or effectively dealt with for their wrongdoing. See *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170.

34. Another example is Hong Kong's fraud provision under section 16A of the Theft Ordinance, Cap. 210. It is poorly drafted and confusing, limited to deceit and to possibly only a single act of fraud. This should be compared to the money laundering offence under section 25(1) of the Organized and Serious Crime Ordinance, Cap. 455 which I will address in detail later that is simple, straight forward and very effective.

35. There should be comprehensive investigatory powers for

evidence gathering including compulsory powers to require information and the production of documents. See Part III of the Prevention of Bribery Ordinance, Cap. 201; Part VIII of the Securities and Futures Ordinance, Cap. 571. See *R v Commissioner of ICAC* (2007) 10 HKCFAR 293 per Li CJ at para. 1 and per Bokhary and Chan PJJ at para. 74.

36. The process of a criminal trial should be straight forward and uncomplicated but in white collar trials that tends not to be the case. Lord Bingham in the Privy Council case of *Randall v R* [2002] 1 WLR 2237 described the difficulties with fraud trials as follows :

“A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. There may well be disputes concerning the relevant and admissibility of evidence. There will almost always be a conflict of evidence. Some witnesses may be impugned as unreliable others perhaps as dishonest. Witnesses on both sides may be accused of exaggerating or even fabricating their evidence. Defendants may choose to act in an obstructive and evasive manner. Opposing counsel may find each other easy to work with or they may not. It is not unusual for tempers to become frayed and relations strained. In a fraud trial the pressure on all involved may be even more acute than in other trials. Fraud trials tend to involve a great deal of documentation, which is particularly cumbersome to handle in a jury trial. They tend to involve much unfamiliar detail, often of a technical nature, which it is difficult for many people to understand, assimilate, retain and recall. And fraud trials tend to be very long, which in itself tends to increase the strain on all involved, whether the defendant, witnesses, jurors, counsel or the judge.”

37. The essence of success in prosecuting white collar crime is preparation and presentation. Need to identify the criminality and determine the appropriate jurisdiction for trial. If necessary, may have to confine the prosecution to separate and distinct areas of criminality. Need to prepare by

getting the charges right and getting all the evidence together in an ordered and proper manner. When it comes to transnational crime need to consider the implications of trying criminal activities which occurred outside the jurisdiction and the obtaining of evidence to support it. Need to present by collating documentary exhibits, use charts and spreadsheets, use experts when required and make sure the prosecution case tells the story fully and accurately. Also need to deal with the defence case.

38. There are two aspects to white collar crime that need to be singled out and addressed. They are corruption and money laundering. In cases involving or concerning corruption, Hong Kong has been very effective. The Independent Commission Against Corruption was established in 1974 and is armed with a range of investigatory powers and offence provisions to combat corruption. See the Prevention of Bribery Ordinance, Cap 201 and the Independent Commission Against Corruption Ordinance, Cap 204. Corruption is extensively addressed under the POBO. The structure of the POBO is to define separate offences for public sector corruption and private sector corruption in respect of the general principle of prohibiting the offering to or solicitation or acceptance by a person of a particular defined status (that is, prescribed officer, public servant or agent) of unauthorized advantages. As a supplement to public sector bribery offences under the POBO is the common law offence of Misconduct in Public Office. This is an important offence in dealing with misfeasance in public office which may not be bribery related. It covers official misconduct when a public official commits serious abuse of any power, duty or responsibility exercisable for the public good.

39. A key feature in combating white collar crime is to remove the incentive to commit it by taking the profit out of it and by undermining the criminal enterprise through prosecution action against those involved in it and those who deal in the proceeds of it.

40. The fight against ML is to some extent an example of the changing face of crime and how the law has changed to deal with it. The fight against ML has been waged for some 20 years. In that time, AML measures have grown in nature and scope. It started off as an attack on the proceeds of drug trafficking and then extended to the proceeds of serious crime, with the addition of terrorist financing in recent times. It provides an

effective means to deal with white collar crime by :

- (1) Prosecuting those involved in the white collar crime with the offence of ML as they will inevitably be dealing in the proceeds of the crime. For example, those involved in a corporate fraud will deal in the proceeds of their criminal enterprise and should be prosecuted for ML. A successful prosecution for this offence will normally attract a substantial term of imprisonment which will act as a specific and as well as a general deterrent.
- (2) Restraining and confiscating the proceeds of the crime. This does two things. First, it disgorges the illicit profits from the criminals, taking the profit out of crime. Secondly, and this is sometimes overlooked, it prevents criminals from using the profits to further develop and expand their criminal enterprise. To this end, confiscation should be civil based rather than conviction based.

41. The Hong Kong offence of ML reads :

“... a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person’s proceeds of drug trafficking/of an indictable offence, he deals with that property. ”

42. The mens rea of the offence has two parts. “Knowing” and having reasonable grounds to believe”. “Knowing” includes evidence of the person’s involvement with the commission of the indictable offence, or by admission that he or she knew that the property was proceeds of an indictable offence. “Having reasonable grounds to believe” contains objective and subjective elements. The objective element requires proof that there were grounds that a common sense, right-thinking member of the community would consider were sufficient to lead a person to believe that the property in whole or in part represented any person’s proceeds of an indictable offence; and the subjective element requires proof that those grounds were known to the accused. There must be evidence that the person had grounds for believing, and there is the additional requirement that the grounds must be

reasonable, in that anyone looking at those grounds would so believe. See *Oei Hengky Wiryo v HKSAR (No. 2)* (2007) 10 HKCFAR 98.

43. There is no requirement for the prosecution to prove the commission of the indictable offence. What is required is proof that the accused had knowledge or reasonable grounds to believe that the property represented any person's proceeds of an indictable offence. The gravamen of the offence is the criminal scheme to deal with property that was known or believed to be proceeds from an indictable offence. It defines it as dealing with "property" which the accused knows or has reasonable grounds to believe represents the proceeds of an indictable offence. The quality of the goods being such proceeds is therefore an element in the mens rea but not the actus reus. The mental element to be proved, whether in terms of knowledge or belief on reasonable grounds, is directed merely at the property being dealt with.

44. Money laundering is commonly described as the processing of the proceeds of crime to disguise their illegal origin. But the offence of ML goes beyond that. A person commits the offence if knowing or having reasonable grounds to believe that he is dealing in the proceeds of crime. It is therefore not limited to the process of disguising the illegal origins of the proceeds but covers a much wider field of dealing in the proceeds.

45. The anti-money laundering provisions in Hong Kong are found in the Organized and Serious Crime Ordinance, Cap 455 (OSCO). It was enacted in 1994. The restraint and confiscation provisions cover a wide range of specified offence which has been expanding with the inclusion of bribery and fraud offences. See Schedules 1 and 2. On 1 April 2012, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, Cap 615 (AMLO) came into force. Offences have been enacted to regulate the failure to observe the customer due diligence (CDD) provisions specified in Schedule 2 of the AMLO.

The New Legislation

- By virtue of Schedule 2 of AMLO, the customer due diligence measures and record-keeping requirements will apply to all financial institutions which includes:

Financial institution	Enforcement body
Securities Companies	Securities and Futures Commission
Insurance Companies	Office of the Commissioner of Insurance
Money exchangers/ remittance agents	Customs & Excise Department
Banks	Hong Kong Monetary Authority

Offences under the AMLO

- Section 5(5): A financial institution commits an offence if it knowingly contravenes a specified provision.

Penalty: If on conviction on indictment, a fine of \$1 million and 2 years' imprisonment. If summary conviction, a fine at level 6 and 6 months' imprisonment.

- Section 5(6): A financial institution commits an offence if it, with intent to defraud any relevant authority, contravenes a specified provision.

Penalty: If on conviction on indictment, a fine of \$1 million and 7 years' imprisonment. If summary conviction, a fine at level 6 and 6 months' imprisonment.

- Specified provision is defined under section 5(11) and includes the following provisions of Schedule 2 :
 - 3(1), (3) or (4) – when customer due diligence measures must be carried out
 - 5(1) or (3) – duty to continuously monitor business relationships
 - 6(1) or (2) – provisions relating to pre-existing customers
 - 7(2) – provisions relating to pre-existing correspondent banks
 - 9 – special requirements when customer is not physically present for identification purposes
 - 10(1) or (2) – special requirements when customer is politically exposed person
 - 11(1) or (2) – special requirements for insurance policies
 - 12(3), (4), (5), (6), (8), (9) or (10) – special requirements for wire transfers
 - 13(2) – special requirements for remittance transactions
 - 14(1) or (2) – special requirements for correspondent banking relationships
 - 15 – special requirements in other high risk situations
 - 16 – prohibition from opening or maintaining any anonymous account or account in a fictitious name for customers
 - 17(1) – prohibition from establishing or continuing a correspondent banking relationship with shell banks
 - 18(4) – carrying out customer due diligence measures by means of intermediaries
 - 19(1),(2) or (3) – financial institutions to establish procedures
 - 20(1),(2),(3) or (5) – duty to keep records
 - 21 – manner in which records are to be kept
 - 22(1) or (2) – duties extended to branches and subsidiary undertakings outside HK
 - 23 – obligation on financial institutions to take reasonable steps to prevent contravention of Part 2 (Customer Due Diligence Requirements) or 3 (Record-keeping requirements) of Schedule 2

Personal Liability

- Section 5(7): An employee of a financial institution will commit an offence if:
 - (i) he/she is an employee of a financial institution or is employed to work for a financial institution or is concerned in the management of a financial institution; and
 - (ii) knowingly causes or knowingly permits the financial institution to contravene a specified provision.

Penalty: If on conviction on indictment, a fine of \$1 million and 2 years' imprisonment. If summary conviction, a fine at level 6 and 6 months' imprisonment.

- Defence under section 5(9): It is a defence for the person to prove that he/she has acted in accordance with the policies and procedures established and maintained by the financial institution for the purpose of ensuring compliance with the relevant specified provision.
- Section 5(10) provides that a fine imposed on a partnership on its conviction will be paid out of the funds of the partnership.

46. The fight against white collar crime will not be easy but we need to respond to deal with it in an effective and coordinated manner. Keeping the rules and the laws simple and providing the necessary evidence gathering powers to get the information and material; a network of international cooperation and coordination and getting the perpetrators of white collar crime where it hurts, that is, by disgorging the profits of white collar crime and prosecuting them for ML as well.