

LCQ7: Prosecutions

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Following is a question by the Hon Paul Tse and a written reply by the Secretary for Justice, Mr Rimsky Yuen, SC, in the Legislative Council today (October 16):

Question:

The Independent Commission Against Corruption (ICAC) had reportedly indicated earlier that, due to insufficient evidence, it would not further pursue a corruption complaint against a former Executive Council Member who was suspected of having accepted a low-interest loan of \$70 million from a developer. However, the former Director of Public Prosecutions (the former Director) of the Department of Justice (DoJ) had subsequently told the media prior to his retirement that he was examining the case. He also expressed the views that it was inappropriate for the Securities and Futures Commission (SFC) to concurrently assume the roles of investigator, monitoring authority and prosecutor, and that its prosecution powers should be transferred to DoJ. In this connection, will the Government inform this Council:

(a) whether it has examined why the former Director expressed the aforesaid views on the operations of ICAC and SFC prior to his departure from office; if it has, of the outcome; if not, whether it will face up to the relevant views;

(b) whether the incumbent Director of Public Prosecutions has followed up the aforesaid views of the former Director; if he has, of the progress; if not, the reasons for that;

(c) whether it will, in the light of the former Director's views, review the criteria adopted by ICAC for deciding whether investigation will be conducted into corruption complaints so as to enhance the transparency of the operation of ICAC; and

(d) whether it will, with reference to the former Director's views, study the transfer of SFC's prosecution powers to DoJ so as to maintain proper checks and balances on the functions and powers of SFC?

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Reply:

President,

(a) to (c) ICAC

Insofar as the decision of the Independent Commission Against Corruption (ICAC) whether to commence and continue with its investigation is concerned, there is a well-established and effective procedure in place. In accordance with section 12 of the Independent Commission Against Corruption Ordinance, the ICAC Commissioner has a statutory duty to investigate pursuable allegations under the Prevention of Bribery Ordinance. All cases, including cases which are eventually classified as non-pursuable complaints, are carefully considered by the Operations Review Committee (ORC) on a regular basis. Apart from ex-officio members, the ORC comprises members who are not government officials, but are from different sectors of the community and are fully independent of the ICAC. No case, whether involving pursuable or non-pursuable allegations, will be closed by the ICAC without the endorsement of the ORC. This mechanism is well-established and has provided adequate check and balance.

There is a reference to a particular case in the preamble to this question. It is generally not appropriate for the Department of Justice (DoJ) to comment on specific complaint lodged with the ICAC, and the DoJ sees no reason to depart from this general approach with regard to the case mentioned in this question. Without commenting on the accuracy of the media report referred to in this question, the case in question had been considered by the ORC in accordance with the established procedure, and it is considered that that case

does not provide any basis to question the efficacy of the aforesaid mechanism.

(d) SFC

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 Magistrates' Courts. However, section 388(3) of the SFO makes it clear that this power on the part of the SFC does not derogate from the powers of the Secretary for Justice in respect of the prosecution of criminal offences.

The SFC's power to prosecute summary offences before the Magistrates' Court is not a new power. Prior to the enactment of the SFO, similar provisions can be found in: (a) section 148 of the (repealed) Securities Ordinance; (b) section 114 of the (repealed) Commodities Trading Ordinance; (c) section 62 of the (repealed) Securities and Futures Commission Ordinance; (d) section 65 of the (repealed) Leveraged Foreign Exchange Trading Ordinance; and (e) section 49 of the (repealed) Securities (Disclosure of Interests) Ordinance. It is also pertinent to note that in the Report of the Securities Review Committee entitled "The Operation and Regulation of the Hong Kong Securities Industry" (May 27, 1988) (commonly known as the Hay Davison Report), recommendation was made to enable the SFC to prosecute summary offences in its own name (see paragraphs 9.107, 9.111 and 9.112). Upon the introduction of the SFO (enacted in March 2002 and came into operation on April 1, 2003), the aforesaid legislations were consolidated and section 388 of the SFO simply retained the SFC's previous power to prosecute summary offences before the Magistrates' Court. Indeed, the current section 388 of the SFO is closely modelled on section 62 of the repealed Securities and Futures Commission Ordinance.

Besides, Hong Kong is not the only jurisdiction which empowers agencies similar to SFC to prosecute relevant offences. Other common law jurisdictions which have similar statutory provisions include Australia, New Zealand, Malaysia, Ontario (of Canada) and the United Kingdom.

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 prosecution policy prevailing from time to time (Prosecution Code). In practice, the SFC refers 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 Code. When appropriate, counsel of the DoJ will also prosecute 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 takes supremacy.

The DoJ is fully conscious of its constitutional role under Article 63 of the Basic Law, which provides that the DoJ shall control criminal prosecutions, free from any interference. During the legislative process of section 388 of the SFO, the DoJ had considered the relationship between section 388(1) of the SFO and Article 63 of the Basic Law. Having considered the provisions of section 388(3), it was and remains the view of the DoJ that section 388(1) is not inconsistent with Article 63 of the Basic Law.

It was and still is the position of the DoJ that the SFC should at all times respect section 388(3) of the SFO and Article 63 of the Basic Law and that the power under section 388(1) of the SFO should be exercised under the overriding prosecutorial authority of the DoJ and with appropriate check and balance. For this reason, high-level communications and discussions between the DoJ and the SFC in respect of the latter's co-operation and employment of its powers with respect to the investigation and prosecution of criminal

cases have been ongoing. The new Director of Public Prosecutions has taken and will continue to take an active role in the process. 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. The Administration currently has no plan to suggest any changes to section 388 of the SFO. The DoJ will continue to work closely with the SFC to ensure that the aforesaid objectives are achieved.

Ends/Wednesday, October 16, 2013