

EFFECTIVE FINANCIAL INVESTIGATION AND ANTI-MONEY-LAUNDERING MEASURES FOR CONFISCATION AND ASSET RECOVERY TO COUNTER NEW AND EMERGING CORRUPTION THREATS

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I. BACKGROUND

A. Relationship between Corruption and Money-Laundering

Corruption and money-laundering (ML) are inextricably linked. Offenders need to launder their ill-gotten gains in order to give them an appearance of legality. On the other hand, ML activities associated with other predicate offences, for instance, drug-trafficking, fraud, illegal gambling and terrorism, might be facilitated by or otherwise connected with corruption, such as when a banker, insurance agent or estate agent is corruptly compromised to assist or connive at ML activities. As such, the ICAC, as a graft buster, is one of the stakeholders in the anti-money-laundering (AML) regime.

Last year, Hong Kong went through an evaluation exercise conducted by the Financial Action Task Force (FATF) to assess the compliance and effectiveness of Hong Kong's AML and counter-terrorist financing (CTF) system against international standards. In September 2019, FATF published a report commending that Hong Kong is particularly effective in a number of areas, including law enforcement and asset recovery. Hong Kong's AML/CTF regime is assessed to be compliant and effective overall, making it the first jurisdiction in the Asia-Pacific region to have achieved an overall compliant result in the current round of FATF evaluation.

II. HONG KONG'S ANTI-CORRUPTION AND ANTI-MONEY-LAUNDERING REGIME

As an international financial centre, Hong Kong attaches great importance to safeguarding the integrity of its financial system, which comprises of over 200 banking institutions and a vibrant insurance and securities industry. However, the availability of corporate services and the relative ease with which shell companies can be purchased contribute to the risk of Hong Kong being used for structuring of the proceeds of financial crime and corruption. To combat corruption and money-laundering, Hong Kong has a robust and comprehensive anti-corruption and anti-money-laundering regime consisting of the following key measures:

A. Legislation

Prevention of Bribery Ordinance (POBO)

Independent Commission Against Corruption Ordinance (ICACO)

Organized and Serious Crimes Ordinance (OSCO)

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Drug Trafficking (Recovery of Proceeds) Ordinance (DTRPO)
United Nations (Anti-Terrorism Measures) Ordinance (UNATMO)
Anti-Money-Laundering and Counter-Terrorist Financing Ordinance (AMLCTFO)

I will go deeper into some of the above legislation later on when covering the aspect of asset recovery.

I would like to highlight that in an effort to meet the prevailing international standards to combat money-laundering, the company law in Hong Kong has been amended with effect from 1 March 2018 to enhance the transparency of beneficial ownership of Hong Kong companies. The amended legislation requires all companies incorporated in Hong Kong to maintain beneficial ownership information by way of keeping a “Significant Controllers Register” (SCR). A company must keep a register to show information of those persons or entities that have “significant control” over the company, for instance, those directly or indirectly holding more than 25% of the issued shares or voting rights of the company; those that have the right to appoint or remove a majority of the board of directors of the company etc. A company must maintain the SCR at the company’s registered office or a prescribed place in Hong Kong, keep the information up-to-date and make it available to a law enforcement officer for inspection and copying.

B. Law Enforcement

While the ICAC is tasked with investigating allegations of corruption as well as any crimes (including money-laundering) that are facilitated by or connected with suspected corruption offences, the Hong Kong Police Force is the designated authority to investigate money-laundering offences, including all stand-alone ML offences and those arising from suspected foreign corruption cases. Although there is no foreign bribery law in Hong Kong, the ICAC can also investigate bribery involving foreign officials or agents if part of the corruption offence took place in Hong Kong, for instance, the bribe was paid into a bank account in Hong Kong. In investigating such foreign corruption cases, the ICAC is also empowered to investigate any related money-laundering offences and pursue asset recovery accordingly.

The Joint Financial Intelligence Unit (JFIU) is a dedicated unit jointly operated by the Hong Kong Police Force and the Custom and Excise Department to receive, analyse and disseminate suspicious transaction records filed by financial institutions. Although the ICAC is not a member of the JFIU, we can make requests for financial intelligence on a case-specific basis. On the other hand, the JFIU will also proactively provide the ICAC with relevant intelligence if it comes to their knowledge that the information may be of interest to the ICAC.

To uphold market integrity and to maintain confidence of the international community and investors in the Hong Kong financial system, the ICAC strived to crack down on potential corruption and irregularities involving listed companies that always involved huge sums of bribes. It also maintained close cooperation with the Securities and Futures Commission, relevant government departments and regulators in sharing intelligence and, where appropriate, taking joint enforcement actions.

In view of the rapid developments in technology and operations of banks, money can be remitted by the click of a mouse or by the press of a button, resulting in assets being dissipated regardless of geographical boundaries.

The use of corporate vehicles, trusts, nominees, company service providers, lawyers and accountants creates additional impediments to detecting hidden assets. Often money-laundering cases are facilitated by professionals where multi-layers of fund flows, a large number of parties including offshore companies, and innovative and dubious accounting techniques are involved. This has made it easier for criminals to conceal their ill-gotten gains.

It is, therefore, imperative that law enforcement agencies across the globe deploy effective financial investigation and anti-money-laundering measures to ensure that the criminals are deprived of their illicit profits.

C. Financial Investigation

To surmount these challenges, ICAC not only has to improve its investigation and detection techniques constantly but also equip ourselves with the necessary expertise to outwit the corrupt. The ICAC has over the years sharpened its tools by establishing dedicated units in forensic accounting. The ICAC is fortunate to have committed and well-qualified investigators to fight the problem of corruption through law enforcement. The Forensic Accounting Group (FAG) provide assistance to investigators whenever their expertise is required.

As a preliminary activity to asset recovery, the identification and the tracing of proceeds of crime and securing the property for final confiscation is an essential part of the process. This is a demanding and time-consuming task and should be conducted in parallel with the investigation of the criminal offence. Investigators usually direct their investigation towards securing evidence of the underlying criminality. As a pre-requisite to asset recovery, establishing what happened to the proceeds of crime should become a routine part of the investigation into criminal offences.

Established in 2011, the FAG comprises dedicated Forensic Accountant Grade officers with professional qualifications and extensive forensic accounting experience. It provides support to frontline investigators in dealing with cases involving increasingly sophisticated modus operandi from a financial perspective. The support includes the provision of expert opinions in relation to financial and accounting matters as well as the provision of assistance in search operations. Training sessions are also provided by FAG officers to frontline investigators to enhance their skills and knowledge in financial investigation. During 2018, the FAG provided assistance on 83 cases concerning 264 target individuals and companies in connection with transactions of an aggregate sum of approximately HK\$10.5 billion (US\$1.3 billion).

D. Asset Recovery

Following the process of identifying and tracing assets, the next course of action in the stage of asset recovery is to obtain a restraint order to facilitate future confiscation of proceeds of crime after conviction of the defendant. The purpose of a restraint order is to preserve and prevent dissipation of assets.

To enhance the capability of the ICAC to deprive criminals of their corrupt and illicit crime

proceeds, the Proceeds of Crime (POC) Section was established in 2010 to deal with restraint, disclosure and confiscation of assets under the Organised and Serious Crimes Ordinance. Similar to the FAG, the establishment of the POC section brings the benefit of clear demarcation of responsibilities between frontline investigating sections and POC section.

In 2018, assets amounting to HK\$208.94 million (US\$27 million) were restrained following the making of two Restraint Orders and two Confiscation Orders were obtained for HK\$119 million (US\$15 million). In addition, applications for confiscating HK\$663.45 million (US\$85 million) worth of realizable assets, in relation to four cases, were being dealt with by the courts.

1. Restraint and Confiscation Proceedings in Hong Kong

Hong Kong has the legal framework to deal with asset recovery. The powers vested in the POBO and OSCO enable investigators to restrain assets. The criminal confiscation regime in Hong Kong in relation to corruption and money-laundering offences is governed by these two Ordinances.

- (a) The POBO provides for the restraining of property but does not have provisions for confiscation of proceeds of corruption, except for conviction in respect of Section 10(1)(b) offences that relates to a prescribed officer convicted of being in control of pecuniary resources or property disproportionate to his present or past official emoluments. The POBO also provides for restitution orders that are *limited to the corrupt proceeds* received by the defendant. The restitution orders are civil in nature and their effectiveness depends upon the cooperation of the principal of the corrupt agent. Where the principal is the Government, enforcement is not difficult, but where the beneficiary of the order is a private sector principal there have been occasions where the principal was disinterested in enforcing the order. Being a civil order there is no default penalty that can be imposed upon a defendant who refuses to comply with the order.
- (b) The OSCO deals with the restraint and confiscation of the *proceeds of crime* and the *profits so derived* in relation to the specified offences, which are listed in Schedule 1 and Schedule 2 of the ordinance. Schedule 1 defines the offences that are specified offences which may constitute an organized crime. It is a comprehensive list ranging from murder to kidnapping to copyright infringement and includes conspiracy to pervert the course of justice, fraudulent offences and money-laundering. Schedule 2 makes reference to other specified offences and includes conspiracy to defraud and certain corruption offences under the POBO.

In cases where there is a victim of crime involved, particularly in relation to private sector corruption cases, the Government does not compete with the victim in the latter's attempt to recover losses from the defendant. Therefore, before considering the feasibility of applying for a restraint order, the stance of the victim is ascertained in relation to the following:

- a) whether the victim intends to institute civil proceedings to establish the victim's claim;
- b) where the victim has no such intention, whether the victim would contest the Government's application for restraint; or

- c) if the victim does not contest, whether the victim would be prepared to support the Government's restraint application or adopt a neutral stance.

In a situation where a victim of crime indicates that he or she would be interested in instituting civil proceedings upon the defendant's conviction, but is unwilling to obtain a Mareva injunction in the interim, or chooses to adopt a wait and see approach, then the victim's attention is drawn to the following consequences:

- a) Under the current legislative regime, once the Secretary for Justice has taken all proper steps to apply for an order for confiscation, and all other requirements of the legislation have been met, the making of a Confiscation Order by the Court for an appropriate sum is mandatory.
- b) A Confiscation Order takes priority over any subsequent civil claim made by the victim.

Despite being informed of the consequences, if a victim still opts not to initiate civil proceedings, then as a matter of principle, an application for a Restraint Order proceeds on the basis that a defendant should not be entitled to retain ill-gotten gains. It should be noted that an application for a Restraint Order is never made for the purpose of facilitating the civil claim of a victim who has chosen to adopt a wait and see approach and refuses to take any steps to preserve his or her position pending the defendant's conviction.

2. Conditions for Obtaining a Restraint Order

The following conditions need to be fulfilled before obtaining a Restraint Order under the OSCO:

- a) proceedings have been instituted and not yet concluded;
- c) reasonable cause to believe that the defendant benefited from the crime and the proceeds are at least HK\$100,000 (US\$13,000).

3. Realizable Property

The property that can be restrained/confiscated includes the following:

- a) any property held by the defendant;
- b) any property held by a person as a gift from the defendant;
- c) any property subject to the effective control of the defendant.

4. Disclosure Order

The Court has the inherent jurisdiction to make a disclosure order in the restraint order requiring the respondent to disclose information on oath, about his salary or other earnings with any money, goods or other assets held by him, whether in his own name or on his behalf by some other person, and whether located in or outside Hong Kong. As the information is obtained under compulsion, *it cannot be used for the purpose of investigation or to advance any criminal*

prosecution. The disclosure made by the defendant assists the investigators in identifying assets that were not previously known.

5. Confiscation Order

Application for a Confiscation Order under OSCO is made upon the conviction of the defendant of a specified offence but before being sentenced by the trial judge. An application for a Confiscation Order can also be made where a person, against whom proceedings for a specified offence have been instituted, has absconded or died before the conclusion of the proceedings.

When the Court makes a Confiscation Order, it also makes an order fixing the period within which the defendant must pay under the Confiscation Order and fixes a term of imprisonment which the defendant has to serve if any amount is not paid within that period. The terms of imprisonment can range between 12 months to 10 years.

E. International Cooperation

As corruption knows no geographical boundary, it is imperative that countries cooperate and assist each other in the process of asset recovery. The Mutual Legal Assistance in Criminal Matters Ordinance (MLA) is the principal piece of legislation for implementing bilateral and multilateral agreements concerning mutual legal assistance in Hong Kong. As at November 2019, MLA agreements with a total of 30 jurisdictions are in force, i.e. Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, India, Indonesia, Ireland, Israel, Italy, Japan, Malaysia, Netherlands, New Zealand, Philippines, Poland, Portugal, Singapore, South Africa, South Korea, Spain, Sri Lanka, Switzerland, Ukraine, the United Kingdom, and the United States of America.

Under the MLA Ordinance, signatories may request and provide assistance covering taking of evidence, production of materials under a court order (including bank documents), transfer of prisoners and arrangement for witnesses to give assistance or testify in criminal proceedings, confiscation of proceeds of crime, etc.

Hong Kong, as part of China, is also a State Party, to the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC). Under Chapter IV of UNCAC, State Parties are obliged to assist one another in every aspect of the fight against corruption, including prevention, investigation and the prosecution of offenders. Chapter V of UNCAC establishes asset recovery as a “fundamental principle” of the Convention and “States Parties shall afford one another the widest measure of co-operation and assistance in this regard”. Asset recovery is now an internationally accepted objective as laid down in Article 51 of UNCAC and is established as a fundamental principle in the investigation of corruption and other serious crimes, whereby the corrupt and associated criminals are deprived of the benefits of their crimes.

The law permits Hong Kong to restrain, forfeit or confiscate property in relation to a foreign offence punishable by at least 24 months, imprisonment in the requesting jurisdiction. This can be done whether the foreign proceedings are criminal or civil in nature, and whether the proceedings are against persons or property. Therefore, the procedure allows for action in cases of confiscation following criminal conviction, or action based on civil proceedings against

identifiable property arising from criminal conduct but not necessarily requiring a criminal conviction.

The requesting jurisdictions also have the option to institute private civil proceedings in Hong Kong against persons holding or having an interest in the property sought to be recovered. In such circumstances, the Hong Kong Government will not be involved in the proceedings nor represent the party seeking recovery. In these instances, the requesting parties instruct law firms in Hong Kong in the action for recovery of assets.

In 2018, the ICAC handled 69 requests (including 19 requests received in 2018). In return, the ICAC may also secure assistance from its overseas counterparts in conducting enquiries in their jurisdictions. During the year, our counterparts in Japan, Switzerland, Thailand and the United States of America handled six ICAC requests under the MLA for investigative assistance.

1. Strengthening International Collaboration

The ICAC has strengthened cooperation with and provided training for anti-corruption agencies in other jurisdictions within the framework of UNCAC. Efforts to assist these jurisdictions in building up anti-corruption capacity will not only benefit Hong Kong businessmen, enterprises and professionals seeking opportunities in these countries and places, but also help minimize the risk that Hong Kong is used as a place to launder bribes and crime proceeds. The initiatives also further expand the ICAC's global anti-corruption network and demonstrate to the international community Hong Kong's unwavering commitment to the fight against corruption.

F. Anti-Money-Laundering Measures

As aforesaid, Hong Kong has passed the FATF Mutual Evaluation Exercise this year and was commended to have an overall effective system on AML and CFT. The effort did not stop there, and the battle is a long and continuous one. The ICAC has been reviewing the internal system in all aspects with a view to further enhancing our AML capabilities to meet the international standards. Among other things, we particularly focus on:

- (i) Risk Assessment – Sectors like banking, securities, money service operators, insurance, money lenders, lawyers, accountants, trust and company service providers, estate agents and dealers in precious metals and stones are identified to be industries and professions with higher risk of ML. Officers investigating corruption cases in these charter areas are reminded to remain alert to identifying evidence of possible ML offences. A methodology for conducting risk assessment in these areas is being developed.
- (ii) Training – AML has been incorporated in our training curriculum for different ranks of officers. AML workshops are also arranged for officers from time to time.
- (iii) Guidelines and reminders – Different sets of guidelines and reminders have been put in place during different phases of their anti-corruption investigative work in order to enhance officers' awareness and capabilities on AML.
- (iv) Statistics – In order to objectively measure the ICAC's work in the AML regime, the keeping of relevant statistical records has been further enhanced. The figures include the

number of ML offences investigated, convicted and prosecuted and the number of referrals of ML cases for those cases falling beyond the ICAC's purview.

G. "No Consent" Regime

It should be noted that in order to prevent the dissipation of crime proceeds before an application of Restraint Order is made, there is an administrative measure, i.e. by way of issuing a "No Consent Letter" by the JFIU, to require the relevant financial institutions or entities not to allow any person from further dealing with the property in question. This is an administrative measure and may be subject to judicial review. To ensure that the "No Consent" power is invoked in the most prudent manner, approval from a Directorate officer of the ICAC must be sought before such a request is made to the JFIU and each request should not be valid for more than six months.

In approving a request for issuing a "No Consent Letter", the approving authority must consider the following factors:

- (i) the seriousness of the offence concerned;
- (ii) the prospect of prosecution and conviction
- (iii) the value of the proceeds of crime and realizable property involved;
- (iv) the reasonable likelihood of obtaining a Restraint Order; and
- (v) the need to preserve the proceeds of crime for confiscation.

III. CONCLUSION

The keys to success to combat corruption of various nature are:

- (i) A professional and thorough financial investigation – especially if the scam is sophisticated and involves multiple layers of transactions and different forms of financial instruments (e.g. shares and convertible notes). If we use a team of forensic accounting experts to focus on the financial analysis, the front-line investigating unit can focus on other aspects of the investigation. Eventually the forensic team can also give expert testimony in court to explain the flow of funds etc. and help in subsequent asset recovery.
- (ii) Use of money-laundering charges – this lesser charge is useful to target any accomplices where there is insufficient evidence to charge them with the more serious crime of bribery. This is to deter anyone from facilitating others in dealing with suspicious financial transactions in a corruption scam.
- (iii) Asset recovery – strong deterrent and message to the public that corruption is a crime that comes with severe penalties and that any ill-gotten gains will be forfeited together with imprisonment. A strong message to the criminals that there is no safe haven anywhere in

the world for them to park their proceeds of crime. Again, an expert team should be used to deal with this aspect, which can be a long process after the conviction of the defendant.

- (iv) International cooperation – Corruption knows no boundaries and due to the inter-connectivity of today's global banking environment, ill-gotten gains can be instantly dissipated with a click of the mouse. Therefore, international cooperation and sharing of intelligence is crucial in combating corruption and money-laundering. That is why we are all here today.