

SFC statement on prosecutorial responsibility

30 Aug 2013

The Securities and Futures Commission (SFC) issues the following statement in relation to recent comments made by Mr Kevin Zervos, SC, the retiring Director of Public Prosecutions (DPP), concerning the SFC's prosecutorial responsibility.

The SFC has been conducting summary prosecutions in the Magistrates' Courts in its own name since 1989. The SFC has express power to do so under section 388 of the Securities and Futures Ordinance (SFO) which has been in operation since 2003 (Note 1).

In exercising this power, the SFC has actively sought the participation of the Prosecutions Division of the Department of Justice (DOJ) in the handling of criminal cases.

Due to the increasingly complex and serious nature of market misconduct cases, the SFC sought an agreement with the Prosecutions Division in 2007 with a view to elevating the prosecution of serious market misconduct cases above the Magistrates' Courts (Note 2).

This led to an arrangement in which the SFC agreed to refer all potential market misconduct prosecutions to the Prosecutions Division to assess whether the case should be criminally prosecuted and, if so, whether the case should be prosecuted on indictment by the DOJ in the higher courts or summarily by the SFC in the Magistrates' Courts (Note 3).

Under this arrangement, the DOJ agreed that it was appropriate for all non-market misconduct cases to continue to be prosecuted by the SFC directly under section 388 of the SFO (Note 4).

All criminal prosecutions conducted by the SFC since 2007 have been in accordance with this arrangement with the Prosecutions Division (Note 5).

Under this arrangement, the SFC has conducted almost 300 summary prosecutions in the Magistrates' Courts with a success rate of over 90%. This record includes insider dealing and market manipulation cases that the Prosecutions Division declined to prosecute on indictment in the higher courts.

The SFC has robust and transparent checks and balances within which it discharges its regulatory duties. No decision to prosecute is made without supporting legal advice and all contested prosecutions are conducted by external counsel who are highly experienced in criminal law. The SFC also applies the Prosecution Policy of the DOJ and follows a model litigant policy in all litigation. No market misconduct case is commenced by the SFC without the DOJ's advice that it is suitable for prosecution.

All criminal cases investigated and initiated by the SFC are determined by an independent judge following due process. This means that the SFC can never be a judge of its own case.

In its 24 years of prosecuting, the SFC has discharged its prosecutorial responsibility fairly and in full compliance with all relevant obligations and standards.

The SFC has worked hard to establish a constructive and professional relationship with the Prosecutions Division. As part of that relationship, the SFC has raised concerns with the DOJ over the level of resourcing allocated within the Prosecutions Division for the handling of SFC cases, the time taken to respond to referrals by the SFC and decisions about whether market misconduct cases should be prosecuted on indictment by the Prosecutions Division or summarily by the SFC (Note 6).

The SFC believes many of these cases are complex and serious and should be prosecuted by the Prosecutions Division on indictment in the higher courts of record rather than by the SFC in the Magistrates' Courts. The SFC is continuing to refer cases to the Prosecutions Division under the 2007 arrangement. **No case has been taken up by the Prosecutions Division for prosecution on indictment during the tenure of the current DPP.**

The SFC looks forward to working actively with the incoming DPP and the Prosecutions Division to build on the objectives of the 2007 arrangement and to safeguard the integrity of Hong Kong's

financial market.

End

Notes:

1. This was a re-enactment of a similar provision in the repealed Securities and Futures Commission Ordinance (Cap. 24) which was in force from the establishment of the SFC in 1989 until the commencement of the SFO.
2. The six types of market misconduct under the SFO are insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions, and stock market manipulation.
3. A summary prosecution is one that takes place in a Magistrates' Court and is usually appropriate for cases that are viewed as less serious. An indictable prosecution is one where the trial takes place in the District Court or in the Court of First Instance of the High Court. Only the Prosecutions Division of the DOJ is able to carry on an indictable prosecution which is reserved for more serious offences.
4. The SFC prosecutes a range of non-market misconduct, regulatory offences that are contained in the SFO, for example, unlicensed dealing under section 114, illegal short selling under section 170, failure by a listed company director or a substantial shareholder to perform a duty of disclosure under Part XV.
5. The essence of these practices was acknowledged in the Yearly Review of the Prosecutions Division 2011 and reflected in the reply by the Secretary for Justice in May 2013 to the Legislative Council on the role of the DOJ in the SFC's process for making prosecution decisions under the SFO. It was also acknowledged in the section of the Yearly Review of the Prosecutions Division 2012 dealing with how the Prosecutions Division has handled the market misconduct cases referred to it by the SFC. Numerous other agencies in Hong Kong likewise have the power to bring prosecutions before magistrates under explicit statutory authority akin to section 388 of the SFO. Overseas regulators such as the Financial Conduct Authority in the UK and the Australian Securities and Investment Commission are vested with the power to conduct criminal prosecutions under their own name.
6. In the Yearly Review of the Prosecutions Division 2012, it is stated that the unit which handles SFC cases comprises four prosecutors who also handle all cases from the Inland Revenue Department and share workload from the Commercial Crime Bureau of the Police.

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