

Press release

LCQ3: Progress of the investigation into the affairs of CITIC Pacific Limited

Wednesday, November 10, 2010

Following is a question by the Hon James To and a reply by the Secretary for Financial Services and the Treasury, Professor K C Chan, in the Legislative Council today (November 10):

Question:

The various investigations into the leveraged foreign exchange transactions of CITIC Pacific Limited (CITIC) and related affairs have hitherto been conducted for two years. In this connection, will the Government inform this Council:

(a) whether it knows how the Listing Division of the Stock Exchange of Hong Kong has followed up its disciplinary investigations on CITIC, since the Securities and Futures Commission (SFC) completed its investigation and submitted its report to the Department of Justice (DoJ), so as to make it clear to the public whether the practice in relation to the disclosure of price-sensitive information in the incident has contravened the Listing Rules;

(b) of the progress of the investigation conducted by the Police, the difficulties encountered, and the estimated time required for completing the investigation; and

(c) given that under the existing mechanism, SFC has to wait for DoJ's legal advice before it can decide whether the case should be referred to the Financial Secretary for considering if the case should further be referred to the Market Misconduct Tribunal for instituting proceedings, and DoJ has to wait for the Police to complete their investigation before it can decide whether criminal prosecution should be instituted and provide legal advice to SFC, whether there are time limits for waiting on the part of DoJ or SFC, and what factors DoJ will take into account when considering whether criminal or civil standards should be adopted for handling individual cases involving market misconduct, so as to respond effectively to activities which may have significant impact on the market?

Reply:

President,

In response to Hon James TO's question, we have consulted the Securities and Futures Commission (SFC), the Stock Exchange of Hong Kong Limited (SEHK), the Hong Kong Police Force (the Police) and the Department of Justice (DoJ) for comments and our reply is as follows:

(a) To minimise duplication in investigatory efforts and to avoid possible prejudice to any follow-up action by SFC, SEHK suspended its consideration of whether CITIC Pacific Limited (CITIC) might have breached the Listing Rules when SFC began its enquiries. SEHK will take further action only if it has been so advised by SFC or any other relevant law enforcement agencies.

(b) The Police seized a large volume of documents and computer exhibits during the course of its investigation. The legal representatives of CITIC lodged an application to the High Court in April 2010 claiming legal professional privilege (LPP) in respect of some of the exhibits. After several court hearings, the case is set down for a hearing scheduled for March 9 to 11, 2011. Since the Police investigation is ongoing, it is inappropriate to comment further on the case.

(c) According to DoJ, the factors DoJ considers in deciding to lay criminal charges are the same for any case. They include:

(i) whether there is evidence sufficient to justify institution of proceedings; and

(ii) if so, whether the public interest requires a prosecution.

As to (i) above, there has to be enough evidence to prove all the ingredients of an offence. Even where there is sufficient evidence, if it is only sufficient to meet a prima facie case only, this will not justify a prosecution. What is required is evidence which indicates there is a reasonable prospect of securing a conviction before charges will be laid.

As to (ii) above, DoJ considers a number of matters on the question of whether it is in the public interest to pursue charges. They include:

- * how serious is the offence;
- * what were the effects;
- * how serious a view a court would take of the conduct;
- * would the consequences of a prosecution be out of all proportion to the seriousness of the offence; and
- * the penalty a court would likely impose.

Any decision to prosecute involves a balancing act weighing up the abovementioned factors. If a decision is made that there is insufficient evidence to point to a reasonable prospect of securing a conviction, no charges will be brought.

In the case of CITIC, SFC has already forwarded a report to DoJ dealing with issues under the Securities and Futures Ordinance (SFO). DoJ will advise SFC in accordance with the above factors. If criminal prosecution is not to be pursued, SFC may consider reporting the matter to the Financial Secretary (FS) and the Civil Division of DoJ will advise FS as to whether or not the matter should be referred to the Market Misconduct Tribunal (MMT). The sequence is important since SFO makes clear that a person cannot be prosecuted for a criminal offence under Part XIV at the same time as he is being subjected to civil proceedings for the same conduct before MMT, whether or not he has been eventually found culpable of market misconduct by MMT.

The Commercial Crime Bureau of the Police is continuing its investigation into the CITIC matter. At the completion of that investigation, the Police will forward a report to DoJ for consideration on whether or not to lay criminal charges. DoJ has advised that at this point of time, it will not provide SFC with legal advice, pending the completion of the Police investigation.

Ends