Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

Norton Rose Fulbright

Asia Pacific Insights

Business ethics and anti-corruption

Issue 14 / March 2018

In this issue:

From the editor

Welcome to Issue 14 of our Business ethics and anti-corruption *Asia Pacific Insights*!

This year 2018 started with a significant announcement by the Singapore Law Minister that the authorities will be considering the introduction of deferred prosecution agreements in Singapore. While it is a development that has drawn both support and scepticism, it will clearly align Singapore more closely with mature enforcement jurisdictions like the US and UK. There will also be profound implications for businesses in Singapore – not least for issues like corporate criminal liability, the extraterritoriality of the Prevention of Corruption Act, the compliance defence and senior personnel liability. In our first article on "Justice delayed or justice denied", Paul Sumilas, Jeremy Lua and I survey various jurisdictions and compare their approaches to deferred prosecution agreements.

In a similar vein, China promulgated its new Anti-Unfair Competition Law which came into effect at the beginning of the year. Sun Hong focuses on the provisions with regard to bribery in commercial transactions and examines the impact of the new law.

From across the ocean, my US colleagues analyze various aspects of the FCPA Corporate Enforcement Policy that was launched late last year and compare it to the preceding FCPA Pilot Program. Among other matters, Kevin Harnisch, Keith Rosen and Daniel Kacinski consider the incentives and consequences of voluntary self-disclosure and cooperation with the US authorities.

Finally, we are delighted to profile our new Hong Kong-based partner Etelka Bogardi – subjecting her to some pointed questions regarding her former role as regulator, why she decided to join us at Norton Rose Fulbright and the expectations of clients. *Great to have you on board, Etelka!*

In closing, I would like to thank everyone for your support over all these years, without which we would not be enjoying the success of our practice. I am delighted that we achieved Band 1 status with Chambers & Partners for the inaugural Corporate Investigations/Anti-Corruption 2018 category in Singapore; and were named in Who's Who Legal: Investigations Lawyers 2018. Legal 500 Asia Pacific continues to rank us Tier 1 for our Financial Services Regulatory practice in Singapore for the second year running in 2018. Our team in Australia likewise received affirmation by Chambers & Partners for Anti-Bribery and Corruption, and Legal 500 for Regulatory Compliance and Investigations. Abigail McGregor, in particular, was *"recommended for her work in anti-bribery, corruption and business ethics"*. Such broad market recognition would not have been possible without the support of our clients – many thanks!

Wilson Ang
Partner
Tel +65 6309 5392
wilson.ang@nortonrosefulbright.com

Contents

Deferred Prosecution Agreements – Justice delayed or Justice denied?

Introduction

On March 19, 2018, the Singapore Parliament passed the Criminal Justice Reform Bill (the Criminal Justice Bill),[1] which introduced sweeping changes to Singapore's criminal justice framework. One key change is a formal legislative framework for the Public Prosecutor to enter into deferred prosecution agreements (DPAs) with corporate offenders to resolve misconduct.

The introduction of DPAs as a formal prosecutorial tool represents a significant shift in Singapore's approach towards corporate wrongdoing – one that aligns Singapore more closely with global trends.

Features of DPAs

As discussed in more detail below, DPAs are used in various jurisdictions. Although they have unique characteristics, certain features are common among them

- DPAs are generally used as a means to resolve allegations of corporate wrongdoing in an attempt to avoid collateral consequences resulting from a company pleading guilty to a crime.

- When used in a corporate context, the DPAs do not absolve individuals of liability. Rather, DPAs are often the first step in an enforcement action. Once allegations against the corporate entity have been resolved, the authorities will then prosecute individuals.

- DPAs generally require the defendant corporation to agree to certain terms, often including the creation or enhancement of a corporate compliance program.

- In certain cases, regulators will require the imposition of an independent monitor as part of a DPA. The monitor, who is generally chosen by the regulators and for some defined period of time, will serve as the ears and eyes of the regulators while ensuring that the defendant company is abiding by the DPA terms.

United States

Under the "Speedy Trial Act" (18 USC §§ 3161-3174), US federal courts are generally required to set a date for trial within 70 days of a criminal indictment or information (i.e. the charging document which sets forth the allegations against the defendant) being filed. However, under § 3161(h) (2), this period can be extended as a result of "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." The US Department of Justice (DOJ) began to use DPAs increasingly after the criminal conviction of the public accounting firm of Arthur Anderson arising from its work for Enron which resulted in the firm shutting down. On appeal, the conviction was eventually overturned; however, the damage was already done. The victims included workers left unemployed, affected investors, and markets. DPAs also appeal to defendant corporations because they provide a complete resolution to allegations of wrongdoing without causing the company to suffer the potentially devastating consequences of criminal liability, such as loss of licensing or debarment. Recently, the US Securities and Exchange Commission (SEC) began to use DPAs to resolve civil cases within its jurisdiction.

In the United States, the use of DPAs in a corporate criminal case is completely within the discretion of federal prosecutors. As instructed in the US Attorneys' Manual, when determining whether to charge a corporation, prosecutors should consider

- The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime.

- The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning

1 The relevant amendments introduced by the Criminal Justice Bill would be implemented in Singapore's Criminal Procedure Code.

of, the wrongdoing by corporate management.

- The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it.
- The corporation's willingness to cooperate in the investigation of its agents.
- The existence and effectiveness of the corporation's pre-existing compliance program.
- The corporation's timely and voluntary disclosure of wrongdoing.
- The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies>
- Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution.
- The adequacy of remedies such as civil or regulatory enforcement actions.
- The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

In the US model, most of the process occurs between the putative defendant and the prosecutors in an extra-judicial way. Although the final agreement requires judicial approval, judges have little leeway to deny such approval. In a recent case, an appeal was filed after a district court judge denied approval of a DPA following his criticism of the lack of individual prosecutions in the case and the leniency shown to the defendant. The D.C. Circuit, however, vacated the lower court's decision noting that the determination as to whether to enter into a DPA and the terms of such a DPA are squarely within the ambit of the federal prosecutors. *United States v Fokker Services B.V.*, 818 F.3d 733, 742-45 (D.C. Cir. 2016) (stating that the approval requirement in the Speedy Trial Act does not enable a court to reject a DPA for being too lenient but rather "enables courts to assure that a DPA does not exist merely to allow evasion of speedy trial time limits, but instead serves the bona fide purpose of confirming a defendant's good conduct and compliance with law"); see also *United States v HSBC Bank USA, N.A.*, 863 F.3d 125 (2d Cir. 2017) (limiting the court's ability to supervise and oversee the implementation of a DPA). As a result, some commentators have criticized the use of DPAs in the United States as largely bypassing the formal legal system, raising a number of constitutional and public policy considerations. In particular, there are also fears that prosecutors hold an undue advantage throughout the process because the emphasis on co-operation and negotiation masks disproportionate prosecutorial leverage.

The increased use of DPAs has also led to a limited judicial review and oversight of the prosecution of certain laws, such as the US Foreign Corrupt Practices Act (FCPA). Additionally, the facts set forth in a DPA are negotiated by the parties and do not necessarily provide the full extent of the conduct at issue. As a result, key issues, such as the extent of the law's extraterritorial jurisdiction, remain open.

United Kingdom

In February 2014, the UK introduced a DPA framework in response to perceived deficiencies in the existing prosecution framework involving economic crime, including[2]

- Investigations and trials for offences of economic crime becoming "forbiddingly long, expensive and complicated".
- UK regulators suffering from a lack of "flexibility to secure appropriate penalties for wrongdoing, at the same time as achieving better outcomes for victims".
- Difficulties in proving that the "directing mind and will" of an organization was at fault, thereby founding criminal liability.
- Commercial organizations having "little incentive to self-report" making the investigation of matters involving hidden, specialist or technical fields very difficult.
- Existing criminal penalties having "unintended detrimental consequences", such as a disproportionate impact on a company's share price, or collapse of a business.
- Civil proceedings allowing regulators to recover the proceeds of unlawful conduct and avoid the imposition of a criminal penalty, but not compensating victims.
- The absence of a wider and more flexible range of enforcement tools in England and Wales impacting "negatively upon enabling closer cooperation between foreign

2 http://www.nortonrosefulbright.com/knowledge/publications/117164/deferred-prosecution-agreements.

jurisdictions and the UK, and achieving resolution across several jurisdictions".

- Investigations and prosecutions being disproportionately expensive and time-consuming.
- The lack of flexible enforcement tools for UK prosecutors making negotiations between UK and its overseas counterparts, particularly in the United States, and ultimately resolution of the case, difficult.

Under a DPA in the UK, a prosecutor charges a company with a criminal offence but proceedings are automatically suspended if the DPA is approved by the judge. Under UK Serious Fraud Office policy, a company would only be invited to enter DPA negotiations if there was full cooperation with the SFO's investigations. Under such agreements, penalties could include: (1) a financial penalty; (2) compensation to aggrieved parties; and (3) continuing cooperation with respect to prosecutions of individuals.

To date, the SFO has entered into four DPAs, totaling over £667 million.

DPAs – an emerging trend?

In recent years, we have observed an emerging trend of jurisdictions introducing DPAs, drawing upon the largely positive experience the US and UK authorities have had thus far with DPAs as a prosecutorial tool.

In December 2016, France introduced *conventions judiciaire d'intérêt public* (CJIPs), which are similar to DPAs, under Sapin II Law and in November 2017, French prosecutors entered into their first CJIP. CJIPs share similar characteristics but also have some differences compared to the US and UK DPAs

- Under a CJIP, the company does not have to plead guilty, although the company may need to agree to a statement of facts and the legal significance of those facts.
- CJIPs can only be entered into by an entity, not by an individual and can only be used for certain specified offenses (including bribery and corruption).
- CJIPs will set forth the terms that a company must abide by, including the requirement to pay a financial penalty, implement or enhance a compliance program, and compensate victims.
- CJIPs require judicial approval.
- An entity may withdraw from a CJIP within ten days of the judge's approval.
- The CJIPs will be made public.
- If the company fails to abide by the terms of the CJIP, the prosecution can resume.

In December 2017, Australia announced that it will introduce new laws to establish DPAs as part of a raft of new reforms to Australia's anti-bribery and corruption regime.[3] The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 aims to

- Reduce barriers to investigations and prosecutions.
- Beef up offences that can apply to companies that operate overseas.
- Create a DPA regime (the first of its kind for Australia) that will encourage companies to be transparent and self-report.
- Push responsibility onto companies to strengthen their anti-bribery and corruption risk compliance systems by introducing a new offence of failing to prevent foreign bribery and an adequate procedures defence.

In addition, Argentina recently implemented a DPA scheme and Canada announced on February 22, 2018 that it would be introducing legislation for deferred prosecution agreements to be implemented through judicial remediation orders, following a public consultation on DPAs that took place between September and December 2017.

Singapore – the historical context to corporate liability

Until the recent introduction of DPAs as a formal prosecutorial tool, Singapore's approach towards corporate crime had been to focus on individual conduct and personal criminal liability.

This position was most recently stated in a 2015 opinion-editorial on financial crime authored by then Attorney-General V.K. Rajah, who stated:[4]

In Singapore, both individuals and corporate entities can expect to face prompt enforcement action for financial misconduct. The emphasis, if there is one, is placed on holding accountable the individuals who perpetrated the misconduct. Persons involved in financial misconduct should expect that they would be subject to enforcement action. The threat of personal criminal liability for misconduct in Singapore is real. There is no certainty of escape from liability by hiding corporate structures or the corporate veil.

3 http://www.nortonrosefulbright.com/knowledge/publications/158656/deferred-prosecution-agreement-scheme-and-failure-to-prevent-bribery-offence-for-australia. See also https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Norton-Rose-Fulbright.PDF for Norton Rose Fulbright Australia's response to the Australia's public consultation on deferred prosecution agreements in May 2016.

4 "Financial crime: Leaders can instil spirit of compliance", VK Rajah, Business Times (4 November 2015).

In this regard, it is unsurprising that Singapore's emphasis on individual conduct and personal criminal liability is also reflective of its historical approach towards corporate criminal liability for bribery and corruption.

In Singapore, the Prevention of Corruption Act (PCA), Singapore's primary anti-bribery legislation, criminalizes bribery of domestic and public officials, which may be committed by "persons". The term "person" has been defined in the Singapore Interpretation Act to include "any company or association of body of persons, corporate or unincorporated". Hence, the offences under the PCA can theoretically be committed by a corporation. In addition, case law in Singapore indicates that corporate liability can be imposed on companies for crimes committed by their employees or agents.

In this regard, the test for whether a company can be found liable for bribery and corruption depends on whether the individual who committed the crime can be regarded as the "embodiment of the company" or whose acts "are within the scope of the function of management properly delegated to him". This test, known as the "identification doctrine", was derived from English common law.[5]

However, the "identification doctrine" sets a relatively high bar for corporate criminal liability to be established. Only a very select few individuals in a company can be said to be an "embodiment of the company", and with large multinationals comprising complex corporate structures, it would be difficult to identify such persons.

It would also be difficult to show that an individual's acts of bribery or corruption on behalf of or for a company are "acts within the scope of the function of management properly delegated to him" in light of the complex decision-making structure of large multinationals.

Therefore, under the "identification doctrine", companies, in particular large multinationals, could avoid criminal responsibility for acts of bribery and corruption committed for and on its behalf, even if the company had clearly benefitted from such conduct. This poses further difficulty in the recovery of the illegal revenue generated by corrupt conduct. Consequently, even though in theory there is a concept of corporate criminal liability, prosecutions against corporations for bribery offences are rare in Singapore.

The novel use of the "conditional warning"

In light of Singapore's approach to corporate criminal liability for bribery and corruption, the use of the "conditional warning" by the Singapore authorities in a recent global resolution involving the US and Brazil was a novel development.

Under the terms of the global resolution, the Singapore Corrupt Practices Investigation Bureau (CPIB) issued a "conditional warning", including an undertaking by the Singapore corporation to make payment of a stipulated sum, for corruption offences under section 5(1) (b)(i) of the PCA, as part of the total criminal penalties imposed pursuant to the global resolution.

A "conditional warning" is a variant of a "stern warning", which is an exercise of prosecutorial discretion granted to the Attorney-General as the Public Prosecutor and is not governed by written law. Neither "stern warning" nor "conditional warning" result in a conviction; the accused person will not have any criminal record for the infraction. The difference between a "stern warning" and a "conditional warning" lies in the stipulation that the public prosecutor's exercise of his discretion not to prosecute is contingent on the recipient's fulfilment of certain conditions, typically to stay crime-free for a period of between 12–24 months and/or to pay a sum of money as compensation or restitution to the victim. Traditionally, "conditional warnings" were used in minor criminal offences involving youths or in a community/domestic context as a means of diverting such cases from the criminal justice system.

In a recent Singapore High Court decision, *PP v Wham Kwok Han Jolovan* [2016] 1 SLR 1370, the legal effect of a "stern warning" was considered. In that case, the High Court held that a "stern warning" was not binding on its recipient such that it affected his/her legal rights, interests or liabilities, and that it is "no more than an expression of the relevant authority that the recipient has committed an offence ... [i]t does not and cannot amount to a legally binding pronouncement of guilt or finding of fact."

In this regard, the use of the "conditional warning" mechanism by Singapore authorities to resolve the criminal violations as part of the global resolution was a novel development.

First, as "conditional warnings" are not governed by written law, such resolutions are opaque and lack transparency. It is not common for the terms of a "conditional warning" to be made public; the exact terms of such warnings are typically known only to the offender and the

5 *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127. The identification doctrine was subsequently broadened in the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, which held that the test for attributing mental intent should depend on the purpose of the provision creating the relevant offence. This broader approach has been affirmed in Singapore.

authorities.[6] While it may be argued that opacity and lack of transparency of a "conditional warning" may not be a cause for major concern in cases involving minor offences because the stakeholders involved are few and the impact of the conduct is likely to be localized, this may not be the case for serious corporate criminal conduct, which has the potential of impacting a greater number of stakeholders, such as shareholders, employees and other third parties across multiple jurisdictions. To this end, it should be noted that in jurisdictions such as the United States and UK, DPA resolutions are often accompanied with statements of facts that detail the misconduct of the corporate entity, which serve to inform the public about the degree of wrongdoing and provide a level of transparency to the process of achieving the resolution.

Second, under the terms of the global resolution, the payment made to the Singapore authorities far exceeded the maximum fine of S$100,000 per charge under the PCA. While being able to extract a penalty far in excess of what is provided for under written law may be desirable from an enforcement perspective, it is nevertheless dissonant and suggests that the current state of the law may require amendment.

Third, as warnings in general are not legally binding pronouncements of guilt or findings of fact, it is likely that in the event the recipient breaches any of the terms of the "conditional warning" and a decision is made to prosecute the company, authorities in Singapore will need to embark on the usual criminal justice process against the company, without the benefit of relying on documents such as a statement by the company setting out the company's formal admission of the misconduct to aid in the prosecution. In such a case, as prosecution would have possibly been delayed by a few years, the prosecution would find further challenges in collating evidence.

Fourth, this resolution potentially marks a shift in focus for Singapore authorities, who have traditionally focused on personal criminal liability (see above), to one that focuses on ensuring both corporates and individuals remain accountable for criminal misconduct.

In light of the issues raised, the use of the "conditional warning" to participate in a global resolution is certainly unprecedented. While it allowed Singapore to achieve a robust outcome, the "conditional warning" approach may not necessarily be the most appropriate tool to be employed in future similar cases in light of the concerns raised above.

Formal DPA regime in Singapore and further issues to be considered

Therefore, the introduction of DPAs to Singapore is a positive step and reflects Singapore authorities' awareness of the value of DPAs and the need to formalise the process by which such corporate resolutions are arrived at, as opposed to the use of "conditional warnings" to achieve such outcomes.

The DPA regime introduced by the Criminal Justice Bill is broadly similar to the UK approach in that

- DPAs are only available to corporate entities and not to individuals.
- DPAs must contain a statement of facts relating to the alleged offence and may impose various conditions on the subject (e.g. payment of financial penalty, disgorgement of profit, implementation of a compliance programme, imposition of a corporate monitor etc.)
- All DPAs will require court approval.
- In approving a DPA, the court must be satisfied that the DPA is in the interests of justice and that the terms are fair, reasonable and proportionate.
- The terms of the DPA may be varied while the DPA is in force, subject to court approval.
- The prosecution may apply to the court for relief if it believes that the subject has failed to comply with the terms of a DPA, and must prove the alleged breach(es) on a balance of probabilities.
- There is a prescribed framework governing the use of material obtained in the course of negotiating a DPA, including how the statement of facts contained in a DPA will be treated (i.e. as proof of a formal admission).
- How money received by the prosecution under a DPA is to be dealt with is clearly specified (i.e. payment into the Consolidated Fund).

However, one significant difference between the Singapore and UK approach is that under the UK framework, the Director of Public Prosecutions and the Director of the Serious Fraud Office are required to jointly issue a Code on DPAs to provide guidance on various issues. Such guidance includes the general principles to be applied in determining

6 In response to a question from a member of the house on the terms of the "conditional warning" issued to the company, Senior Minister of State for Finance and Law, Ms. Indranee Rajah stated: "[i]t is not our practice to disclose terms of conditional warnings ... In other words, conditional warnings are things which had been given in the past by the agencies but, as a general practice, we do not disclose its exact terms." Singapore Parliamentary Debates, Official Report (January 8, 2018) (Indranee Rajah, Senior Minister of State for Finance and Law.

whether a DPA is likely to be appropriate in a given case (including the benefits of self-disclosure and conditions for leniency), whereas the Singapore approach does not impose such a requirement. This divergence in approach is likely due to the fact that Singapore has taken the position that it is not desirable to publish prosecutorial guidelines.[7] It is possible, however, that the factors considered by the UK authorities will also be relevant factors in Singapore.

Thus far, reception towards the proposal to introduce DPAs in Singapore has been largely positive in Singapore. In this regard, the approach to DPAs adopted by Singapore addresses many of the concerns with the informal "conditional warning" approach highlighted above. Nevertheless, there have been concerns that DPAs may embolden companies to behave irresponsibly or that prosecutors may, in the future shy away from fearlessly prosecuting companies for egregious corporate misconduct. Such criticism, however, is unfounded and largely represents a misunderstanding of what DPAs stand for.

Contrary to concerns that DPAs may encourage reckless corporate behavior, DPAs are likely to encourage companies to put in place sound governance procedures and compliance programs. In order to avail itself of a DPA, a company must first show that it is a worthy candidate for the exercise of such prosecutorial discretion. Factors such as self-reporting, the existence of a working compliance program, and a commitment to reform are among the factors to be considered when authorities consider whether to grant a DPA. Duplicitous conduct, such as acting irresponsibly and appearing contrite when caught is unlikely to be seen favorably by the authorities. Furthermore, under DPAs, the benefits of misconduct are often disgorged, providing little incentive for a company to act irresponsibly. As for prosecutors shying away from prosecuting companies, experience has shown that Singapore's prosecutors do not avoid taking on "difficult" cases. Finally, it must also be noted that DPAs also benefit the public, in that it provides a company genuinely seeking to rehabilitate with an opportunity to do so, and minimizes the potential fallout from the collapse of major public companies caught up in corporate wrongdoing (such as insolvency and lay-offs to innocent rank and file employees).

The introduction of a DPA regime, however, is only one piece of the puzzle if Singapore wants to make good on its commitment to ensure that Singapore companies comply with the laws of Singapore and the laws of the jurisdictions in which they operate.

In order to achieve such aims, the government will need to ensure that its anti-bribery laws keep pace with international developments and the international business reality. In this regard, we note that a review of Singapore's PCA has been ongoing since January 2015. Areas of potential reform include

- Corporate liability – In light of the issues with corporate liability set out above, Singapore may do well to take a leaf out of the pages of Singapore's own anti-money laundering law – the Corruption, Drug-Trafficking and Serious Crimes (Confiscation of Benefits) Act (CDSA). The CDSA renders money-laundering by a corporation a criminal offence that can be proven through the state of mind as well as the conduct of any "director, employee or agent" who was acting within the scope of his or her actual or apparent authority. In other words, the evidential threshold is significantly lowered and the outdated "directing mind and will" test is done away with.

- Increased penalties – The fact that the global resolution resulted in penalties that were far in excess of what could be imposed on the company under Singapore law is a sign that Singapore's penalties for corruption are inadequate. The issue perhaps lies in the fact that the PCA makes no distinction in financial penalties that could be imposed on natural persons and companies. Singapore should consider revising corporate penalties so that such penalties are based on a formula that could take into account various aggravating factors, such as the amount of bribes paid and benefit received, rather than a strict monetary limit of S$100,000.

- Compliance defence – If the threshold for proving corporate liability is lowered, some balance can be restored by introducing a compliance defence. Under such a defence, for example, a corporation that is found liable for bribes paid by its "director, employee or agent" could be absolved of legal liability if it could show that it took reasonable steps to prevent such corrupt practices from taking place. Such a compliance defence provides a legal impetus for companies to adopt prudent business practices and foster ethical corporate cultures through the implementation of anti-corruption compliance programs.

7 See https://www.agc.gov.sg/legal-processes/publication-of-prosecution-guidelines.

- Extraterritorial effect – The PCA, as it currently stands, provides for limited extraterritorial effect in respect of the acts of bribery of Singapore citizens abroad. Such acts will be dealt with as if the bribe had taken place in Singapore. Notwithstanding this provision, non-citizens, such as Singapore permanent residents and corporations, are not subject to the extraterritorial scope of the law. If the non-corruptible image of Singapore is to be maintained, it should be burnished based on conduct both at home and abroad. The PCA should be expanded to address this discrepancy.

- Whistleblowing protection – The PCA currently provides for the right to anonymity and protects informers' identities by prohibiting the disclosure of information like the informer's name or address. However, given that there is no overarching whistleblower law in Singapore, there is no statutory protection afforded to employees of companies who may lodge complaints against their supervisors and lose their jobs as a consequence. Anti-retaliation measures ought to be legislatively introduced.

- Senior personnel liability – While individuals directly involved in corporate misconduct ought to be held legally liable, there should also be scrutiny on the behaviour of senior personnel, such as members of management or board of directors, for neglect or failure to take steps to prevent such misconduct. Senior personnel are responsible for setting the right tone and fostering ethical corporate culture, so they should naturally bear the responsibility for creating toxic cultures that incentivise illegal behavior.

In summary, while the introduction of DPAs is a step in the right direction, other pieces of the puzzle need to fall into place to create a coherent regime to combat corporate crime. Only then will Singapore's reputation for incorruptibility align with the state of its anti-bribery laws.

An abridged version of this article was published in The Business Times on February 6, 2018.

For more information contact:

Wilson Ang
Partner, Singapore
Tel 65 6309 5392
wilson.ang@nortonrosefulbright.com

Paul Sumilas
Of counsel, Singapore
Tel +65 6309 5442
paul.sumilas@nortonrosefulbright.com

Jeremy Lua
Associate, Singapore
Tel +65 6309 5336
jeremy.lua@nortonrosefulbright.com

China's new Anti-Unfair Competition Law redefines bribery

China's new Anti-Unfair Competition Law (the New Law) was promulgated by the Standing Committee of the National People's Congress on November 4, 2017 and will take effect from January 1, 2018, by which date the current version of the law promulgated back in 1993 will cease to be effective.

Whilst the New Law covers different forms of unfair competition practices, this briefing only focuses on the provisions with regard to bribery in commercial transactions.

Since the first draft of the New Law was published for public consultation in early 2016 (the First Draft Amendments), there have been a few amendments made to the draft and the final version of the New Law has deviated significantly from the First Draft Amendments as far as the provisions on bribery are concerned.

By way of background, the current Anti-Unfair Competition Law had long been subject to market criticism due to the fact that it failed to set out clear parameters for the offence of commercial bribery. Although some clarity was provided in the Interim Provisions on Banning Commercial Bribery (SAIC Provisions) issued by the State Administration for Industry and Commerce (SAIC, being one of the anti-bribery enforcement agencies in China) in 1996, the line had never been clear between permissible business incentives offered to transaction counterparties and impermissible commercial bribery[1]. As a result, SAIC's local counterparts exercised great discretion in the interpretation and enforcement of the law in practice and different opinions often existed as to whether or not a particular act amounted to bribery.

The market therefore expected the New Law to clarify what exactly would be treated as bribery in the commercial arena.

To provide a complete picture, we compare in this article the relevant provisions in the current Anti-Unfair Competition Law, the First Draft Amendments and the New Law in order to better understand the implications of the New Law. We focus on three elements which are most relevant in this context: (i) what practices would constitute bribery, (ii) whether a business counterparty would be a briber-taker, and (iii) whether a corporate would bear liability for its employees' bribery activities.

The current Anti-Unfair Competition Law

Article 8 of the current Anti-Unfair Competition Law provides, using an undefined word "bribe" to describe bribery activities, that business operators must not, by using money, property or other methods, bribe others in order to sell or purchase goods. It further provides that (i) provision of off-the-book rebate by a party to its counterparty or individuals shall constitute bribe-giving, whilst acceptance of such off-the-book rebated by the counterparty or individuals shall constitute bribe-taking, and (ii) business operators may give discounts to counterparties or pay commissions to intermediaries provided both parties to the transactions expressly and genuinely record the discounts and commissions in their accounts and books.

Based on the principles set out in the law, the SAIC Provisions explain a few key terms in order to guide its implementation, including "discounts", "commissions", "off-the-book rebate" and "expressly and genuinely recording", and provide that business operators must not give cash or property to business counterparties as gifts in the sale and purchase of goods, with the exception of promotional gifts of small value according to commercial practice, otherwise it will constitute commercial bribery.

What practices would constitute bribery

It is not certain what practices constitute bribery given the absence of a clear definition of bribery. However, the ways in which the local counterparts of SAIC have interpreted and enforced the current Anti-Unfair Competition Law and SAIC Provisions

1 http://www.nortonrosefulbright.com/knowledge/publications/117165/walking-a-fine-line-in-china

suggested that corporate-to-corporate incentives may very likely be regarded as commercial bribery unless they fall squarely within the narrowly described scope of discounts, commissions and promotional gifts, as briefly described above. As a result, business operators have been struggling in trying to figure out what may be offered in this competitive market without crossing the line. The tension between business units who propose innovative commercial incentives and compliance team has been phenomenal.

Whether a business counterparty would be a briber-taker

Bribes may be given to individuals as well as to corporates. In practice, there have been many cases, including, for instance, the ten cases relating to tyre companies published by Shanghai AIC early this year, where corporate-to-corporate arrangements between direct transaction parties (e.g. manufacturers and distributors) were regarded as bribery.

Whether a corporate would bear liability for its employees' bribery activities

Although the current Anti-Unfair Competition Law is silent on this point, the SAIC Provisions do make it clear that the act of an employee who sells or purchases goods for a business operator by way of bribery shall be regarded as the conduct of the business operator. The SAIC Provisions however do not provide any defence that the corporate concerned may use to defend its position.

First Draft Amendments

The First Draft Amendments took the bold step of trying to define commercial bribery. Article 7 of the First Draft Amendments provide as follows:

"A business operator may not engage in the following commercial bribery acts: (i) to gain financial interests for its entity, department or persons in or through public services;
(ii) to offer financial interests without truthfully reflecting that in contracts or accounting documents; or (iii) to offer or promise to offer financial interests to a third party who may exercises influence on the transaction, whereby damaging the lawful rights and interests of other business operators or consumers.

Commercial bribery refers to the circumstances where a business operator offers or promises to offer financial interests to its business counterparty or a third party who may exercise influence on the transaction, so as to induce them to seek business opportunities or competitive advantages for the former. The party who offers or promises to offer financial interests shall be regarded as the party of giving commercial bribery, while the party who accepts or agrees to accept such financial interests shall be regarded as the party of taking commercial bribery."

What practices would constitute bribery

Clearly, the First Draft Amendments made an attempt to provide a clear definition of commercial bribery which is missing from the current Anti-Unfair Competition Law. According to the provisions quoted above, commercial bribery comprises the following components

- Financial interests being offered or promised to be offered.
- To the business counterparty or a third party.
- To seek business opportunities or competitive advantages.

The logical connection between the definition of commercial bribery in the second paragraph and the specific circumstances in the first paragraph, as both quoted above, is not entirely clear. It is unclear whether the first paragraph merely serves as an illustration of a few examples of commercial bribery or intends to supplement conditions for an act to be regarded as commercial bribery. Specifically, while financial interests are offered by a business operator to its counterparty in seeking competitive advantages, would such act only be regarded as commercial bribery if the parties failed truthfully to reflect such arrangements in contracts or accounting documents? Whilst such financial interests are offered by a business operator to a third party who may exercise influence on the transaction, would such act only be regarded as commercial bribery if such arrangement damages the lawful rights and interests of other business operators or consumers? If the answers to these questions are "no", the ambit of commercial bribery under the First Draft Amendments becomes even wider.

It seems that the First Draft Amendments also failed to answer the questions that the market expected to be answered.

Whether a business counterparty would be a briber-taker

Under the First Draft Amendments, bribes may be given to a business operator's counterparty as well as a third party who may exercise influence on the transaction. Therefore, business counterparties are captured in the scope of bribe-takers under the First Draft Amendments.

Whether a corporate would bear liability for its employees' bribery activities

The First Draft Amendments provide that an employee's act of commercial bribery in seeking trading opportunities or competitive advantages for a business operator shall be considered as the act of the business operator, unless it can be proven that the employee's act is in breach of the interests of the business operator.

The First Draft Amendments make an improvement by providing a defence that a corporate may rely on although the scope of such defence is rather vague. "Interests of the business operator" may refer to a short-term interest, (e.g. securing a sales contract), or a long-term interest, (e.g. being compliant to avoid penalties). It would no doubt receive different interpretations if such defence is raised in practice.

The New Law

The New Law has made a rather significant change in taking out a business operator's counterparties from the scope of bribe-takers, which indicates that corporate-to-corporate commercial incentives, which have long been the targets of anti-bribery enforcement by SAIC (and its local counterparts) would most likely no longer be regarded as a commercial bribery under the New Law.

Article 7 of the New Law provides as follows:

"Business operators must not use financial or other methods to bribe the following entities or individuals in seeking business opportunities or competitive advantages

- Staff members of transaction counterparties.
- Entities or individuals entrusted by transaction counterparties to handle relevant matters.
- Entities or individuals that may take advantage of the work position or influential power to exercise influence on transactions."

Article 7 further restates the position under the current Anti-Unfair Competition Law that business operators may offer express discounts to business counterparties or pay commissions to intermediaries and shall genuinely record such discounts or commissions on the books and accounts by both parties involved.

What practices would constitute bribery

The New Law goes back to the approach under the current Anti-Unfair Competition Law in using "bribe" to describe "bribery", as may be seen from the provisions above, which may be rather disappointing. It is also notable that it expands the purpose of bribery from "selling or purchasing goods" under the current Anti-Unfair Competition Law to "seeking business opportunities or competitive advantages" which sensibly captures a broader scope of activities.

Whether a business counterparty would be a briber-taker

The most fundamental change introduced by the New Law is the removal of transaction counterparties from the scope of briber-takers, as shown in the provisions highlighted. According to market commentary, this change was based on comments collected in the draft consultation stage that China had been penalizing commercial arrangements (e.g. sales bonus, incentives) between transaction parties as bribery which were however often regarded as legitimate in other jurisdictions. It was noted in some of the comments that "bribe" was often defined in many jurisdictions as an improper offer or payment of something of value to an individual employee, agent or other fiduciary with the intent to induce or reward the recipient for acting in violation of the recipient's legal duties to the recipient's employer or principal and that the scope of bribery defined under Chinese law appeared to be a lot broader.

Obviously these comments have been reflected in the New Law. It looks from the market commentary so far that this change has been viewed as a positive step allowing transaction parties to agree on flexible transaction arrangements which would have been regarded as bribery under the current Anti-Unfair Competition Law.

However, the following questions have arisen from this change which call for further clarification

- If the transaction counterparty is out of the scope of bribe-takers in the first instance, what is the implication of the provisions requiring the discounts and commissions between the transaction parties to be recorded genuinely to the books and accounts? What if these requirements are not complied with? Would non-compliance make the transaction a bribery again? If the answer is yes, it is certainly contradictory to the position established by other provisions of Article 7, and if the answer is no, what is the point of having these provisions included in Article 7? The penalty provisions of the New Law only refer to "bribery"?
- If the arrangements between transaction parties fall outside of the scope of commercial bribery under the New Law, how should these arrangements be viewed with respect to offences under the PRC Criminal Law with regard to bribe-giving to entities (in Chinese: 对单位行贿罪, Article 391) and bribe-taking by entities (in Chinese: 单位受贿罪, Article 387)? Under these PRC Criminal Law provisions, off-the-book rebate and commissions taken by, or given to, a state-owned enterprise may constitute a criminal offence. The New Law is meant to govern not only transactions between private companies but also transactions between private companies and state-owned enterprises. The gap therefore emerges where an improper transaction arrangement

between a private company and state-owned enterprise would not be regarded as bribery under the New Law but could potentially constitute a criminal offence of bribery under the Criminal Law.

Given the above, it remains to be seen how the newly defined bribery under the New Law will be implemented.

Whether a corporate would bear liability for its employees' bribery activities

The New Law takes the same position as the First Draft Amendments in confirming that bribery committed by an employee of a business is deemed to have been committed by the business. It makes it a defence for the business if the business can prove that the act of the employee is irrelevant to seeking a transaction opportunity or competitive advantage for the business.

Compared to the defence under the First Draft Amendments, the defence under the New Law is more specific and less ambiguous, which is an improvement. However, proving the irrelevance between the bribery and the transaction opportunity or competitive opportunity can be very challenging for the corporates in practical terms, which will make it difficult to use the defence successfully.

Corporates should seriously consider the risks that may be extended to it by employees' bribery conduct, given the position under the New Law.

Beyond all these achievements and uncertainties under the New Law, administrative penalties that may be applied for bribery are significantly increased from fines ranging from RMB10,000 to RMB200,000 plus confiscation of illegal income under the current Anti-Unfair Competition Law, to fines ranging from RMB100,000 to RMB3 million, confiscation of illegal gains, and in the worst case scenario, revocation of business licence.

Businesses operating in China need to be aware of these upcoming changes and take the necessary precautions by implementing robust and effective anti-corruption compliance programs.

For more information contact:

Sun Hong
Head of Shanghai
Tel +86 21 6137 7020
hong.sun@nortonrosefulbright.com

New FCPA enforcement policy provides additional certainty, but risks remain

Introduction

In November 2017, the United States Department of Justice (DOJ) announced a potentially significant change to how it will evaluate and reward corporate cooperation and self-disclosure in Foreign Corrupt Practices Act (FCPA) cases. In a speech to the 34th International Conference on the Foreign Corrupt Practices Act on November 29, 2017, Deputy Attorney General Rod Rosenstein announced that the DOJ would add a "revised FCPA Corporate Enforcement Policy" to the US Attorney's Manual. The new policy, which codifies and expands upon the DOJ's 2016 FCPA Pilot Program, underscores the DOJ's professed desire to incentivize companies to self-disclose potential FCPA violations and cooperate fully in any resulting investigations. On its face, the policy aims to enable companies and their advisors to better predict the pros and cons of self-disclosing potential FCPA violations by defining the benefits that could be obtained by timely self-disclosure and complete cooperation.

As welcome as this increased certainty may be for companies concerned about FCPA exposure, the analysis of whether a disclosing and cooperating company will qualify for the new benefits is not a simple one, and there are thus still significant risks in self-disclosing potential FCPA violations. DOJ prosecutors retain significant discretion in determining how to resolve a matter even with this new policy, especially in how prosecutors determine what constitutes a qualifying "voluntary" self-disclosure. Recent case resolutions have shown, for example, that some self-disclosing companies have been denied self-disclosure credit because information about the alleged corrupt conduct had already appeared in the public domain. While the new FCPA policy may raise the hope of greater certainty about self-disclosure decisions, the benefits of the policy may remain highly limited and navigating the incentive structure could create a trap for the unwary.

The experiment – the FCPA pilot program

The purpose of the 2016 pilot program was to deter FCPA violations, encourage strong anti-corruption compliance programs, and provide greater transparency to companies who sought mitigation credit for fully cooperating with the DOJ. Under the pilot program, companies that 1) voluntarily self-disclosed suspected violations; 2) fully cooperated with the DOJ; and 3) implemented appropriate remedial measures, could earn up to a 50 percent reduction from the bottom of the US Sentencing Guidelines (USSG) fine range at the time the case was resolved. While this incentive could be significant, it still would only be realized if the company was convicted or entered into some form of resolution with the DOJ. The pilot program left unclear the extent to which self-disclosure and cooperation could lead the DOJ to decline prosecution altogether.

While there was an increase in voluntary self-disclosures after the commencement of the pilot program, there was only a moderate increase in the publicly disclosed number of declinations. The DOJ only publically announced declinations in seven matters under the pilot program, though estimates indicate that there may have be fifteen or more total declinations during the period of the program.[1] Considering the DOJ issued as many as twelve declinations in the year before the pilot program, it was not clear that the chances of obtaining a declination under the pilot program were meaningfully different than before. This may have been a function of the program's opaque and discretionary incentive structure. As we warned when the DOJ announced the pilot program,[2] the program's criteria were vague and the benefits were far from guaranteed given the prosecutors' wide latitude in determining the appropriate penalty. Indeed, the DOJ retained broad discretion under the pilot policy not to grant any leniency even if a company voluntarily self-disclosed, cooperated, and appropriately remediated the misconduct.

1 Of course, it is not always clear whether a declination was reached because the DOJ determined that there was no violation or, instead, DOJ exercised its prosecutorial discretion not to seek a criminal resolution for other reasons. For a discussion of known declinations, see Marc Alain Bohn and James G. Tillen, Evaluating FCPA Pilot Program: Declinations On The Rise, Law360 (Apr. 10, 2017), https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise.

2 DOJ launches pilot program for FCPA cases (April 2016), available at http://www.nortonrosefulbright.com/knowledge/publications/138645/doj-launches-pilot-program-for-fcpa-cases.

The "new" FCPA corporate enforcement policy and key changes

The revised FCPA corporate enforcement policy is designed to address some of the shortcomings of the pilot program. In announcing the policy, Deputy Attorney General Rod Rosenstein noted that one of the goals of the new policy is to provide "greater clarity" about the DOJ's decision-making in connection with FCPA enforcement decisions and "reassure corporations that want to do the right thing." Along these lines, the new policy has been added to the U.S. Attorney's Manual so that, in Rosenstein's words, it can be "readily understood and easily applied by busy prosecutors."

Elements of policy

The requirements for obtaining full cooperation credit remain similar to those in the pilot program: companies must timely disclose all relevant facts; proactively cooperate and disclose information even if not asked; collect and preserve relevant documents; engage in de-confliction of internal investigations where asked; and make current and former employees and officers available for interviews.

The most substantive changes appear designed to reduce the uncertainties present in the pilot program. Most notably, the policy provides companies that fully comply with all of the requirements with a presumption – not just the mere possibility – that the matter will be resolved with a declination. Specifically, the revised policy provides that "when a company has voluntarily self-disclosed misconduct,...fully cooperated, and timely and appropriately remediated, ... there will be a presumption that the company will receive a declination, absent aggravating circumstances." Some uncertainty nevertheless remains as what constitutes aggravating circumstances, as it is not necessarily an objective determination. Still, this reflects a stark change in position towards incentivizing self-disclosure by providing stronger metrics for companies and their advisors to use when evaluating whether to self-disclose potential FCPA violations.

Moreover, in the event aggravating factors are present and the DOJ proceeds with seeking a criminal resolution of the matter, the new policy still provides for greater certainty for cooperating companies that satisfy the program's requirements. Specifically, the new policy unequivocally states that the DOJ "will accord ... a 50 percent reduction off of the low end of the" USSG fine range. This is a significant positive change for companies compared to the pilot program, which only noted that companies could receive up to a 50 percent reduction.

However, the revised policy has a new and potentially significant caveat: companies must pay "all disgorgement, forfeiture, and/or restitution resulting from the misconduct" in order to even qualify for the policy. This language appears broader than the pilot program requirement to disgorge "all profits from the FCPA misconduct at issue" and which made no mention of restitution payments. Additionally, the new provision may expand the conduct for which payments are required as it refers to all misconduct, as compared to the pilot program's explicit reference to FCPA-related conduct.

To summarize, the following chart highlights some of the notable differences between the pilot program and the revised FCPA corporate enforcement policy

	FCPA Pilot Program	Revised FCPA Corporate Enforcement Policy
Declination for Fully Compliant Companies	"Will Consider" Declination	Presumption of Declination (absent aggravating circumstances)
Mitigation of Fines for Fully Compliant Companies	May accord up to a 50 per cent reduction in fines	Will accord a 50 per cent reduction in fines
Imposition of Monitor for Fully Compliant Companies	Generally should not require monitor	Generally will not require monitor
Voluntary Self-Disclosure	Does not include disclosures a company is required to make by law, agreement, or contract	Removes language excluding disclosures required by law, agreement, or contract
Disgorgement, Forfeiture and/or Restitution	Must disgorge all profits from FCPA Violation	Must pay all disgorgement, forfeiture, and/or restitution from misconduct at issue
Publication of Declinations	No policy regarding publication	Will make public in cases that would have been criminally resolved but for self-disclosure, remediation, cooperation and disgorgement

While the policy on its face appears to provide significantly more certainty to companies facing decisions about self-disclosing FCPA violations in exchange for a possible declination or mitigation credit, prosecutors still have significant "wiggle room" to withhold those benefits and resolve matters criminally if they so choose. As with the pilot program, the policy is only a guideline that creates no enforceable rights. In other words, there are no guarantees.

"Voluntary" self-disclosure

The revised policy largely keeps intact the pilot program's strict definition of what constitutes a "voluntary" self-disclosure. In order for a self-disclosure to be considered voluntary, it must: 1) qualify under the USSG "as occurring prior to an imminent threat of disclosure or government investigation;" 2) be made "within a reasonably prompt time after becoming aware of the offense" with the company having the burden to show timeliness; and 3) disclose all relevant facts known to it about the violation. Helpfully, a self-disclosure can still be considered "voluntary" even if the company is contractually or otherwise obligated to make it. The revised policy removes a criteria under the pilot program that a disclosure "that a company is required to make by law, agreement, or contract, does not constitute voluntary self-disclosure."

Unhelpfully, however, the new policy retains the requirement that to be considered a "voluntary self-disclosure," companies must disclose the potential misconduct before there is a threat of public disclosure. Even if the DOJ or other regulators are unaware of the conduct, some amount of press reports (even outside the United States) or other public information could disqualify the company from self-disclosure credit if that public information creates an "imminent threat" of government investigation.

To be clear, the language of the policy could disqualify a company's disclosure even if there is no information in the public domain if it soon might become known.

This poses a complex problem for companies wishing to, as the DOJ says, "do the right thing" – as whether or not they will receive credit is highly dependent on an unknowable variable, namely whether the DOJ already knows or believes it would soon know about the issue. Recent enforcement actions make clear that any amount of publicity – including publicity outside the United States—regarding a purported FCPA violation, regardless of where or even the factual basis thereof, could preclude self-disclosure credit being granted. This is the case regardless of whether or not the DOJ is actually aware of that publicity, and there is no burden on the DOJ to demonstrate whether it knew or was about to learn of the press reports in some demonstrable way. Consistent with the so-called Yates Memorandum, the revised policy also requires the disclosure to include "all individuals involved in the violation of law" in order to qualify. Given the importance of the timeliness of the self-disclosure in the evaluation of the cooperation credit, companies will often have to make a decision whether to self-disclose at an early stage, before a proper internal investigation can be completed and before the extent of the alleged misconduct may be understood. That decision will further have to be made before there is complete knowledge about the extent of the involvement of various directors, officers, or employees. Thus, the new policy does not eliminate the tension of making such significant decisions on imperfect information, and may actually enhance it. Once the self-disclosure is made, of course, there is no ability to undo it even if the DOJ later decides in its discretion that the disclosure was not timely.

Conclusion

The announcement and implementation of the revised FCPA corporate enforcement policy do, on the whole, suggest the DOJ is being serious in trying to incentivize voluntary self-disclosure and full cooperation. The additional (but not complete) objectivity of the new policy is a welcome step forward in helping companies and their advisors to be better able to perform a meaningful cost-benefit analysis in determining whether to self-disclose a potential FCPA violation. However, as the DOJ has shown, even with this additional guidance, companies are not guaranteed credit for their self-disclosure. Companies must still weigh the serious risks and benefits of self-disclosure that remain under this new policy.

For more information contact:

Keith M. Rosen
Partner, Washington, DC
Tel +1 202 974 5687
keith.rosen@nortonrosefulbright.com

Kevin James Harnisch
Partner, Washington, DC
Tel +1 202 662 4520
kevin.harnisch@nortonrosefulbright.com

Daniel Kacinski
Associate, New York
Tel +1 212 728 4115
daniel.kacinski@nortonrosefulbright.com

Profile interview with Etelka Bogardi

In this issue we speak with Etelka Bogardi, our new financial services regulatory partner based in Hong Kong, who joined us from the Hong Kong Monetary Authority.

01 | Why did you join Norton Rose Fulbright?

One of the key things that attracted me to Norton Rose Fulbright was the strength of the financial services regulatory (FSR) team globally. I was really impressed by how our London (in fact, our global) team is creating a consultancy, bringing in people with compliance and operational backgrounds to tackle issues financial institutions have such as systems and controls that don't fit squarely in the "legal" box. This multi-disciplinary approach is very forward thinking for a law firm. It's a visionary group and the firm is clearly thinking about where the financial industry is heading as a whole.

In addition, my experience as a financial services lawyer at another international firm and then as senior counsel at the Hong Kong Monetary Authority (HKMA) fits in very well with the Financial Institution (FI) focus at Norton Rose Fulbright.

02 | Tell us more about the regulatory bodies in Hong Kong.

There are three financial services regulators in Hong Kong which we engage actively with – the Insurance Authority, the HKMA and the Securities and Futures Commissions (SFC).

We are increasingly dealing with the Insurance Authority as the new insurance regime is taking effect and we have a very strong insurance practice in this region so that combination has created a lot more work for us in that space.

The HKMA is the front line regulator for licensed banks and deposit-taking companies, while the SFC is the frontline regulator for financial intermediaries or anyone performing regulated activities, including securities dealing and asset management.

It's a fascinating dynamic and much different to other countries' models, for instance Singapore which has one financial regulator, the Money Authority of Singapore (MAS).

There is quite a bit of overlap between what the HKMA and the SFC does. For example, if a licensed bank has a securities or asset management arm, it is frontline regulated by HKMA, but many of the relevant laws, guidelines and regulations are issued and effectively overseen by the SFC, so clients need to be very vigilant and really consider both regulators for all their activities, especially since the regulators approach cases quite differently.

Clients must be prepared to deal with two separate sets of questions and two separate sets of people who may sometimes have different policy concerns and priorities (as well as enforcement tools at their disposal). Often amongst themselves, they will come to a decision on whether or not they (or one of them) will initiate enforcement action and what that will be but it's not always entirely clear on what basis those decisions are made.

03 | How has the FSR landscape changed in Hong Kong in the past three years?

There are more and more regulations, and both the regulators and financial institutions are working hard to keep up. A lot of the regulations start off as G20 commitments implemented through treaty-based organizations such as the Financial Stability Board or Bank for International Settlements which are then rolled out globally. Examples include the resolution and recovery regime, OTC derivatives reform, the Manager-in-Charge regime, which have all started elsewhere and have come to Hong Kong for adaptation and implementation in the local market.

I do think that we are coming through to the tail end of the big enforcement and mis-selling cases related to the financial crisis, so it will be interesting to see what the next enforcement wave would be. In the next 18 months or so, I believe we will see more personal accountability-type cases and also more anti-money laundering enforcement actions.

04 | What are the key risks for FIs operating in Hong Kong?

There is a significant anti-money laundering risk in Hong Kong because the city is a conduit for money flows and I also think the regulators are increasingly concerned about the lack of their extra-territorial reach. This is why they are pushing for legislation and enforcement outcomes cross-border (the first conviction under section 115 the offshore marketing offence under the Securities and Futures Ordinance springs to mind); as well as increasing cooperation between national regulators, with a particular emphasis on Mainland China.

Generally there's a lot more desire and need to work together with foreign regulators, particularly on issues like resolution planning where local regulators have to cooperate with regulators in home jurisdictions in crisis management groups and supervisory colleges, to work out what they are going to do if and when the next crisis comes.

05 | Tell us about your experience working at the HKMA, what are some of the highlights and learning curves?

The key difference between working in private practice and at the HKMA is that, while at the HKMA, I was much more involved in the policy side and being responsible for accompanying pieces of legislation in the financial sector from start to finish, working with the Department of Justice and the Financial Services and Treasury Bureau- these were real highlights for me, though in many ways, it's much less commercial. When you are in private practice, you are always trying to give your advice within commercial parameters, bearing in mind what is actually happening in practice in the markets and the commercial drivers. The regulators can sometimes take a more black and white legal approach.

06 | What are clients most curious about when they find out you've been at the HKMA?

Often the client queries are on the intangible – why the regulator is approaching issues or matters a certain way and how the HKMA operates internally.

I was struck by the disparity between what regulators are thinking about versus what clients are asking about in practice. The bank resolution is a good example to cite for this, the discussion at the regulators end would be a very technical one – how the legislation should look like and the policies backing it, but with clients the practical cross border elements are almost always the most important ones. You respond to very practical questions like if they had a resolution action at headquarter level, what would happen if someone in Hong Kong was a counterparty and insisted on terminating a relevant contract; or "Do I need to change my contracts to cater for this?"

There is sometimes a bit of misalignment in the thought process for regulators and for clients. The regulators have a very tough job but they don't operate in a day-to-day business environment the way clients do. So with my experience, I advise clients on what I think the regulators' objective is, what the policy is about and the practical implications which the regulators may not have filtered off; it's important to ensure that we are providing practical advice that still keeps the client's business compliant.

There is another angle which people forget which is the politics of it all – when a regulator wants to put in new rules, they have to approach the Legislative Council (LegCo) to get them passed, and there's always a concern at the back of their minds on how what is proposed will be perceived by politicians and the general public.

For now, no two pieces of work I have received so far have been the same, which has made this practice very interesting to be in. It's such a broad area, and questions I've fielded range from almost operational (reviewing to make sure operation models are compliant with supervisory policies) to a lot of cross-border work where there is a Hong Kong element and in determining whether or not a certain activity will be regulated in Hong Kong.

There's also a lot of interesting work coming out of the fintech sphere, where companies are developing payment systems with blockchain elements, and on the insurance regulatory space, particularly from offshore insurers planning on activities in Hong Kong.

07 | So what do you think are some of the key changes Hong Kong needs to make to become a true fintech leader in APAC?

Hong Kong has some unique structural characteristics which could pose challenges for the implementation of fintech and regtech solutions.

For one, it is dominated by large established financial institutions (29 of the 30 global systemically important banks are represented in Hong Kong) with a high degree of market saturation. As a result, it is not a place where technological change is driven by smaller fintech market disruptors. This dominance of incumbent FIs is evidenced by some of the regulatory responses, such as the fact that, unlike for example the UK or Singapore, the regulatory sandboxes are available only to institutions that are already licensed or those that have partnered up with licensed FIs. As a result, it is likely that the implementation of fintech in Hong Kong will be largely driven by existing FIs partnering up (or investing in) fintech start-ups, which may result in the pace of disruption being slower (and perhaps less innovative and nimble) than in jurisdictions where fintech development is more disruptor-driven.

Hong Kong also has a slightly more complex regulatory landscape. There are three main regulators (the HKMA, the SFC and the Insurance Authority) to navigate which can involve higher start-up costs for industry entrants. It can also be difficult to determine which regulatory regime will apply to any given fintech solution.

But the regulators are responding – as can be seen by the HKMA's consultation in relation to Open Application Program Interface, the updated guidance on virtual banks and its other proposals for what it calls "New Smart Banking".

For more information contact:

Etelka Bogardi
Partner, Hong Kong
Tel +852 3405 2578
etelka.bogardi@nortonrosefulbright.com

nortonrosefulbright.com

NORTON ROSE FULBRIGHT

Contacts

Asia

China

Sun Hong
Tel +86 21 6137 7020
hong.sun@nortonrosefulbright.com

Hong Kong

Alfred Wu
Tel +852 3405 2528
alfred.wu@nortonrosefulbright.com

Etelka Bogardi
Tel +852 3405 2578
etelka.bogardi@nortonrosefulbright.com

India

Sherina Petit
Tel +44 20 7444 5573
sherina.petit@nortonrosefulbright.com

Japan

George Gibson
Tel +81 3 5218 6823
george.gibson@nortonrosefulbright.com

Jason Lemann
Tel +81 3 5218 6825
jason.lemann@nortonrosefulbright.com

Singapore

Wilson Ang
Tel +65 6309 5392
wilson.ang@nortonrosefulbright.com

Paul Sumilas
Tel +65 6309 5442
paul.sumilas@nortonrosefulbright.com

Thailand

Somboon Kitiyansub
Tel +662 205 8509
somboon.kitiyansub@nortonrosefulbright.com

Sarah Chen
Tel +662 205 8518
sarah.chen@nortonrosefulbright.com

Australia

Abigail McGregor
Tel +61 3 8686 6632
abigail.mcgregor@nortonrosefulbright.com

Global

Global head of dispute resolution and litigation

Gerard G. Pecht
Tel +1 713 651 5243
gerard.pecht@nortonrosefulbright.com

Head of business ethics and anti-corruption

Sam Eastwood
Tel +44 20 7444 2694
sam.eastwood@nortonrosefulbright.com

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.