

HONG KONG, SAR

● Little or no enforcement

2.3% of global exports

Investigations and cases

In the period 2016-2019, it is unknown whether Hong Kong opened any investigations. It commenced no known cases and concluded no known cases.

Several cases involving Hong Kong residents or companies were brought in the United States. Former Hong Kong Secretary for Home Affairs Patrick Ho Chi-Ping was convicted in 2019 of violations of the US Foreign Corrupt Practices Act (FCPA) for his role in a multi-year, multi-million-dollar scheme to bribe top officials of Chad and Uganda in exchange for business advantages for **CEFC China Energy Company**.¹ Former **Goldman Sachs** Southeast Asia Chairman Tim Leissner, who had a base in Hong Kong, pleaded guilty in 2018 to FCPA violations in connection with the Malaysian 1MDB scandal.² The violations involved the transfer of funds through a Hong Kong bank account in the name of a holding company.³ According to an order by the US Securities and Exchange Commission

(SEC) in 2019, Leissner, “in coordination with other Goldman Sachs senior executives, authorised and paid bribes and kickbacks to government officials in Malaysia and... Abu Dhabi in order to secure lucrative business for Goldman Sachs”.⁴ Hong Kong’s financial regulator banned him from re-entering the industry for life and the SEC took a similar step.⁵ A Hong Kong Goldman Sachs executive resident in Hong Kong was also charged. **Credit Suisse (Hong Kong)**, a Hong Kong-based subsidiary of the **Credit Suisse Group AG (CSAG)**, reached a resolution with the US Department of Justice in 2018 and agreed to pay a US\$47 million criminal penalty for its role in a scheme to corruptly win banking business by awarding employment to friends and family of Chinese officials.⁶

Recent developments

Several reforms have been enacted to help align Hong Kong’s system with Financial Action Task Force (FATF) standards.⁷ Since 1 March 2018, a number of additional Hong Kong businesses and professions have been subject to enhanced customer due diligence and record-keeping obligations under Hong Kong anti-money laundering legislation.⁸ In December 2018, the Hong Kong Monetary Authority issued a circular to the financial industry recommending standards for the prevention and management of risks of misconduct, including a whistleblowing policy and training programmes.⁹ Amendments introduced in 2019 to the rules on

¹ Patrick Ho’s conviction was for his role in money laundering and a multimillion-dollar scheme to bribe state leaders and officials of Chad and Uganda in exchange for business advantages for CEFC China Energy Company Limited, a Shanghai-based conglomerate. He was convicted on seven out of eight counts of bribery and money-laundering, sentenced to three years in prison and fined HK\$3.1 million (US\$400,000), www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-sentenced-3

² <https://www.sec.gov/litigation/admin/2019/34-87750.pdf>

³ <https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known>; <https://www.justice.gov/opa/press-release/file/1106936/download>. The holding company was a shell company incorporated in the British Virgin Islands, owned by Tim Leissner’s co-conspirator and controlled by both the co-conspirator and Tim Leissner.

⁴ <https://www.sec.gov/litigation/admin/2019/34-87750.pdf>

⁵ <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=19PR60>; <https://de.reuters.com/article/us-goldman-sachs-1mdb-sfc/hong-kong-regulator-bans-former-goldman-banker-leissner-for-life-over-1mdb-idUSKCN11Y12B>

⁶ <https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt>

⁷ Consultations on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Terrorist Financing Regulation in Hong Kong, April 2017, www.fstb.gov.hk/fsb/ppr/consult/doc/conclu_eaml_etbo_e.pdf Anti-money laundering and counter-terrorist financing measures (Hong Kong, China) Mutual Evaluation Report, September 2019, <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Hong-Kong-2019.pdf>

⁸ The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance (the AML Law), <https://www.cr.gov.hk/en/publications/docs/es1201822053-e.pdf>. The Companies (Amendment) Ordinance 2018 adds a New Division 2A in Part 12 of the Companies Ordinance (Cap. 622) and new Schedules 5A, 5B and 5C. See also the Section on Beneficial Ownership Transparency about the Companies (Amendment) Ordinance of 2018.

⁹ <http://www.conventuslaw.com/report/hong-kong-whistleblower-protection-high-time-for-a/>

stock exchange listings aim to limit the misuse of listed companies for “backdoor” listings and to restrict the creation of shell companies.¹⁰

In October 2019, a proposed extradition bill that would have permitted the transfer of individuals suspected of criminal activity, including bribery offences, to mainland China for investigation and prosecution was formally withdrawn.¹¹

Transparency of enforcement information

The Independent Commission Against Corruption (ICAC) publishes statistics on the number of prosecutions and reports of corruption, as well as notable corruption-related investigations and cases.¹² Otherwise, data on foreign bribery enforcement is difficult to locate, as Hong Kong has no centralised database or press release outlet on foreign corruption enforcement. Hong Kong does not publish statistics on mutual legal assistance (MLA) requests made or received.

Court decisions and case resolutions which are significant as precedents on points of law, procedure, court practice and the public interest are reported in full and made available to the public through the judiciary’s official website.¹³

Beneficial ownership transparency

There is no central register of beneficial ownership of companies or trusts. However, the Companies Ordinance was amended in 2018 to require companies incorporated in Hong Kong to identify persons who exercise significant control, and to maintain a significant controllers’ register (SCR).¹⁴ While the ordinance does not require SCRs to be publicly available, they must be accessible to law enforcement officers on demand.¹⁵ SCRs must be kept at the company’s registered office or a prescribed place in Hong Kong, in either hard copy or electronic form.¹⁶ Trusts are also required to meet these requirements, although beneficiaries with less than a 25 per cent stake are not identified as beneficial owners.¹⁷ Companies listed on the Hong Kong stock exchange are exempt, as they are subject to more stringent disclosure requirements.¹⁸ Foreign companies are also exempt.

Inadequacies in legal framework

Hong Kong’s Prevention of Bribery Ordinance (POBO) still has no specific offence of bribery of foreign public officials. Instead, this crime is dealt with through the offence of corrupt transactions with agents, as Hong Kong courts have broadly interpreted the term “agent” to include foreign

¹⁰ https://www.skadden.com/insights/publications/2019/08/hkexs-latest-rule-amendments?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

¹¹ <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.htm>

¹² The ICAC is Hong Kong’s independent government agency responsible for investigating bribery-related cases and common law misconduct, <http://www.icac.org.hk/en/rc/figure/prosecute/index.html>; <http://www.icac.org.hk/en/law/case/index.html>

¹³ https://www.judiciary.hk/en/judgments_legal_reference/index.html

¹⁴ https://www.cr.gov.hk/en/publications/docs/GN20170623_2405-e.pdf; The Companies (Amendment) Bill 2017 came into force on 1 March 2018. Hong Kong was rated largely compliant with FATF recommendation 24 with regards to the transparency and beneficial ownership of legal persons, <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Hong-Kong-2019.pdf>. Section 653H, Companies (Amendment) Ordinance 2018. Part 1 of Schedule 5A to the Companies (Amendment) Ordinance 2018 has definitions of person with significant control.

¹⁵ Sections 653X, 653Y and 653Z, Companies (Amendment) Ordinance 2018. A law enforcement officer is one whose functions relate to the prevention, detection or investigation of money laundering or terrorist financing. A law enforcement officer includes an officer of the following government departments or statutory bodies: Companies Registry; Customs and Excise Department; Hong Kong Monetary Authority; Hong Kong Police Force; Immigration Department; Inland Revenue Department; Insurance Authority; Independent Commission against Corruption, and the Securities and Futures Commission. Section 653B, Companies (Amendment) Ordinance 2018.

¹⁶ Section 653M, Companies (Amendment) Ordinance 2018, <https://www.cr.gov.hk/en/publications/docs/es1201822053-e.pdf>; Companies must notify the Registrar of Companies of the place where their SCRs are kept, and of any change (section 654N).

¹⁷ Section 1(e) Part 1 Schedule 5A, Companies (Amendment) Ordinance 2018

¹⁸ Listed corporations must keep a register of individuals or entities owning 5 per cent or more interests in any voting shares (including any beneficial owner of such shares). Such register is open for inspection by the public. Section 336(1) of the Securities and Futures Ordinance (Cap.571).

public officials.¹⁹ However, the POBO only applies if the offer of a bribe is made in Hong Kong.²⁰ This means that Hong Kong enforcement authorities have no grounds to prosecute a person or entity for bribing foreign government officials outside Hong Kong.

Hong Kong has no specific legislation protecting or rewarding whistleblowers, in either the public or the private sector.

The POBO does not include strict liability offences for companies for failure to prevent bribery, as under the UK Bribery Act. Hong Kong courts are willing to find corporate entities liable under common law, in particular under the “identification principle”, which holds a corporate entity liable for the acts of officers in control of the entity. The identification principle has been criticised as unsuitable to the modern realities of multinational corporations, in which complex corporate structures make it difficult to identify a single decision-maker with the requisite criminal intent. The POBO does not address liability of a company for the acts of its subsidiaries. Liability is subject to the general rules of attribution, which refer to whether or not the acts of a subsidiary can be attributed to the mind or direction of the parent.²¹

Penalties are inadequate, especially in relation to corporate entities. There is no specific regime for recovery against corporate entities, nor is there a formal scheme in place to ban convicted corporate entities from participating in public procurement processes.²²

Inadequacies in enforcement system

Money laundering continues to be a high risk for Hong Kong, as highlighted by the Tim Leissner case. The government’s own review rated the city’s overall money laundering threats and vulnerabilities as “medium-high”, with the banking sector in particular facing a “high” risk.²³ Hong Kong has not prosecuted any legal persons for money laundering.

As Hong Kong has no foreign bribery offence, an MLA request relating to foreign bribery may not satisfy the dual criminality requirement for coercive MLA unless the underlying conduct constitutes a crime under Hong Kong law.²⁴ The 2019 FATF Mutual Evaluation Report on Hong Kong noted that the low number of outgoing MLA requests does not reflect Hong Kong’s risk profile.²⁵

Recommendations

- Become a party to the OECD Anti-Bribery Convention
- Expand the coverage of beneficial ownership of trusts by requiring that all beneficiaries of a trust with nexus to Hong Kong are identified and the information can be accessed
- Establish laws that clearly prohibit Hong Kong persons and entities from engaging in corrupt practices overseas, including bribery of foreign public officials
- Define “foreign public officials” in POBO and other applicable laws
- Establish a robust legal framework addressing whistleblower protection
- Establish laws that expressly address liability of legal persons
- Establish laws that expressly prescribe foreign bribery-related sanctions
- Criminalise the failure of companies to prevent bribery
- Continue efforts at monitoring the newly introduced SCR and to adequately address any legal gaps that may arise
- Increase

¹⁹ Section 9, POBO. *B v. Commissioner of the Independent Commission against Corruption* [2010] 3 HKC 118-129, Court of Final Appeal. This held that where an advantage is offered in Hong Kong, section 9(2) of the Prevention of Bribery Ordinance applies, even if the recipient is a public official of a place outside Hong Kong, and the actual forbearance concerned is in relation to his public duties in that place.

²⁰ In a landmark decision in 2012, the Court of Appeal held that POBO section 9 does not apply extraterritorially to an offer of a bribe made outside Hong Kong aimed at inducing acts of a foreign official, and any agreement made in Hong Kong to make such an offer is not triable in Hong Kong as a conspiracy. *CACC 99/2012*. The decision was confirmed by the Court of Final Appeal on 1 August 2014 (FAMC 1/2014), www.corporatecomplianceinsights.com/a-safe-haven-from-which-to-plan-foreign-bribes-the-lack-of-extra-territoriality-of-hong-kongs-anti-bribery-laws/

¹²⁴³ <https://nationalcrimeagency.gov.uk/what-we-do/national-economic-crime-centre>

²² <https://thelawreviews.co.uk/edition/the-anti-bribery-and-anti-corruption-review-edition-6/1151853/hong-kong>. Also elaborated on in the *Exporting Corruption* Report 2018.

²³ Hong Kong Money Laundering and Terrorist Financing Risk Assessment Report, April 2018, https://www.fstb.gov.hk/fsb/aml/en/doc/hk-risk-assessment-report_e.pdf

²⁴ <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39984764.pdf>; See Articles 46 and 57 of the UN Convention against Corruption.

²⁵ <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Hong-Kong-China-2019.pdf>

enforcement efforts, including through the ICAC and collaborative initiatives with foreign governments and other international anti-bribery organisations.