GIR

ASIA-PACIFIC
INVESTIGATIONS REVIEW 2023

As well as daily news, GIR curates a range of comprehensive regional reviews. This volume contains insight and thought leadership from 17 pre-eminent practitioners in the Asia-Pacific region. Inside you will find articles on Australia, China and Singapore; on the main types of cryptocurrency fraud and how to trace cryptocurrency; and on how to 'do' a multi-jurisdictional internal investigations with all of challenges and contradictory requests from various agencies that those can entail.

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Preface

Welcome to the *Asia-Pacific Investigations Review 2023*, one of Global Investigations Review's annual yearbook-style reports. Global Investigations Review (for any newcomers) is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters, in their chosen professional niche.

Throughout the year, the GIR editorial team delivers daily news, surveys and features; organises the liveliest events (GIR Live); and maintains innovative research tools and know-how products to make working life more efficient.

In addition, with the aid of external contributors, we curate a range of regional reviews that go deeper into local developments than the exigencies of journalism allow.

The *Asia-Pacific Investigations Review* is one such publication. It contains insight and thought leadership from 17 pre-eminent practitioners from across the region. Across some 130-plus pages, you will find this particular volume to be part retrospective, part primer, part crystal ball – and 100 per cent useful. As you would expect from GIR, all contributors are vetted for their standing and knowledge before being invited to take part.

Together they address a variety of subjects pertinent to internal investigations undertaken in the region, complete with footnotes and relevant statistics. This edition in particular focuses on Australia, Singapore and China, and has overviews on cryptocurrencies, on the challenge of dealing with more than one national enforcement agency, and on how to work smarter in the post-covid world.

As so often with our annual reviews, a close read yields many gems. On this occasion, for this reader, they included that:

- Vietnam is on an anti-corruption drive;
- Singapore requires you to report if property may be 'connected' to crime even where the property (or the crime) are unconnected with Singapore;
- LinkedIn is one of the apps sophisticated fraudsters now use to find and groom their victims; and
- There are 18,000 cryptocurrencies currently in existence.

And much, much more. I also commend the Herbert Smith article on the challenges of multi-jurisdictional internal investigations. It is one of the most lucid explanations of the key points GIR has ever published. I was also impressed, later in the book, by the splendid explanation of the various Chinese laws conditioning data-transfer.

As ever, if you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you. Please contact us on insight@globalarbitrationreview.com.

David Samuels
Publisher, Global Investigations Review
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Singapore: Handling Financial Services Investigations

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WongPartnership LLP

In summary

Singapore's robust but practical regulatory approach is integral in ensuring that it continues to thrive as a stable, sustainable business and financial hub. In recent years, there has been a shift in our legislative and regulatory framework, from a merits-based approach to a disclosure-based regime. This seeks to encourage a pro-business environment while still allowing for well-managed risk-taking and innovation, underpinned by high standards of financial regulation and strict supervision.

Discussion points

- Singapore's main regulatory bodies for financial regulation and prosecution
- Roles of these regulatory bodies in driving compliance and enforcement
- Tools encouraging voluntary disclosure and self-reporting
- Range of enforcement actions imposed by regulatory bodies
- Considerations for internal investigations
- Singapore's role in international cooperation and enforcement for cross-border investigations

Referenced in this article

- *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] 136 FCR 357
- *Regina (Jet2.com Ltd) v Civil Aviation Authority (Law Society Intervening)* [2020] 2 WLR 1215
- Securities and Futures Act (SFA)
- *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367

In just over five decades, Singapore has established itself as the pre-eminent financial centre for the Asia-Pacific region. Home to over 3,000 financial institutions (FIs) across the full spectrum of asset classes, Singapore offers a pro-business environment that allows for well-managed risk-taking and innovation, underpinned by high standards of financial regulation and strict supervision. Particularly in the wake of recent scandals affecting the industry that have had far-reaching consequences, Singapore's robust but practical regulatory approach is integral in ensuring that it continues to thrive as a stable, sustainable business and financial hub.

The main regulatory bodies empowered to undertake financial services investigations and prosecutions are the following:

- The Monetary Authority of Singapore (MAS), which is the central bank and integrated financial regulator of Singapore. It regulates and supervises the financial services sector through administering, among others, the Securities and Futures Act 2001 (SFA), the Financial Advisers Act 2001 (FAA), and the Singapore Code on Take-overs and Mergers. MAS oversees the enforcement of the civil penalty regime for market misconduct. Errant corporates and directors may potentially face civil penalties, Prohibition orders (PO) or licence revocations.[1] On 2 July 2021, MAS issued a consultation paper proposing to strengthen and standardise its investigative powers across various MAS-administered acts, including by requiring a person to appear for examination; entering premises without a warrant; and the transferring of evidence between MAS, the police and the public prosecutor.[2]
- The Singapore Exchange Ltd (SGX), which plays a dual role as both market regulator and commercial entity. SGX manages the day-to-day regulation of listed companies, monitors ongoing compliance with listing requirements and provides support on regulatory issues to listed companies. The regulatory functions of SGX are carried out by an independent regulatory subsidiary, the Singapore Exchange Regulation Pte Ltd (SGX RegCo), which has a separate board of directors to make the segregation of SGX RegCo's regulatory functions more explicit from SGX's commercial and operating activities. SGX RegCo is empowered to investigate infractions of the Listing Rules and to take appropriate disciplinary actions for violations, such as

1 MAS Enforcement Report July 2020 to December 2021 (published April 2022) (the MAS Enforcement Report) at https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Monographs-and-Information-Papers/ENF-Report-20202021-PDF.pdf. MAS may also issue reprimands and warnings. One of the noteworthy reprimands to senior management in the past year was of the CEO and director of Aviva Financial Advisers Pte Ltd (Aviva FA) for failure to put in place arrangements to monitor the activities of an external consultant and to address the issue of poor conduct of Aviva FA's representatives (which included misrepresentations to customers regarding the nature and features of certain insurance products).

2 https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/2021-FI-Amendment-Bill/Proposed-Amendments-to-MAS-Investigative-and-Other-Powers-under-the-Various-Acts.pdf.

issuing reprimands to non-compliant corporates.[3] SGX RegCo's powers of enforcement were expanded in August 2021 to enable swifter enforcement outcomes.[4]

- The Singapore Police Force (SPF), which has broad investigative powers pursuant to Part IV of the Criminal Procedure Code 2010 (CPC). The Commercial Affairs Department (CAD), which is a specialised division of the Singapore Police Force, investigates a wide spectrum of commercial and financial crimes. Through the Joint Investigations Arrangement, MAS and CAD cooperate to co-investigate all capital markets and financial advisory offences, allowing for the consolidation of investigative resources and further improvement of the effectiveness of market misconduct investigations. In March 2021, the CAD also formed the Anti-Scam Division to 'ensure efficient enforcement coordination and swift information sharing to enhance the scam fighting efforts of the . . . SPF'.[5]
- The Corrupt Practices Investigation Bureau (CPIB), which is an independent agency that reports directly to the Prime Minister's Office. CPIB investigates both public and private sector corruption offences. The powers of investigation of CPIB officers are set out in Part 4 of the Prevention of Corruption Act 1960.
- The Accounting and Corporate Regulatory Authority (ACRA), which regulates business registration, financial reporting, public accountants and corporate service providers. ACRA administers, among others, the Accountants Act 2004 and the Companies Act 1967 and its powers of enforcement are set out in, *inter alia*, section 39 of the Accounting and Corporate Regulatory Authority Act 2004.
- The Competition and Consumer Commission of Singapore (CCCS), which promotes competition in markets by eliminating or controlling practices that potentially hinder competition in Singapore. CCCS enforces the Competition Act 2004 and the Consumer Protection (Fair Trading) Act 2003, taking action against anticompetitive agreements, corporate abuse of dominance in the marketplace and mergers that substantially lessen competition, and protects consumers from such unfair practices.[6]
- The Personal Data Protection Commission (PDPC), which implements policies to promote the protection of personal data and develops Advisory Guidelines to promote compliance with the same.[7]

3 www.sgx.com/regulation/about-sgx-regco#Regulatory%20Functions.

4 https://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers. See also amendments to the Mainboard Rules and Catalist Rules at https://rulebook.sgx.com/sites/default/files/net_file_store/AMENDMENTS_TO_ENFORCEMENT_(MAINBOARD)_1_August_2021.pdf and https://rulebook.sgx.com/sites/default/files/net_file_store/AMENDMENTS_TO_ENFORCEMENT_(CATALIST)_1_August_2021.pdf respectively.

5 CAD Annual Report 2020 released on 8 October 2021, accessible at https://www.police.gov.sg/media-room/publications?filter=9BC92AE1F3FF452D9CECC3D03C7D5BCB.

6 CCCS' investigation and enforcement powers are set out in Division 5 Part 3 of the Competition Act 2004 and Part 3A of the Consumer Protection (Fair Trading Act) 2003.

7 The PDPC's powers of investigation are set out in Schedule 9 of the Personal Data Protection Act 2012.

Following the completion of investigations, the Attorney-General's Chambers, which has oversight of all prosecutions, may prosecute potential offenders in court.

When handling financial services investigations, it is not only critical to understand the interplay between regulatory agencies, but to address at the outset whether to self-report or cooperate with investigations, and whether legal professional privilege applies.

Self-reporting

Singapore's legislative and regulatory framework is a disclosure-based regime.[8] For offences where a deferred prosecution agreement (DPA) is available,[9] self-reporting may be a factor considered in the prosecution's decisions on whether to enter into a DPA, and on the conditions or any penalty imposed therein.

For companies listed on the Singapore Exchange, Rule 703 of the Listing Manual (LM) requires a listed company to disclose, in a timely manner, any information it has concerning itself, its subsidiaries, or associated companies that is either 'necessary to avoid the establishment of a false market in [its] securities', or that 'would be likely to materially affect the price or value of its securities'. Non-compliance is an offence if intentional or reckless.[10] Directors can also be prosecuted in their personal capacity for the acts of their company, provided the non-compliance was proven to be committed with their 'consent or connivance', or is attributable to their neglect.[11] In addition to the above, listed companies are also obliged to 'comply-or-explain' with regard to deviations from the Code of Corporate Governance (the Code).[12] While variations to the Code are permitted, companies must 'explicitly state and explain' in a comprehensive and meaningful way how their varied practices are 'consistent with the aim and philosophy' of the principles set out in the Code.[13]

Under the CPC and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 (CDSA), self-reporting is also required for offences connected with anti-money laundering and counter-financing of terrorism. The CDSA imposes an obligation on individuals to file a suspicious transaction report with CAD as soon as is reasonably practicable once they know or have reasonable grounds to suspect that any property represents the proceeds of, was used in connection with, or is intended to be used in connection

8 Speech by Tharman Shanmugaratnam at the OECD Asian Corporate Governance Roundtable (27 June 2007), www.mas.gov.sg/news/speeches/2007/speech-by-mr-tharman-and-second-minister-for-finance-at-the-oecd2007.

9 See Sixth Schedule of the CPC, these offences include corruption, money laundering, and certain types of market misconduct under the SFA.

10 Section 203 of the SFA; while negligent non-disclosure is not a criminal offence under section 203(3) of the SFA, civil liability can still arise.

11 Section 331 of the SFA.

12 Code at [2] of the Introduction.

13 Code at [8] of the Introduction.

with any act that may constitute criminal conduct, and the information on which the knowledge (or suspicion) is based came to their attention during the course of their trade, profession, business or employment.[14] Individuals who disclose possible offences are given statutory protection, such as immunity against certain civil proceedings and anonymity.[15] Failure to self-report attracts criminal penalties.[16]

Further, FIs and payment services providers are required to self-report under mandatory notices issued by MAS.[17] For example, FIs are required to report any misconduct committed by its representatives, including criminal conduct, inappropriate advice or inadequate disclosure of information to clients, failures to satisfy fit and proper criteria, non-compliance with regulatory requirements, and serious breaches of internal policy or codes of conduct.[18] FIs are also required to undertake internal investigations into their representatives' conduct. Where there has been no instance of reportable misconduct in the course of the financial year, FIs are required to submit an annual nil return.[19]

On 14 May 2021, MAS issued its Response to Feedback from Public Consultation on Revisions to Misconduct Reporting Requirements and Proposals to Mandate Reference Checks for Representatives (the Response)[20] and a Consultation Paper on Proposals to Mandate Reference Checks.[21] In the Response, MAS provided guiding principles to assist FIs in assessing and determining whether a representative has committed an act of misconduct within the reportable categories, and proposed extending the reporting obligation from 14 calendar days to 21 calendar days to allow FIs to establish with reasonable certainty whether a representative has committed misconduct before reporting it to MAS. FIs will also be required to provide to the relevant representative a copy of any misconduct report (and update report) filed, and to take reasonable steps to do so with former representatives. Representatives will in turn be required to provide their current or recruiting FIs with any misconduct report that has

14 Section 45(1) of the CDSA, where a person knows or has reasonable grounds to suspect that any property was used in connection with, represents the proceeds of or is intended to be used in connection with any act that may constitute drug dealing or criminal conduct, and the information on which the knowledge or suspicion is based came to their attention during the course of their trade, profession, business or employment.
15 Sections 45(6), 46 and 47 of the CDSA.
16 Section 45(3) of the CDSA.
17 These notices are issued by MAS pursuant to, *inter alia*, section 101 of the SFA, section 67 of the FAA and section 102 of the Payment Services Act 2019 (PSA). Contravention is a criminal offence under section 101(3) of the SFA, section 67(5) of the FAA and section 102(5) of the PSA.
18 MAS Notice SFA04-N11, Reporting of Misconduct of Representatives by Holders of Capital Markets Service Licence and Exempt Financial Institutions; MAS Notice FAA-N14, Reporting of Misconduct of Representatives by Financial Advisers (Notice FAA-N14).
19 Notice FAA-N14.
20 www.mas.gov.sg/publications/consultations/2018/consultation-paper-on-revisions-to-misconduct-reporting-requirements-and-proposals-to-mandate-reference-checks-for-representatives.
21 www.mas.gov.sg/publications/consultations/2021/consultation-paper-on-proposals-to-mandate-reference-checks.

been filed against them.[22] The Consultation Paper expanded on MAS's proposal to implement mandatory reference checks for FI representatives, extending the ambit of such checks to other significant employees (ie, employees whose misconduct has the potential to detrimentally affect an FI's prudential soundness, reputation, customers' interests or the public's confidence and trust in the financial industry).

In the realm of competition law, CCCS has a leniency programme that offers different levels of benefits to businesses, depending on whether they are the first to come forward with information about cartel activity or on whether investigations have already commenced when they come forward.[23]

CCCS also operates a 'leniency plus' programme, which incentivises businesses that cooperate with CCCS in cartel investigations in one market to inform of their participation in a separate cartel in another market. In this case, applicable businesses may be granted leniency in respect of the second market, and also receive a reduction in the financial penalties in the first market.[24]

Internal investigations

In cases involving certain types of misconduct by their representatives, MAS requires FIs to conduct an internal investigation and keep proper records of, among other things, interviews with relevant parties, documentary evidence of the alleged misconduct, and the investigator's assessment and recommendation.[25] Other scenarios in which FIs may be prompted to launch an internal investigation include the receipt of a complaint from employees or customers, concerns raised by independent directors or their audit committee, incidents of employee misconduct, suspicious transactions, fraud or technology breaches and those in connection with the self-reporting requirements referenced above. Generally, from an FI's perspective, it is important to keep in mind the applicable legal disclosure obligations during the course of the investigations (eg, under the LM or to its directors and shareholders) as well as its reporting obligations under law (eg, under the CPC or the CDSA).

Typical internal investigations involve conducting interviews with relevant employees, management and directors, collection and forensic review of documents, emails, telephone records and electronic device transmissions,

22 Following on from the Response, on 19 April 2022, MAS issued a Consultation Paper on Revised Notices on Misconduct Reporting Requirements under the SFA, FAA and the Insurance Act 1966, inviting responses to the proposed amendments to the relevant Notices, https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/Consultation-on-Revised-Notices-on-Misconduct-Reporting-Requirements.pdf.

23 CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016 (effective 1 December 2016) (CCCS Guidelines on Cartel Activity 2016).

24 CCCS Guidelines on Cartel Activity 2016 at [6.1]–[6.3].

25 Notice SFA04-N11; Notice FAA-N14.

and tracing of the proceeds of fraud. External third parties, such as lawyers, accountants, forensic investigators and computer experts, are often asked to assist in the investigations. All individuals being interviewed or investigated may retain their own lawyers, depending on the nature and gravity of the investigations. If there are reasonable grounds to suspect that the investigations may lead to prosecutions or civil action, it is advisable to consider retaining lawyers at an earlier stage so that the statements given during the internal investigations may be considered with the benefit of legal advice.

Care must be taken that there is no breach of banking secrecy under section 47 of the Banking Act (Cap 19) or of personal data under the PDPA in the course of investigations. One way to address the issue is to implement appropriate anonymising of any customer or personal information before it is referenced by the FI concerned.

A key question in internal investigations is the extent to which legal professional privilege can be maintained.[26] In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* (*Skandinaviska*),[27] the Court of Appeal had to consider whether draft reports submitted by auditors to the company were protected by legal professional privilege. In *Skandinaviska*, Asia Pacific Breweries (Singapore) (APBS) was informed by CAD that its finance manager had fraudulently opened bank accounts in the company's name to borrow money for his personal use, prompting the board of directors to constitute a special committee comprising external auditors and lawyers to investigate and review the company's internal control systems and procedures. Although draft reports were prepared by the external auditors, a final report was never issued.

Legal advice privilege

The Court of Appeal in *Skandinaviska* accepted that communications to and from a third party were not protected by legal advice privilege and that auditors would not be regarded as agents of communication for the purposes of legal advice privilege. The court, however, strongly endorsed the decision of the Australian Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (*Pratt Holdings*),[28] which suggested a broader and more flexible approach that was 'principled, logically coherent and yet practical'. In *Pratt Holdings*, communications from third parties were accorded legal advice privilege by focusing on the nature of the function the third party performed, rather than the nature of the third party's legal relationship with the party that engaged it. This has commonly

26 Legal professional privilege covers both legal advice privilege (all confidential communications between a client and his or her lawyer) and litigation privilege (all communications between a client and his or her lawyer and other third parties that were made for the predominant purpose of litigation).
27 [2007] 2 SLR(R) 367.
28 [2004] 136 FCR 357.

been termed as the 'dominant purpose' test. Such an approach accords with modern commercial reality, with parties often engaging the assistance of third-party experts who are not lawyers, and is particularly apposite in cases of large commercial fraud where the victims need expert advice, not only to protect themselves from future fraud, but also to determine the rights and liabilities in connection with the fraud. The Court of Appeal in *Skandinaviska* did not decide on whether the draft auditors' report was subject to legal advice privilege, as this issue was not argued by APBS's counsel. However, if the flexible dominant purpose approach were applied to the facts, legal advice privilege arguably would extend to the legal advice embedded in or that formed an integral part of the draft reports, even though the draft reports were prepared by the third-party auditors and forwarded directly to APBS by those auditors.

The English Court of Appeal in *Regina (Jet2.com Ltd) v Civil Aviation Authority (Law Society Intervening)* (*Jet2*)[29] recently confirmed that the 'dominant purpose' test applied to legal advice privilege, which is in line with the broader and more flexible approach noted in *Pratt Holdings*. While the English position on legal advice privilege appears to be settled following *Jet2*, it remains to be seen whether the 'dominant purpose' test with regard to legal advice privilege would be endorsed by the Singapore courts. That said, given that the Court of Appeal in *Skandinaviska* had strongly endorsed the broader and more flexible approach in *Pratt Holdings*, it is likely that the courts will choose to focus on the nature of the function the third party performed, rather than on the nature of the legal relationship between the parties.

Litigation privilege

The Court of Appeal in *Skandinaviska* found that as the dominant purpose of the draft reports at the time they were created was in aid of litigation, litigation privilege applied to the draft reports. APBS had appointed external auditors and lawyers to determine and quantify the financial impact of the finance manager's fraud and to ascertain APBS's potential liability with regard to the foreign banks. In this regard, as litigation was imminent[30] and 'foremost in the mind' of APBS, such communications were, therefore, protected by litigation privilege.[31]

In light of *Skandinaviska*, it appears that FIs may be able to maintain legal professional privilege over investigation reports, statements and drafts that are created during internal investigations if there is a reasonable prospect of litigation, and legal advice is sought for the main purpose of litigation or

29 [2020] 2 WLR 1215.

30 The Singapore High Court in *Comptroller of Income Tax v ARW and another* [2017] SGHC 16 noted at [37] that where there is a high probability or likelihood of litigation, litigation is likely to be made out to be dominant purpose since a party would be expected to take steps to prepare for the probable and the likely.

31 *Skandinaviska* at [88].

contemplated litigation. The benefit of this is significant: various statutes recognise that powers of investigation that require disclosure of documents and information do not extend to any communications protected by legal professional privilege.[32]

In-house counsel

Legal advice privilege extends to communications with in-house counsel that are made for the dominant purpose of seeking legal advice.[33]

Exceptions to legal professional privilege

These relate to communications made in furtherance of an illegal purpose, or any fact observed by any advocate or solicitor in the course of his or her employment as such showing that any crime or fraud had been committed since the commencement of his or her employment.[34] As for litigation privilege, despite the literal wording of section 131 of the EA, which suggests that litigation privilege is an absolute privilege, in *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd*,[35] the High Court held that litigation privilege under section 131 of the EA is subject to the same fraud exception found in section 128(2) of the EA.

Procedure for handling privileged material seized

The High Court in *Ravi s/o Madasamy v Attorney General*[36] clarified the procedure for handling legally privileged material seized by the authorities. After considering the approach adopted in the US, Australia, New Zealand and England and Wales, the ourt held that an independent 'privilege team' within the AGC (comprising officers not involved in the underlying investigation) should be the party reviewing the seized materials for privilege. The Court would only determine the matter if there is a dispute. This approach is most similar to the US practice.

32 Section 66(3) of the Competition Act and Sections 30(9)(a) and 34(5) of the CDSA.
33 Section 128A of the Evidence Act (Cap 97) (EA).
34 Section 128(2) of the EA.
35 [2010] 1 SLR 833.
36 [2021] 4 SLR 956

Waiver and limited waivers

The powers to compel disclosure of documents and information to an investigating body do not extend to communications protected by legal professional privilege. In *Yap Sing Yee v Management Corporation Strata Title Plan No. 1267*,[37] the High Court held that statutes will not be regarded to have revoked legal advice privilege unless this is expressly provided for or abrogated by necessary implication.

Such a waiver of privilege in relation to regulators may give rise to the question of whether the waiver may be limited, and whether privilege may still be maintained in other contexts. For instance, in relation to third parties, the UK Court of Appeal has held that a litigant who made clear that waiver was being made only for certain limited purposes was nevertheless able to maintain privilege under circumstances outside those purposes.[38] The Singapore High Court considered this decision in making the ruling that as a particular document had been disclosed only for the purposes of a specific application and that legal privilege had not otherwise been waived, any waiver of legal privilege was limited to the specific purpose of the application.[39] It remains to be seen to what extent Singapore courts will follow this line of reasoning in other contexts, although it would be prudent to seek to expressly limit waiver in any event.

To not inadvertently waive privilege, particularly under circumstances where the reports from internal investigations are required to be submitted to the regulators, mandate letters and strict communication protocols should be implemented at the commencement of any investigation. Should the investigation include a cross-border element, it is critical to establish at the outset the extent to which legal professional privilege may be effective given that not all jurisdictions recognise legal professional privilege, and even for those that do, there are differences in what types of communications are regarded as being privileged. It is also necessary to consider whether the report can be submitted to regulators on a 'limited waiver of privilege' basis, and if so what the scope of this waiver should be. Needless to say, the scope must be carefully and expressly spelt out, so as not to result in waiver that is wider than intended.

Cooperation and DPAs

Generally, FIs and their directors, officers and employees in Singapore are obliged to cooperate with regulatory investigations by the aforementioned authorities. The failure to attend police interviews, produce a document or electronic record, or give information to a public servant when one is legally bound to, or the giving of false statements, are offences under Chapters X and XI of the Penal Code 1871. Further, the failure to appear before MAS and to render

37 [2011] 2 SLR 998.
38 *Berezovsky v Hine & Ors* [2011] EWCA Civ 1089.
39 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [57].

all reasonable assistance in connection with investigations, and the failure to produce accounts for inspection, are offences under Part IX of the SFA.

FIs under investigation would be entitled to rely on legal professional privilege and the privilege against self-incrimination. However, in many instances, they may choose to waive privilege and turn over privileged material to regulators, on the basis that full cooperation would be favourably regarded, particularly in instances where regulators may have the discretion to proceed via a civil penalty, via criminal prosecution, or a DPA.

The Criminal Justice Reform Act 2018 (No. 19 of 2018) introduced DPAs into the CPC.[40] Under the DPA framework, companies can seek to avoid criminal prosecution in exchange for compliance with certain conditions,[41] restricted to offences in the Sixth Schedule to the CPC (ie, offences relating to corruption, money laundering, dealing with stolen property or the proceeds of crime, and falsification of records). To become effective, a DPA must be sanctioned by the High Court, which must decide that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. The Public Prosecutor can thereafter apply to the High Court to have a 'discharge amounting to an acquittal' granted in favour of the subject company once the DPA has been completed and complied with. Although the viability and usefulness of DPAs has yet to be tested in the Singapore investigations scene, it is clear that the DPA regime is intended to incentivise and encourage a higher level of cooperation with the authorities, which would hopefully assist and lead to a decrease in commission of future offences.

A key condition that may be imposed in a DPA would be to require the company to cooperate in any investigation relating to the alleged offence. In addition, a company may agree to pay a financial penalty, compensate victims of the alleged offence, implement a robust compliance programme, or make changes to an existing compliance programme that will reduce the risk of a recurrence of any conduct prohibited by the DPA.

In terms of the level of cooperation that may be required to enter into an ideal DPA, companies may take guidance from *SFO v Rolls-Royce Plc*. The UK's Serious Fraud Office (SFO) had entered into a DPA with Rolls-Royce and agreed to grant Rolls-Royce amnesty for criminal conduct involving bribery and corruption, in exchange for several terms and conditions (such as a financial penalty and the requirement for Rolls-Royce to cooperate fully and honestly with SFO in relation to any prosecution brought by SFO in respect of the alleged offences). Crucially, SFO observed that its decision to offer the DPA to Rolls-Royce was

40 With effect from 31 October 2018.

41 These conditions include: providing an admission of wrongdoing, paying a financial penalty, disgorging profits, implementing programmes for corporate reform; and assisting in the investigation and prosecution of other wrongdoers. During the second reading of the Criminal Justice Reform Act 2018 in Parliament, the then Senior Minister of State for Finance and Law Ms Indranee Rajah noted that the financial penalties under the DPA regime would not be subject to a statutory maximum.

heavily influenced by the fact that Rolls-Royce had fully cooperated with SFO during its investigations and opened its doors, providing SFO with copies of key documents and access to all relevant emails. Rolls-Royce had also waived legal professional privilege in respect of certain documents or communications, which was viewed as a key indicator of whether a company was genuinely cooperating and deserving of a DPA.

Enforcement and trends

Corporate entities can be subject to both criminal and civil liability for their employees' misconduct. The Interpretation Act 1965 defines a 'person' or 'party' as including 'any company or association or body of persons, corporate or unincorporate',[42] that criminal liability may attach to. A company may also be held liable for its employee's conduct if the latter is considered the 'directing mind and will' of the company.[43] Further, depending on the nature of misconduct involved,[44] companies can be held liable under the SFA for market misconduct committed by employees if the market misconduct was committed with the companies' consent or connivance,[45] or was attributable to the companies' negligence in failing to prevent or detect the employees' market misconduct.[46]

Aside from imprisonment, companies can be subject to most other forms of sanction, including fines, civil penalties or even disqualification from the right to carry out certain actions in the future.[47] Generally speaking, companies face higher financial penalties than individuals, and some offence-creating provisions specifically provide for this.[48] Where the company or offence concerned falls under the purview of a specific regulator (eg, MAS or SGX), additional sanctions may flow from the offence, such as the revocation of or conditions placed upon any licence required.

In recent years, SGX and SGX RegCo have taken a more interventionist approach towards enforcement. As it stands, this trend can be expected to continue, as regulators seek to enhance issuer accountability and investor confidence in the market. SGX's powers of enforcement were expanded in August 2021 to

42 Section 2 of the IA.
43 *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] 1 SLR(R) 327.
44 For example, a company could be liable for insider trading pursuant to sections 218 and 219 of the SFA read with section 226(1) of the SFA, although it has a defence under section 226(2) of the SFA.
45 Section 236B of the SFA; see also MAS: Explanatory Brief on amendments to the SFA 2008, www.mas.gov.sg/news/speeches/2008/explanatory-brief-sfa-amendment-bill-2008-and-faa-amendment-bill-2008 and MAS: Explanatory Brief on amendments to the SFA 2012, www.mas.gov.sg/news/speeches/2012/explanatory-brief.
46 Section 236C of the SFA.
47 For example, where a company has engaged in discriminatory hiring practices, it may be barred by the Ministry of Manpower from applying for new immigration work passes for its employees for a specified period.
48 Namely, those relating to corruption, money laundering, dealing with stolen property or the proceeds of crime, and falsification of records.

enable swifter enforcement outcomes. From 1 August 2021, SGX RegCo has the powers to:

1. issue a public reprimand and require issuers to comply with specified conditions;
2. prohibit issuers from accessing the facilities of the market for a specified period or until the specified conditions are fulfilled;
3. prohibit issuers from appointing or reappointing a director or an executive officer for up to three years; and
4. require a director or an executive officer to resign.

Although SGX RegCo's powers under (1) are non-appealable, the regulator's powers under (2) to (4) are appealable before the Listing Appeals Committee.[49]

From 1 January 2022, issuers will also be required to state in their annual reports that they have an appropriate whistle-blowing policy in place, as well as provide an explanation of how they have complied with certain key requirements such as having independent oversight of the policy and commitment to protecting the identity of whistle-blowers.[50]

On 27 April 2022, MAS released its Enforcement Report for July 2020 to December 2021.[51] The average time taken by MAS to complete reviews and investigations decreased from 24 to nine months in criminal cases, and from 26 to 19 months in civil penalty cases. The key areas of focus were market abuse (such as false trading), financial services misconduct (including mis-selling of financial products) and money laundering-related control breaches. Enforcement outcomes included seven criminal convictions, $2.59 million in financial penalties and compositions, one licence revocation and 20 POs. MAS also introduced a new section providing updates on the status of selected ongoing major investigations, which take longer to complete due to, *inter alia*, their complexity or cross-border elements necessitating assistance from foreign regulators.[52] These updates provide summaries of actions taken, statuses of the investigations and in the case of Noble Group Limited, an indication when the joint investigation hopes to reach a conclusion.[53]

49 http://rulebook.sgx.com/sites/default/files/net_file_store/AMENDMENTS_TO_ENFORCEMENT_(MAINBOARD)_1_August_2021.pdf; https://rulebook.sgx.com/sites/default/files/net_file_store/AMENDMENTS_TO_ENFORCEMENT_(CATALIST)_1_August_2021.pdf.

50 www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers.

51 https://www.mas.gov.sg/news/media-releases/2022/mas-reports-strong-enforcement-outcomes-and-publishes-updates-on-major-investigations.

52 These cases are the investigations into (1) Noble Group Limited; (2) Hyflux Ltd; (3) Eagle Hospitality Trust and (4) Hui Xun Asset Management Pte Ltd (formerly known as Envysion Wealth Management Pte Ltd).

53 https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Monographs-and-Information-Papers/ENF-Report-20202021-PDF.pdf. Enforcement actions taken by MAS in the past five years are also

In April 2022, Parliament also passed the Financial Services and Markets Bill 2022.[54] The new Financial Services and Markets Act 2022 (FSM Act) will expand and harmonise MAS' powers to issue POs (which currently reside in various industry specific Acts): (1) the categories of persons that may be subject to POs are expanded; (2) Instead of specific acts of misconduct, the ground for issuing POs is a single fit and proper test comprising the elements of (a) honesty, integrity and reputation; (b) competence and capability; and (c) financial soundness. This is consistent with the approach taken in the UK. The FSM Act will also regulate all virtual asset service providers created in Singapore, and which provide services relating to these virtual assets outside Singapore.[55]

Also on the cryptocurrency front, on 30 June 2022, MAS reprimanded the cryptocurrency hedge fund, Three Arrows Capital Pte. Ltd. (Three Arrows), for providing false information to MAS and exceeding the assets under management threshold allowed for a registered fund management company. It is also assessing if there were further breaches of MAS' regulations by Three Arrows.[56] In an interview with the Financial Times, the chief fintech officer at MAS also stated that it will be 'brutal and unrelentingly hard' on bad behaviour in the crypto industry.[57] Greater regulatory scrutiny on cryptocurrency players may be expected moving forward.

International cooperation

Singapore has adopted various international conventions into its domestic law (eg, the CDSA, the Terrorism (Suppression of Financing) Act 2002, the Extradition Act 1968 and the Extradition (Commonwealth Territories) Declaration, the United Nations Act 2001, and the Mutual Assistance in Criminal Matters Act 2000), which facilitate the provision and obtaining of international assistance in criminal matters. These international conventions facilitate the provision and obtaining of evidence, arrangements for parties to give evidence or assist in criminal investigations, and the forfeiture or confiscation of property in the recovery. Singapore is also party to the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, which provides a platform for countries in the region to request and give assistance in the collection of evidence for criminal investigations and prosecutions.

published by MAS at https://www.mas.gov.sg/regulation/enforcement/enforcement-actions?page=1&q=reprimand&sort=&rows=10#.

54 https://sso.agc.gov.sg/Acts-Supp/18-2022/Published/20220511?DocDate=20220511.

55 See the Explanatory Brief on the first reading of the bill https://www.mas.gov.sg/news/speeches/2022/explanatory-brief-for-financial-services-and-markets-bill-2022 and the speech on the 2nd reading of the bill. https://www.mas.gov.sg/news/speeches/2022/financial-services-and-markets-bill-second-reading-speech-on-4-april-2022.

56 https://corp.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers.

57 *Financial Times*, 'Singapore regulator vows to be "unrelentingly hard" on crypto' (23 June 2022) at https://www.ft.com/content/aae591e1-b291-493c-94c6-6babcb682831.

The regulatory authorities in Singapore also work with other foreign regulatory bodies on such initiatives. For instance, the Singapore Police Force is a member of Interpol while MAS is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. In connection with this, MAS is empowered under the SFA to provide assistance to its foreign counterparts in foreign investigative and enforcement actions. Under section 172(1) of the SFA, MAS may, in relation to a request by a foreign regulatory authority for assistance, transmit such information in its possession or order any party to furnish MAS with that information. MAS may also order any person to furnish such information directly to the foreign regulatory authority where there is an ongoing investigation or enforcement by the foreign authority.[58]

Conclusions and outlook

Financial services investigations have not slowed down in the past year notwithstanding the challenges posed by the covid-19 pandemic. The various regulatory authorities also continue to work on enhancing the regulatory framework and enforcement regime, to for greater effectiveness in addressing misconduct in the financial sector. These demonstrate Singapore's commitment to maintaining its position as a trusted financial hub.

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Joy Tan is the joint head of the commercial and corporate disputes practice, the corporate governance and compliance practice and the financial services regulatory practice.

Her main practice areas are banking, corporate and commercial dispute resolution and contentious investigations. She also regularly advises on corporate governance and financial services regulatory matters under the Companies Act, Securities and Futures Act and other regulatory statutes, including in relation to corporate fraud, anti-money laundering issues and market misconduct. She has represented corporations and shareholders in disputes relating to fraud, minority oppression, corporate transactions and share valuations.

58 Section 172(1)(c) read with section 172(2) of the SFA.

Joy graduated with first class honours from Cambridge University. In 1992, she was awarded the UK Council of Legal Education Prize at the Non-Vocational Bar Exam. Joy is admitted to both the English Bar and the Singapore Bar. She joined the Singapore Legal Service as a Justices' Law Clerk with the Singapore Supreme Court before entering private practice.

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Jenny Tsin is the joint head of the employment practice and a partner in both the commercial and corporate disputes practice and the corporate governance and compliance practice.

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On the investigations front, Jenny frequently handles sensitive and complex investigations relating to employee misconduct and workplace safety issues. Jenny has led investigations relating to sexual harassment, conduct that potentially amounts to breaches of sanctions and other financial regulations, privacy breaches, and landmark cases where workplace safety breaches led to loss of lives.

As a partner in the corporate governance and compliance practice, Jenny advises and speaks on provisions of the Securities and Futures Act, the Companies Act and other regulatory statutes. Jenny has an interest in issues relating to corporate fraud, anti-money laundering and insider trading. Jenny routinely advises and assists corporations in their investigations of such issues.

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Headquartered in Singapore, WongPartnership is an award-winning law firm and one of the largest in the country. As a leading provider of legal services, we offer our clients access to our offices in China and Myanmar, and in Abu Dhabi, Dubai, Indonesia, Malaysia and the Philippines, through the member firms of WPG, a regional law network. Together, WPG offers the expertise of over 400 professionals to meet the needs of our clients throughout the region.

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