



**ASIA-PACIFIC**  
INVESTIGATIONS REVIEW  
2022

# Asia-Pacific Investigations Review 2022

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# Preface

Welcome to the *Asia-Pacific Investigations Review 2022*, a Global Investigations Review special report.

Global Investigations Review is the online home for all those who specialise in investigating, and resolving, suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the GIR editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live') – covid-19 allowing; and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Asia-Pacific Investigations Review 2022*, which you are reading, is part of that series. It contains insight and thought leadership by 21 pre-eminent practitioners from the region. All contributors are vetted for their standing and knowledge before being invited to take part.

Across eight chapters and 145 pages, they capture and interpret the most substantial developments pertinent to internal and external investigations from the past 12 months, complete with footnotes and relevant statistics. Elsewhere they focus on a particular topic so you can get up to speed quickly. The result is an invaluable desktop reference work.

This edition covers Australia, China, Hong Kong, India and Singapore in detail; and has a pair of items on the consequences of the continuing US–China trade war; along with an overview on how best to deal with requests from foreign enforcers.

As always with these reviews, a close read yields many gems. For this reader, those include:

- a timeline of the incidents in the US–China trade war;

- a reminder that it is often counterterrorism and anti-money laundering efforts that wedge open a path through which all kinds of cases subsequently pass;
- learning that extradition, which is always tricky, is trickiest in the area of tax and revenue;
- learning that Interpol Red Notices may have been widely abused;
- learning that Australia's Security and Investment Commission now has a 'why not litigate' policy; and
- discovering the thought, on page 134, that China is aping the US on corporate law enforcement 'just as Germany's Kaiser . . . sought to . . . mimic British naval power at the turn of the twentieth century'.

And much, much more.

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 write to [insight@globalinvestigationsreview.com](mailto:insight@globalinvestigationsreview.com).

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# Singapore: Handling Financial Services Investigations

Joy Tan and Jenny Tsin  
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 Monetary Authority of Singapore (MAS), which acts as the central bank of Singapore. It regulates and supervises the financial services sector through administering the Securities and Futures Act (Cap 289) (SFA), the Financial Advisers Act (Cap 110) (FAA), and the Singapore Code on Take-overs and Mergers. MAS oversees the enforcement of the civil penalty regime for market misconduct, and its officers have the power to compel disclosure of the names of persons behind any acquisition or disposal of securities,<sup>1</sup> to provide information or produce company books,<sup>2</sup> and to examine witnesses.<sup>3</sup> MAS officers may also enter premises without a warrant.<sup>4</sup> As noted in the MAS Enforcement Report, errant corporates and directors may potentially face civil penalties, Prohibition Orders or licence revocations.<sup>5</sup> On 2 July 2021, MAS issued a consultation paper proposing to strengthen and standardise its investigative powers across various MAS-administered acts, including by expanding its powers in relation to requiring information from any person for the purposes of investigation; requiring a person to appear for examination; the power to enter premises without a warrant; and the transferring of evidence between MAS, the police and the public prosecutor.<sup>6</sup>

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1 Section 142 of the SFA.

2 Section 163 of the SFA.

3 Section 154 of the SFA.

4 Section 163A of the SFA.

5 MAS Enforcement Report January 2019 to June 2020 (published November 2020) (the MAS Enforcement Report); MAS meted out S\$11.7 million in Civil Penalties, created 25 Prohibition Orders and revoked three licences.

6 <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-Variou-Acts.pdf>.

- 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.<sup>7</sup> SGX RegCo is empowered to investigate infractions of the Listing Rules and to take appropriate disciplinary actions for violations, such as issuing reprimands to non-compliant corporates.<sup>8</sup> On 24 June 2021, SGX RegCo announced the expansion of its powers of enforcement and the additional requirement for its issuers to have a whistle-blowing policy in place.<sup>9</sup>
- The Singapore Police Force, which has broad investigative powers pursuant to Part IV of the Criminal Procedure Code (Cap 68) (CPC). A police officer may issue a written order to any person in Singapore requiring them to assist in investigations, failing which they may apply to court for a warrant to secure his or her attendance.<sup>10</sup> A police officer can also issue a written order for the production of relevant documents or evidence<sup>11</sup> and may conduct a search or apply for a search warrant to retrieve such documents or evidence.<sup>12</sup> The Commercial Affairs Department (CAD), which is a specialised division of the Singapore Police Force, investigates a wide spectrum of commercial and financial crimes. Since 2015, MAS and CAD have been cooperating through the Joint Investigations Arrangement to co-investigate offences under the SFA and FAA. In 2018, the scope of this arrangement was expanded to include all capital markets and financial advisory offences, allowing for the consolidation of investigative resources and further improvement of the effectiveness of market misconduct investigations.
- 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. Under the Prevention of Corruption

7 [www.sgx.com/wps/wcm/connect/sgx\\_en/home/highlights/news\\_releases/singapore\\_exchange\\_regulation\\_appoints\\_tan\\_cheng\\_han\\_chairman](http://www.sgx.com/wps/wcm/connect/sgx_en/home/highlights/news_releases/singapore_exchange_regulation_appoints_tan_cheng_han_chairman).

8 [www.sgx.com/regulation/about-sgx-regco#Regulatory%20Functions](http://www.sgx.com/regulation/about-sgx-regco#Regulatory%20Functions).

9 [www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers](http://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers).

10 Section 21 of the CPC.

11 Section 20 of the CPC.

12 Sections 24 and 25 of the CPC.

Act (Cap 241) (PCA), CPIB officers are empowered to arrest, conduct a premise search or seize evidence without warrant if there is credible information or reasonable suspicion that a corruption offence has been committed.<sup>13</sup>

- The Accounting and Corporate Regulatory Authority (ACRA), which regulates business registration, financial reporting, public accountants, and corporate service providers. Under the Accounting and Corporate Regulatory Authority Act (Cap 2A), ACRA officers have the power to examine any persons reasonably believed to be acquainted with the facts or circumstances of a case, and to require any person to furnish information or documents.<sup>14</sup> Errant corporates and directors who have breached their statutory obligations may be offered composition fines in lieu of prosecution. In the event that the offer of composition is not accepted, ACRA may prosecute the directors in court.<sup>15</sup>
- 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 (Cap 50B) and the Consumer Protection (Fair Trading) Act (Cap 52A), 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. CCCS officers may require the production of specified documents or information and may enter premises to carry out inspections, either with or without a warrant.<sup>16</sup> CCCS may issue directions to require corporates to stop or modify the contravening activity or conduct, and impose a financial penalty on errant corporates.
- 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. Under the Personal Data Protection Act 2012 (No. 26 of 2012) (PDPA), PDPC may require any person to produce a specified document or specified information that it considers relevant<sup>17</sup> and may enter

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13 Sections 15 and 22(2) of the PCA.

14 Section 31 of the Accounting and Corporate Regulatory Authority Act.

15 [www.acra.gov.sg/compliance/enforcement-policy-statement/compliance-and-enforcement-measures](http://www.acra.gov.sg/compliance/enforcement-policy-statement/compliance-and-enforcement-measures).

16 Sections 63 and 64 of the Competition Act.

17 Paragraph 1 of the Ninth Schedule of the PDPA.

premises without a warrant.<sup>18</sup> It also reviews data protection policies, and may issue directives or decisions to ensure compliance.<sup>19</sup> PDPC may issue decisions, warnings, financial penalties or further directions to errant organisations.<sup>20</sup>

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

There has been a shift in Singapore's legislative and regulatory framework, from a merits-based approach to a disclosure-based regime.<sup>21</sup> For offences where a deferred prosecution agreement (DPA) is available,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> In addition to the above, listed companies are also obliged to 'comply-or-explain' with

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18 Paragraph 2 of the Ninth Schedule of the PDPA.

19 [www.pdpc.gov.sg/who-we-are/about-us](http://www.pdpc.gov.sg/who-we-are/about-us).

20 [www.pdpc.gov.sg/Commissions-Decisions](http://www.pdpc.gov.sg/Commissions-Decisions).

21 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](http://www.mas.gov.sg/news/speeches/2007/speech-by-mr-tharman-and-second-minister-for-finance-at-the-oecd2007).

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

23 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.

24 Section 331 of the SFA.

regard to deviations from the Code of Corporate Governance (the Code).<sup>25</sup> 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.<sup>26</sup>

Under the CPC and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) (CDSA), self-reporting is also required for offences connected with anti-money laundering and counter-financing of terrorism framework. 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 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.<sup>27</sup> Individuals who disclose possible offences are given statutory protection, such as immunity against certain civil proceedings and anonymity.<sup>28</sup> Failure to self-report attracts criminal penalties.<sup>29</sup>

Further, FIs and payment services providers are required to self-report under mandatory notices issued by MAS.<sup>30</sup> 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.<sup>31</sup> FIs are also required to undertake

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25 Code at [2] of the Introduction.

26 Code at [8] of the Introduction.

27 Section 39(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.

28 Sections 39(6), 40 and 40A of the CDSA.

29 Section 39(2) of the CDSA.

30 These notices are issued by MAS pursuant to section 101 of the SFA and section 102 of the Payment Services Act 2019 (No. 2 of 2019) (PSA). Contravention is a criminal offence under section 101(3) of the SFA and section 102(5) of the PSA.

31 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).

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.<sup>32</sup>

On 14 May 2021, MAS issued a Consultation Paper on Proposals to Mandate Reference Checks;<sup>33</sup> and a Response to Feedback from Public Consultation on Revisions to Misconduct Reporting Requirements and Proposals to Mandate Reference Checks for Representatives (the Response).<sup>34</sup> 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 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.

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 and/or on whether investigations have already commenced when they come forward:<sup>35</sup>

- Where a business is the first to provide evidence of cartel activity and does so before CCCS has commenced an investigation, provided the business satisfies certain stipulated conditions,<sup>36</sup> it can be entitled to immunity from financial penalties.

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32 Notice FAA-N14.

33 [www.mas.gov.sg/publications/consultations/2021/consultation-paper-on-proposals-to-mandate-reference-checks](http://www.mas.gov.sg/publications/consultations/2021/consultation-paper-on-proposals-to-mandate-reference-checks).

34 [www.mas.gov.sg/publications/consultations/2018/consultation-paper-on-revisions-to-misconduct-reporting-requirements-and-proposals-to-mandate-reference-checks-for-representatives](http://www.mas.gov.sg/publications/consultations/2018/consultation-paper-on-revisions-to-misconduct-reporting-requirements-and-proposals-to-mandate-reference-checks-for-representatives).

35 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).

36 CCCS Guidelines on Cartel Activity 2016 at [2.2]; the conditions are: (a) the business must provide CCCS with all the information, documents and evidence available to it regarding the cartel activity, immediately; (b) the business must grant an appropriate waiver of confidentiality to CCCS in respect of any foreign country where the said business may have also applied for leniency or in respect of any regulatory authority to which the business may have informed of the cartel activity; (c) the business must unconditionally admit to the conduct for which leniency is sought

- Where a business is the first to come forward seeking leniency and satisfies all the conditions, but does so only after CCCS has started an investigation, it would not qualify for immunity. That said, the business may still qualify for a reduction of up to 100 per cent of the financial penalties.<sup>37</sup>
- Where a business is not the first to come forward, or if it initiated the cartel activity or coerced another party to join the cartel's activity, that business may still be granted a reduction of up to 50 per cent of the financial penalties if it comes forward before CCCS issues a notice of a proposed infringement decision under the Competition Act. However, in this scenario, the business will still need to comply with the other stipulated conditions.<sup>38</sup>

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.<sup>39</sup>

## 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.<sup>40</sup> Other scenarios in which FIs may be prompted to launch an internal investigation include, upon receipt of a complaint from employees or customers, or concerns raised by independent directors or their audit committee, or pursuant to incidents of employee misconduct, suspicious transactions, fraud or technology breaches, or in connection with the self-reporting requirements referenced above. Generally, from an FI's perspective, it is important to

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and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore; (d) the business must maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by CCCS arising as a result of the investigation; and (e) the business must refrain from further participation in the cartel activity from the time it discloses the cartel to CCCS, unless CCCS directs otherwise.

37 CCCS Guidelines on Cartel Activity 2016 at [2.3].

38 CCCS Guidelines on Cartel Activity 2016 at [2.4].

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

40 Notice SFA04-N11; Notice FAA-N14.

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, 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.<sup>41</sup> In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals (Skandinaviska)*,<sup>42</sup> 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.

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41 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).

42 [2007] 2 SLR(R) 367.



## 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)*,<sup>43</sup> 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 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)*<sup>44</sup> 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.

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43 [2004] 136 FCR 357.

44 [2020] 2 WLR 1215.

## 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<sup>45</sup> and 'foremost in the mind' of APBS, such communications were, therefore, protected by litigation privilege.<sup>46</sup>

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 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.<sup>47</sup>

## In-house counsel

Legal advice privilege extends to communications with in-house counsel that is made for the dominant purpose of seeking legal advice.<sup>48</sup>

## 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.<sup>49</sup> As for litigation privilege, despite the literal wording of section 131 of the EA, which suggests that litigation privilege is an absolute privilege, in

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45 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.

46 *Skandinaviska* at [88].

47 Section 66(3) of the Competition Act and Sections 30(9)(a) and 34(5) of the CDSA.

48 Section 128A of the Evidence Act (Cap 97) (EA).

49 Section 128(2) of the EA.

*Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd*,<sup>50</sup> 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.

## 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*,<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.

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50 [2010] 1 SLR 833.

51 [2011] 2 SLR 998.

52 *Berezovsky v Hine & Ors* [2011] EWCA Civ 1089.

53 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [57].

## 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 (Cap 224). Further, the failure to appear before MAS and to render 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.<sup>54</sup> Under the DPA framework, companies can seek to avoid criminal prosecution in exchange for compliance with certain conditions,<sup>55</sup> 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.

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<sup>54</sup> With effect from 31 October 2018.

<sup>55</sup> 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.

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 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 (Cap 1) (IA) defines a 'person' or 'party' as including 'any company or association or body of persons, corporate or unincorporate',<sup>56</sup> 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.<sup>57</sup> Further, depending on the nature of misconduct involved,<sup>58</sup> companies can be held liable under the SFA for market misconduct committed by employees

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56 Section 2 of the IA.

57 *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] 1 SLR(R) 327.

58 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.

if the market misconduct was committed with the companies' consent or connivance,<sup>59</sup> or was attributable to the companies' negligence in failing to prevent or detect the employees' market misconduct.<sup>60</sup>

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.<sup>61</sup> Generally speaking, companies face higher financial penalties than individuals, and some offence-creating provisions specifically provide for this.<sup>62</sup> 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. On 24 June 2021, SGX RegCo announced that it has expanded its range of enforcement powers and now requires issuers to have a whistle-blowing policy in place.<sup>63</sup> Specifically in relation to enforcement, from 1 August 2021, SGX RegCo will have 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;

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59 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](http://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](http://www.mas.gov.sg/news/speeches/2012/explanatory-brief).

60 Section 236C of the SFA.

61 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.

62 Namely, those relating to corruption, money laundering, dealing with stolen property or the proceeds of crime, and falsification of records.

63 [www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers](http://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers). Issuers are now required to establish and maintain a whistle-blowing policy that both ensures confidentiality and offers whistle-blowers protection from reprisals. Further, from 1 January 2022, issuers will 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.

- 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.<sup>64</sup>

On 4 November 2020, MAS released its Enforcement Report detailing the Authority's active approach in revoking licences and imposing significant fines.<sup>65</sup> In spite of the global covid-19 pandemic, MAS imposed composition penalties in excess of S\$2.5 million for anti-money laundering and countering the financing of terrorism breaches and failures from 2020 to April 2021.<sup>66</sup> It also meted out S\$11.7 million in civil penalties, 25 Prohibition Orders and had revoked three licences.<sup>67</sup> Overall, MAS also took less time to complete its reviews and investigations into criminal and civil cases, with criminal prosecutions taking an average of 24 months compared with an average of 33 months in the previous reporting period.<sup>68</sup>

As noted above, MAS recently issued a consultation paper on proposed amendments to its investigative powers. Specifically, with regard to enforcement, it has been proposed that MAS be empowered to issue written directions to regulated FIs conducting unregulated business (eg, bitcoin futures, and other payment token

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64 [www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers](http://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers); [http://rulebook.sgx.com/sites/default/files/net\\_file\\_store/AMENDMENTS\\_TO\\_ENFORCEMENT\\_\(MAINBOARD\)\\_1\\_August\\_2021.pdf](http://rulebook.sgx.com/sites/default/files/net_file_store/AMENDMENTS_TO_ENFORCEMENT_(MAINBOARD)_1_August_2021.pdf); [http://rulebook.sgx.com/sites/default/files/net\\_file\\_store/AMENDMENTS\\_TO\\_ENFORCEMENT\\_\(CATALIST\)\\_1\\_August\\_2021.pdf](http://rulebook.sgx.com/sites/default/files/net_file_store/AMENDMENTS_TO_ENFORCEMENT_(CATALIST)_1_August_2021.pdf).

65 Channel News Asia, 'Strong action taken to combat financial misconduct, market abuse in Singapore: MAS', (4 November 2020) at <https://www.channelnewsasia.com/news/singapore/strong-action-to-combat-financial-misconduct-market-abuse-13461624>.

66 [www.mas.gov.sg/regulation/enforcement/enforcement-actions/2021/composition-penalty-on-bank-j-safra-sarasin-ltd-singapore-branch](http://www.mas.gov.sg/regulation/enforcement/enforcement-actions/2021/composition-penalty-on-bank-j-safra-sarasin-ltd-singapore-branch); [www.mas.gov.sg/regulation/enforcement/enforcement-actions/2020/mas-imposes-composition-penalty-of-1100000-on-asiaciti-trust-singapore-pte-ltd-for-amlcft-failures](http://www.mas.gov.sg/regulation/enforcement/enforcement-actions/2020/mas-imposes-composition-penalty-of-1100000-on-asiaciti-trust-singapore-pte-ltd-for-amlcft-failures); [www.mas.gov.sg/regulation/enforcement/enforcement-actions/mas-imposes-composition-penalty-of-400000-on-tmf-trustees-singapore-limited-for-aml-cft-failures](http://www.mas.gov.sg/regulation/enforcement/enforcement-actions/mas-imposes-composition-penalty-of-400000-on-tmf-trustees-singapore-limited-for-aml-cft-failures).

67 MAS Enforcement Report.

68 *The Business Times*, 'MAS accelerates reviews, investigations of criminal and civil cases', (4 November 2020) at [www.businesstimes.com.sg/banking-finance/mas-accelerates-reviews-investigations-of-criminal-and-civil-cases](http://www.businesstimes.com.sg/banking-finance/mas-accelerates-reviews-investigations-of-criminal-and-civil-cases); MAS Enforcement Report.

derivatives traded on overseas exchanges). This, it is hoped, will better manage the risks flowing from such unregulated businesses, and prevent adverse spill-over effects on the FI's regulated business activities.<sup>69</sup>

### **International cooperation**

Singapore has adopted various international conventions into its domestic law, (eg, the CDSA, the Terrorism (Suppression of Financing) Act (Cap 325), the Extradition Act (Cap 103) and the Extradition (Commonwealth Countries) Declaration, the United Nations Act (Cap 339), and the Mutual Assistance in Criminal Matters Act (Cap 190A)), 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.

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.<sup>70</sup>

### **Conclusions and outlook**

Notwithstanding the covid-19 pandemic, regulatory authorities in Singapore have demonstrated that they will be 'continually refining [their] processes, deepening [their] investigative experience, leveraging technology, and strengthening [their]

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69 [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-Variou-Acts.pdf](http://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-Variou-Acts.pdf).

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



collaboration with partners'.<sup>71</sup> This approach will allow Singapore to press ahead with its efforts to build a healthy financial market, and to maintain its position as a leading financial hub.

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<sup>71</sup> *The Business Times*, 'MAS accelerates reviews, investigations of criminal and civil cases', (4 November 2020) at [www.businesstimes.com.sg/banking-finance/mas-accelerates-reviews-investigations-of-criminal-and-civil-cases](http://www.businesstimes.com.sg/banking-finance/mas-accelerates-reviews-investigations-of-criminal-and-civil-cases).



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