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Editor
Nicolas Bourtin

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PREFACE

Observers perceived a deprioritisation of white-collar criminal prosecutions in the United States during the Trump administration and the adoption of policies that were arguably more favourable to corporate defendants: (1) a May 2018 'anti-piling on' policy, (2) an October 2018 policy concerning the selection of monitors, (3) an October 2019 'inability to pay' policy, and (4) a February 2017 policy for the evaluation of corporate compliance programmes, which was further revised in April 2019 and June 2020. These policies, however, while arguably providing transparency, did not mark a foundational change in the US approach to resolving corporate investigations. For example, the US Department of Justice (DOJ) continued its focus on individual culpability in corporate prosecutions – which was formally announced in the September 2015 'Yates Memorandum'. In November 2018, revisions to the Yates Memorandum relaxed the requirements to receive cooperation credit, allowing partial credit for good-faith efforts by a company to identify individuals 'substantially involved', even if the company is unable to identify 'all relevant facts' about individual misconduct.

As the United States emerges from the covid-19 pandemic, the new Biden administration faces a freshly awakened and potentially permanently changed economy. The Biden administration is widely anticipated to reprioritise white-collar criminal prosecutions and usher in a period of increased enforcement and harsher penalties for foreign corruption, healthcare, consumer and environmental fraud, tax evasion and price-fixing, export controls and other trade sanctions, economic espionage, and cybercrime. US and non-US corporations alike will continue to face increasing scrutiny by US authorities. And while many corporate criminal investigations have been resolved through deferred or non-prosecution agreements, the DOJ has increasingly sought and obtained guilty pleas from corporate defendants, often in conjunction with such agreements.

The trend towards more enforcement and harsher penalties has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence or, conversely, have their own rivalries and block the export of evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot

be gleaned from a simple review of a country's criminal code. Of course, nothing can replace the considered advice of an expert local practitioner, but a comprehensive review of corporate investigative practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the Bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more, and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its 11th edition, this publication covers 20 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2021

Chapter 16

SINGAPORE

Joy Tan and Jenny Tsin[1]

I INTRODUCTION

Regulatory authorities empowered to investigate and prosecute corporates include the following:

a Accounting and Corporate Regulatory Authority (ACRA), which regulates business registration, financial reporting, public accountants and corporate service providers.[2] 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.[3] Errant corporates and directors may be offered composition fines in lieu of prosecution and if this offer is not accepted, may be prosecuted in court.[4]

b Singapore Police Force, which has broad investigative powers under the Criminal Procedure Code (CPC),[5] including to enter premises without a warrant, require the attendance of a witness, record statements and conduct searches to retrieve evidence. Within the police force, the specialised Commercial Affairs Department (CAD) investigates commercial and financial crimes.[6]

c Monetary Authority of Singapore (MAS), the central bank of Singapore. MAS regulates and supervises financial institutions (FIs) through the Securities and Futures Act (SFA), the Financial Advisers Act (FAA) and the Singapore Code on Take-overs and Mergers, and enforces the civil penalty regime for market misconduct. MAS officers may require a person to render reasonable assistance in or appear for investigation,[7] or require any person to provide information or produce books relating to any matter under investigation.[8] They may also enter premises without a warrant.[9] Errant corporates and

1 Joy Tan and Jenny Tsin are partners at WongPartnership LLP. The authors thank Simran Toor and Michelle Thio for their assistance in this work.

2 https://www.acra.gov.sg/who-we-are.

3 See Accounting and Corporate Regulatory Authority Act.

4 https://www.acra.gov.sg/compliance/enforcement-policy-statement/compliance-and-enforcement-measures.

5 See Part IV of the Criminal Procedure Code (CPC).

6 https://www.police.gov.sg/Who-We-Are/Organisation-Structure/Specialist-Staff-Departments.

7 Section 154 of the Securities and Futures Act (SFA).

8 Section 163 of the SFA.

9 Section 163A of the SFA.

directors may face civil penalties, prohibition orders or licence revocations.[10] Recently, CAD and MAS have been cooperating through the Joint Investigations Arrangement to co-investigate offences under the SFA and FAA.

d Singapore Exchange Ltd (SGX), which is both a commercial entity and the market regulator. SGX carries out its regulatory functions via an independent subsidiary, Singapore Exchange Regulation Pte Ltd (SGX RegCo). SGX RegCo is empowered to investigate infractions of the Listing Rules and to take appropriate disciplinary actions for violations.[11] On 24 June 2021, SGX RegCo announced that its powers of enforcement have been expanded and that issuers would now be required to have a whistle-blowing policy in place.[12]

e Competition and Consumer Commission of Singapore (CCCS), which administers and enforces the Competition Act, investigates practices that are anticompetitive, and protects consumers.[13] CCCS may require any person to produce documents or information it considers relevant to investigations,[14] and may enter premises without a warrant.[15] It may also issue directions to require a business to stop or modify errant activity or conduct, and can impose financial penalties on non-compliant corporates.[16]

f Corrupt Practices Investigation Bureau (CPIB), which investigates corruption offences across both public and private sectors.[17] CPIB officers are empowered[18] 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.

g Personal Data Protection Commission (PDPC), which administers and enforces the Personal Data Protection Act 2012 (No. 26 of 2012) (PDPA). The PDPC implements policies and develops advisory guidelines to promote the protection of personal data. The PDPC may require any person to produce a specified document or information it considers relevant to investigations,[19] and may enter premises without a warrant.[20] It also reviews corporations' data protection policies and may issue directives or decisions to ensure compliance.[21] The PDPC may issue decisions, warnings, financial penalties or further directions to errant organisations.[22]

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

10 MAS Enforcement Report January 2019 to June 2020 (published November 2020); the Monetary Authority of Singapore (MAS) had meted out S$11.7 million in Civil Penalties, 25 Prohibition Orders and had revoked three licences.

11 For example, Singapore Exchange Regulation Pte Ltd may issue reprimands to non-compliant corporates; https://www.sgx.com/regulation/about-sgx-regco#Regulatory%20Functions.

12 https://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers.

13 See Consumer Protection (Fair Trading) Act; https://www.cccs.gov.sg/about-cccs.

14 Sections 62 and 63 of the Competition Act.

15 Section 64 of the Competition Act.

16 https://www.cccs.gov.sg/faq/complaints-investigations-and-enforcement.

17 https://www.cpib.gov.sg/about-cpib/roles-and-functions.

18 Under the Prevention of Corruption Act (PCA).

19 Paragraph 1 of the Ninth Schedule of the Personal Data Protection Act 2012 (No. 26 of 2012) (PDPA).

20 Paragraph 2 of the Ninth Schedule of the PDPA.

21 https://www.pdpc.gov.sg/who-we-are/about-us.

22 https://www.pdpc.gov.sg/Commissions-Decisions.

Corporates under investigation should always cooperate with the authorities. Various statutes contain provisions penalising a lack of cooperation. For instance, Chapters X and XI of the Penal Code (PC) penalise the giving of false evidence[23] and the destruction of documents.[24]

II CONDUCT

i Self-reporting

Singapore's legislative and regulatory framework adopts a disclosure-based regime.

Rule 703 of the Listing Manual (LM) obliges companies listed on the Singapore Exchange to make timely disclosure of any information a listed entity 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.[25] Directors can be prosecuted in their personal capacity if it is proven that the non-compliance was committed with their 'consent or connivance' or is attributable to their neglect.[26]

Complementing the LM is the revised Code of Corporate Governance (the Code), issued by MAS and applicable to listed companies. Central to the Code is the 'comply or explain' concept.[27] Thus, while variations to the Code are permitted, companies must 'explicitly state and explain'[28] how their varied practices are 'consistent with the aim and philosophy' of the principles set out in the Code.[29]

Separately, FIs and payment service providers under mandatory notices issued by MAS, must also self-report. FIs are required to report to MAS misconduct committed by their representatives.[30] FIs are also required to undertake internal investigations into their representatives' conduct and to submit an annual nil return where there has been no instance of reportable misconduct during the financial year. Failure to comply attracts criminal penalties.[31]

On 14 May 2021, MAS issued (1) Consultation Paper on Proposals to Mandate Reference Checks;[32] and (2) Response to Feedback from Public Consultation on Revisions to Misconduct Reporting Requirements and Proposals to Mandate Reference Checks for Representatives.[33] The Consultation Paper extends MAS's 2018 proposals to implement mandatory reference checks for representatives of FIs, by requiring that reference checks

23 Section 191 of the Penal Code (PC).

24 Section 204 of the PC.

25 Sections 203 and 204 of the SFA.

26 Section 331 of the SFA.

27 Code of Corporate Governance (the Code) at [2] of the Introduction.

28 These explanations must be comprehensive and meaningful.

29 Code at [8] of the Introduction.

30 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).

31 Notice FAA-N14.

32 https://www.mas.gov.sg/publications/consultations/2021/consultation-paper-on-proposals-to-mandate-reference-checks.

33 https://www.mas.gov.sg/publications/consultations/2018/consultation-paper-on-revisions-to-misconduct-reporting-requirements-and-proposals-to-mandate-reference-checks-for-representatives.

also be mandated for other significant employees whose misconduct has the potential to result in detrimental impact to an FI's prudential soundness, reputation, customers' interests or the public's confidence and trust in the financial industry. In the Response to Feedback, MAS stated it will implement certain measures relating to the reporting of misconduct and reference checks on representatives.

More broadly, self-reporting is also generally required to counter money-laundering and terrorist financing.[34]

In respect of competition law matters, 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 whether investigations have already commenced when they come forward.[35]

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

If 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. However, it may still qualify for a reduction of up to 100 per cent of the financial penalties.[37]

If 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, the business will still need to comply with the other stipulated conditions.[38]

---

34 See Section 39(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act) (CDSA):

> *Where a person knows or has reasonable grounds to suspect that any property –*
>
> *(a) in whole or in part, directly or indirectly, represents the proceeds of;*
>
> *(b) was used in connection with; or*
>
> *(c) is intended to be used in connection with,*
>
> *any act which may constitute drug dealing or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.*

Under Section 39(2) of the CDSA, failure to comply with the CDSA attracts criminal penalties.

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: (1) the business must provide CCCS with all the information, documents and evidence available to it regarding the cartel activity; (2) 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; (3) the business must refrain from further participation in the cartel activity from the time it discloses the cartel to CCCS, unless CCCS directs otherwise; (4) the business must unconditionally admit to the conduct for which leniency is sought; and (5) the business must grant an appropriate waiver of confidentiality to CCCS in respect of any foreign country where the business may have also applied for leniency or in respect of any regulatory authority the business may have informed of the cartel activity.

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

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

CCCS also operates a 'leniency plus' programme. This incentivises businesses that cooperate with CCCS in a cartel investigation in one market to inform it of their participation in a separate cartel in another market. Businesses that qualify for this may be granted leniency in respect of the second market and also receive a reduction in the financial penalties in the first market.[39]

For offences where a deferred prosecution agreement (DPA) is available,[40] 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.

ii Internal investigations

A business can conduct its own internal investigations.

Internal investigations typically involve conducting interviews with relevant persons and the review of evidence.[41] External third parties such as lawyers, accountants, forensic investigators and computer experts often assist in the investigations.

Depending on the seriousness and nature of the matter, individuals being interviewed or whose conduct is being investigated may choose to engage their own lawyers.

From the company's perspective, if there are reasonable grounds to suspect that an internal investigation may lead to legal proceedings, it would be prudent to retain lawyers at the earliest stage. This allows the investigation to be conducted with the benefit of legal advice and assists the company in asserting privilege over matters relating to the investigation.

A key issue that often arises is the extent to which legal professional privilege can be maintained during internal investigations. This was considered in the case of *Skandinaviksa Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and other appeals*[42] (*Skandinaviska*).

In *Skandinaviska*, a company, Asia Pacific Breweries (Singapore) (APBS), constituted a special committee comprising external auditors and lawyers to investigate and review its internal controls after a fraud perpetrated by its finance manager. Although draft reports were prepared by the external auditors, a final report was never issued. The Court of Appeal considered whether the draft reports submitted by the auditors to APBS were protected by legal professional privilege.

Legal advice privilege

The Court of Appeal accepted that communications to and from a third party were not protected by legal advice privilege and the auditors would not be regarded as agents of communication for the purposes of legal advice privilege.

That said, the Court of Appeal endorsed the broader approach laid down by the Australian Federal Court in *Pratt Holdings Pty Ltd v. Commissioner of Taxation*[43] (*Pratt Holdings*), which focused 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.

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

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

41 Such as hard copy documents or forensic analysis of information stored in computers.

42 [2007] 2 SLR(R) 367.

43 [2004] 136 FCR 357.

The Court of Appeal did not have to decide whether the draft auditors' report was subject to legal advice privilege as the issue was not argued by APBS's counsel.

In the recent English Court of Appeal decision of *Regina (Jet2.com Ltd) v. Civil Aviation Authority (Law Society Intervening)* (*Jet2*),[44] the English Court of Appeal confirmed that the 'dominant purpose' test applied to legal advice privilege, which is in line with the broad view as advanced in *Pratt Holdings*. While the position appears to be settled in the United Kingdom following *Jet2*, it remains to be seen whether the Singapore courts would choose to adopt a similar approach in subsequent cases. That said, bearing in mind that the Court of Appeal in *Skandinaviska* in fact strongly endorsed the broad approach in *Pratt Holdings*,[45] it is likely that our courts will focus on the nature of the function the third party performed, rather than the nature of the legal relationship between the parties.[46]

Litigation privilege

In *Skandinaviska*, the Court of Appeal found that the dominant purpose of the draft reports at the time they were created was in aid of litigation. This was influenced by the fact that external auditors and a legal adviser had been appointed to discover and quantify the financial impact of the fraud and to determine APBS's potential liability. As litigation was imminent and 'foremost in the mind' of APBS, these communications were protected by litigation privilege.[47]

In-house counsel

Under the Evidence Act, legal advice privilege extends to communications with in-house counsel made for the dominant purpose of seeking legal advice.[48]

Waiver and limited waivers

Various statutes recognise that the powers to compel disclosure of documents and information to an investigating body do not extend to communications protected by legal professional privilege. The Singapore High Court has also held that statutes will not be regarded as revoking legal advice privilege unless that is expressly provided for or abrogated by necessary implication.[49]

Where internal investigation reports are submitted to regulators, it is important to take steps to maintain and not inadvertently waive privilege at any stage[50] and 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.

44 [2020] 2 WLR 1215.

45 *Skandinaviksa Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 (*Skandinaviska*) at [63]–[65].

46 *Pratt Holdings Pty Ltd v. Commissioner of Taxation* [2004] 136 FCR 357 at [41]–[43].

47 *Skandinaviska* at [88].

48 See Section 128A of the Evidence Act.

49 *Yap Sing Lee v. Management Corporation Strata Title Plan No. 1267* [2011] 2 SLR 998.

50 Steps to avoid this include ensuring that strict communication protocols are implemented at the commencement of any investigation, and to clearly spell out the purpose of the investigation in the mandate letters executed in favour of all those engaged in the investigation.

iii Whistle-blowers

At present, there is no overarching legislation in Singapore protecting whistle-blowers.

However, different pieces of legislation contain provisions affording some protection. For instance, the Prevention of Corruption Act (PCA)[51] and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA)[52] afford anonymity to whistle-blowers. Similarly, the identity of whistle-blowers on workplace safety hazards is also protected by statute.[53] In the implementation of CCCS's leniency programme, CCCS will keep the identity of whistle-blowers confidential.[54] Under the Companies Act, auditors are protected from defamation suits and liability when reporting fraud in good faith.[55] The Terrorism (Suppression of Financing) Act (TSOFA) also protects the identity of whistle-blowers.[56]

It is rare for whistle-blowers to be rewarded by means of legislative provision. Two examples are found in competition matters,[57] and on information relating to tax evasion.[58]

The Code requires listed companies to publicly disclose and clearly communicate to employees the existence of any whistle-blowing policy and the procedures for raising concerns of this nature.[59]

As noted above, SGX RegCo has mandated that issuers establish and maintain a whistleblowing policy, which must keep the identity of the whistle-blower confidential and ensure that the whistle-blower is protected from reprisals.[60] In addition, from 1 January 2022, issuers will be required to state in their annual reports that they have such a whistle-blowing policy in place, and 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.[61]

Generally, all companies should have a proper whistle-blowing policy in place that provides an independent avenue for whistle-blowing and assurance that there will be no reprisal actions taken against genuine whistle-blowers. However, in respect of frivolous or false complaints, the policy should provide for the potential ramifications.

51 Section 36 of the PCA, which states that 'no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery'.

52 Sections 39, 40 and 40A of the CDSA, which states 'no witness in any civil or criminal proceedings shall be obliged . . . to disclose the name and address of any informer'.

53 Section 18 of the Workplace Safety and Health Act.

54 CCCS Guidelines on Cartel Activity 2016 at [8.1].

55 Section 208 of the Companies Act.

56 Section 10A of the Terrorism (Suppression of Financing) Act (TSOFA).

57 Where monetary rewards may also be given to informants for information that leads to infringement decisions against cartel members in appropriate situations; https://www.cccs.gov.sg/approach-cccs/making-complaints/reward-scheme.

58 If such information leads to recovery of tax, the informant may be able to receive a reward of 15 per cent of the tax recovered, capped at S$100,000; https://www.iras.gov.sg/IRASHome/Contact-Us/Report-Tax-Evasion/#Rewards.

59 Code at Provision [10.1(f)].

60 https://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers.

61 https://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers.

Other than internal whistle-blowing, affected persons can also report directly to the relevant authorities. This is not uncommon, particularly for employment-related issues. While making a false report to the authorities is an offence, whistle-blowing done in good faith is unlikely to be regarded as a false report.[62]

III ENFORCEMENT

i Corporate liability

Criminal liability and civil penalties

Most offence-creating statutory provisions provide for criminal liability for a 'person' or 'party', which are defined in the Interpretation Act (IA) as including 'any company or association or body of persons, corporate or unincorporate'.[63] Thus, companies in Singapore can commit offences and attract civil penalties. They can also be prosecuted as an accessory (e.g., abetment or conspiracy) to a primary offence.

Where market misconduct offences are concerned, companies can face both criminal liability and civil penalties. The SFA expressly details the circumstances under which liability may accrue to a company. Section 236B of the SFA sets out the criteria required for a corporation to be liable for the acts of an employee or officer.[64] Sections 226 and 227 of the SFA also set out the circumstances under which liability for the acts of an employee relating to insider trading can be attributed to a company.[65] In addition, Section 236C of the SFA allows a civil penalty to be imposed on a company where failure to prevent or detect market misconduct by an employee or officer is attributable to the company's negligence.

Civil liability

A company can attract civil liability for the conduct of its employees and agents, based on the doctrines of vicarious liability and agency, or if the acts of its employees and agents can be attributed to it.

Legal representation

A company and its employees may be represented by the same counsel, so long as their interests are aligned and the requirements on conflicts within the Legal Profession (Professional Conduct) Rules 2015 (PCR) are complied with. Where there is a risk of a conflict arising between the company and the individuals concerned, separate legal representation is recommended from the outset.

62 *Public Prosecutor v. Mohd Ghalib s/o Sadruddin* [2010] SGDC 316, in which a deterrent sentence of six months' imprisonment was imposed on an accused person who had provided false information in a complaint to the Corrupt Practices Investigation Bureau.

63 Section 2 of the Interpretation Act.

64 Namely that the offence must have been committed with the 'consent and connivance' of and 'for the benefit of the corporation'; Section 236B of the SFA.

65 For example, a company can be taken to possess any information that an officer of the company came into possession of in the course of the performance of his or her duties as that officer, and if that officer knows or ought reasonably to know of any matter or thing because of his or her position, it is presumed (until the contrary is proved) that the company knows or ought reasonably to know that matter or thing; see Section 226(1) of the SFA, and the possible defence available under Section 226(2) of the SFA.

ii Penalties

Overview

Other than 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.[66] Typically, financial penalties imposed on companies are higher than those imposed on individuals and some offence-creating provisions specifically provide for this.

DPAs

Under the DPA framework, companies can seek to avoid criminal prosecution in exchange for compliance with certain conditions.[67] DPAs are presently restricted to the offences in the new Sixth Schedule to the CPC.[68]

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. Once the DPA has been completed and complied with, the Public Prosecutor can apply to the High Court to have a 'discharge amounting to an acquittal' granted in favour of the subject company.

Regulatory sanctions

Where the company or offence concerned falls under the purview of a specific regulator, additional sanctions may flow from the offence.[69]

As alluded to above, SGX RegCo has recently announced the expansion of its powers of enforcement. From 1 August 2021, it 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 any 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. While SGX RegCo's powers under point (1) are non-appealable, its powers under points (2) to (4) are appealable before the Listing Appeals Committee.[70]

66 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.

67 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 (No. 19 of 2018) in Parliament, the then Senior Minister of State for Finance and Law Ms Indranee Rajah noted that the financial penalties under the deferred prosecution agreement regime would not be subject to a statutory maximum.

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

69 Such sanctions may include the revocation of or conditions placed upon any required licence.

70 https://www.sgx.com/media-centre/20210624-sgx-regco-expands-range-enforcement-powers.

iii Compliance programmes

Generally, the existence of a compliance programme does not itself amount to a legal defence to a criminal charge. It is nevertheless advisable for companies to implement such programmes, as they allow companies to uncover and address non-compliant aspects within the company. From a practical standpoint, it also allows the company to identify and address any potential loss-causing or liability risks.

In the event that the authorities decide to conduct a criminal investigation into a matter, the existence of a compliance programme (if properly enforced) may be used to persuade the authorities not to take criminal action against the company or individuals involved, or as a basis to enter into discussions for a DPA. If charges are brought against the company in relation to matters relating to the compliance programme, the fact that there is a compliance programme can also be relied upon in mitigation to seek a lower sentence.

iv Prosecution of individuals

Assessment of liability

When an employee faces or has been charged with a criminal offence, the company should first ascertain whether the offending acts were committed in the course of employment. If so, the company should ascertain whether there is a risk of legal liability to it as a result of these acts.

To this end, the company should consider whether an internal (confidential or privileged) investigation should be undertaken. The ramifications for the company could be both legal (resulting in civil or criminal claims) and reputational.

Action against employees concerned

Separately, the company should consider whether any action[71] can or should be taken against the employee at any of the following stages: (1) while the employee is being investigated by the authorities and prior to any criminal charges being brought; (2) during the pendency of the company's internal review; (3) after the internal review is completed and findings have been reached; (4) after the employee is charged in court, but not yet convicted; and (5) after the employee is convicted or – as the case may be – acquitted of the charge in court. A number of factors will have to be considered before reaching a decision at each stage.[72] It is not mandatory for a company to terminate or discipline the employee concerned for it to be considered as having cooperated with the state's investigations.

Coordination between counsel

If both the company and the employee have engaged legal counsel in the course of a government investigation, it is possible for coordination to take place between both sets of counsel. However before doing so, it is important for the parties to consider whether any conflict of interest exists, which would prevent them from doing so.

71 For example, dismissal, suspension or other disciplinary actions.

72 These factors include the terms and content of the company's internal disciplinary policies, the employee's contract, the extent of any reputational impact, the seriousness of the alleged conduct, the likelihood of ongoing loss or damage to the company, the seniority of the employees concerned, the level of cooperation extended to the company by the employees concerned and the presumption that one is innocent until proven guilty.

It is also important for parties to consider whether common interest privilege should be asserted over any ensuing communications. It is prudent for parties to document the extent of the common interest at the outset, and before sharing any privileged material.

Moreover, all such communications must be conducted with care, so as not to breach the provisions in the PCR on the interviewing of witnesses,[73] or the laws pertaining to interfering with or obstructing justice.

Payment of employees' legal fees

Companies may pay the legal fees of its employees. Indeed, many companies obtain directors' and officers' liability insurance policies, which serve to indemnify the company's directors or officers to the extent expressly provided within the policy.

IV INTERNATIONAL

i Extraterritorial jurisdiction

In Singapore, unless expressly provided for by legislation, laws do not have extraterritorial application. The following are notable exceptions to this general position.

TSOFA

Section 34 of the TSOFA states that every person who, outside Singapore, commits an act or omission that, if committed in Singapore, would amount to certain key offences under the TSOFA[74] is deemed to have committed those acts or omissions within Singapore and can be charged, tried and punished accordingly. Section 34 also provides that where certain offences[75] are committed outside Singapore by a Singapore citizen, that person may be dealt with as though the offence was committed in Singapore.

PCA

Section 37(1) of the PCA states that the PCA applies to Singapore citizens located outside Singapore.[76]

73 See Rule 12 of the Legal Profession (Professional Conduct) Rules 2015 on communications and dealings with witnesses.

74 Section 3 of the TSOFA (prohibition against providing or collecting property for terrorist acts); Section 4 of the TSOFA (prohibition against provision of property and services for terrorist purposes); Section 5 of the TSOFA (prohibition against use or possession of property for terrorist purposes).

75 Section 6 of the TSOFA (prohibition against dealing with property of terrorists); Section 8 of the TSOFA (duty to disclose property or information).

76 The effect of this is that if a Singapore citizen commits an offence within the meaning of the PCA while outside Singapore, they can be dealt with as though their acts were committed within Singapore's boundaries.

CDSA

The CDSA deals with money-laundering related offences and the confiscation of benefits from drug dealing or criminal conduct, expressly defines 'criminal conduct' and 'drug dealing' to include the doing of such acts in Singapore 'or elsewhere'.[77] The scope of the CDSA extends to any 'foreign drug dealing offence', 'foreign serious offence' and any property 'whether . . . situated in Singapore or elsewhere'.[78]

ii International cooperation

Singapore has adopted various international conventions into its domestic law that facilitate the provision and obtaining of international assistance in criminal matters, including the provision and obtaining of evidence, the making of arrangements for parties to give evidence or assist in criminal investigations, forfeiture or confiscation of property, securing the custody of a person in transit and locating or identifying persons.[79]

Singapore is also party to the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, which provides a process through which countries in the region can request and provide assistance in the collection of evidence for criminal investigations.

The investigating authorities in Singapore also work with foreign regulatory bodies to promote international cooperation. For example, the Singapore Police Force is a member of Interpol. Similarly, MAS is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. Pursuant to the SFA, MAS can assist its overseas counterparts in foreign investigative actions.[80]

Extradition (both to and from) Singapore is possible, under the Extradition Act (EXA), which provides for the extradition of fugitives to and from foreign states with which Singapore has entered into an extradition treaty, and also a number of declared Commonwealth countries. Only individuals who have (or are alleged to have) committed offences within the definition of an 'extradition crime' under Section 2 of the EXA will qualify for extradition out of Singapore. The extradition processes provided for by the EXA are commonly used.

iii Local law considerations

In multi-jurisdictional investigations, a number of local law considerations are relevant, particularly where the disclosure or sharing of information is concerned.

Where a party is served an order to produce information under Section 22 of the Mutual Assistance in Criminal Matters Act and in good faith complies, that party is immune from civil or criminal action that would otherwise lie against him or her for breach

77 Section 2(1) of the CDSA.

78 Section 3 of the CDSA.

79 The key domestic legislation in this regard include the CDSA, the TSOFA, the Extradition Act and the Extradition (Commonwealth Countries) Declaration, the United Nations Act, and the Mutual Assistance in Criminal Matters Act (MACMA).

80 For example, under Section 172(1) of the SFA, MAS may, upon request, transmit information in its possession or order any party to furnish it with information. MAS may also order any person to furnish information directly to the foreign regulatory authority where there is an ongoing investigation or enforcement by the foreign authority; Section 172(1)(b) read with Section 172(2) of the SFA.

of restrictions concerning the disclosure of information imposed.[81] However, where the request for information emanates from another type of foreign request, considerations of confidentiality, banking secrecy and data protection arise.

The PDPA mandates that data that an organisation has collected, and that can be used to identify an individual, cannot be used or disclosed unless that individual gives or is deemed to have given consent.[82] While the PDPA allows for disclosure of personal data without consent where, among other situations, the disclosure is necessary in the public interest or where disclosure is made to a 'prescribed law enforcement agency' upon production of written authorisation,[83] it does specifically allow disclosure without consent where the request for disclosure emanates from a foreign court or investigatory body.

The Banking Act prohibits banks licensed in Singapore from disclosing 'customer information',[84] except where provided for in the Act.[85] A breach of these provisions will result in criminal liability for the bank or any bank officer involved.[86] One exception where a bank may make disclosure of customer information without the customer's consent is where it is compelled to do so by law.[87]

V YEAR IN REVIEW

i Case law developments

Recent decisions have clarified principles relating to disclosure and privilege within the investigation process.

The Court of Appeal expanded the scope of the prosecution's duty to disclose, noting the additional obligation to disclose a statement of a material witness regardless of whether the statement is favourable, neutral or adverse (in this case, an exculpatory witness).[88] That said, it has been left open whether this relates only to an exculpatory witness or all material persons called as prosecution witnesses.

The High Court clarified the procedure for handling legally privileged material seized by the authorities, noting that a 'privilege team' is to be set up within the AGC and that the subject of the seizure can liaise with this team to assert privilege over certain documents.[89] Any dispute can be resolved by application to the courts. The privilege team should not be part of any subsequent prosecution decisions made in the case.[90] The decision brings helpful clarification as the current legislation does not set out any process by which legally privileged material may be seized or reviewed in the course of investigations.

81 Section 24(1) of the MACMA.

82 Section 13 of the PDPA.

83 Which under the Schedule of the Personal Data Protection (Prescribed Law Enforcement Agencies) Notification 2014 is presently limited to 7 local enforcement agencies.

84 Which is defined as including any information relating to an account of a customer of the bank or any deposits of a customer of the bank; Section 40A of the Banking Act (BA).

85 Section 47 of the BA.

86 Section 47(6) of the BA.

87 See the Third Schedule Part 1 of the BA.

88 *Muhammad Nabill bin Mohd Fuad v. Public Prosecutor* [2020] 1 SLR 984 at [39]-[42].

89 *Ravi s/o Madasamy v. Attorney-General* [2020] SGHC 221.

90 *Ravi s/o Madasamy v. Attorney-General* [2020] SGHC 221 at [72]-[81].

ii Joint investigations

This past year, Singapore has witnessed more robust investigations by regulatory authorities against errant corporates, via the Joint Investigation Arrangement. This ties in with the expanded scope of the Joint Investigation Arrangement in 2018 to cover all capital markets and financial advisory offences.

iii Impact of covid-19

In view of the remote working arrangements adopted by FIs, MAS and the Association of Banks in Singapore jointly issued a paper on managing new risks that could emerge. The key actions areas identified included cybersecurity risks in connection with the use of personal devices, evaluating risk profiles of third-party partners in terms of their remote working controls, and implementing appropriate preventive and detective controls.[91]

Regulatory enforcement has remained robust in Singapore in spite of the pandemic. On 4 November 2020, MAS released its Enforcement Report[92] detailing its active approach in revoking licences and imposing significant fines.[93] The Enforcement Report also observed that MAS was swifter in its reviews and investigations, with criminal prosecutions taking an average of 24 months compared with an average of 33 months in the previous reporting period.[94]

As for other investigating bodies, although CPIB reported a five-year low in the number of corruption-related reports, it noted a high clearance rate of 87 per cent despite the disruptions and challenges caused by the covid-19 pandemic – the highest clearance rate in the past four years.[95]

VI CONCLUSIONS AND OUTLOOK

Notwithstanding the pandemic, Singapore continues to press ahead to maintain its position as a leading financial hub. MAS has stated that it will do so by 'continually refining [its] processes, deepening [its] investigative experience, leveraging technology, and strengthening

91 MAS and Association of Banks in Singapore, Risk Management and Operational Resilience in a Remote Working Environment, March 2021.

92 See footnote 10.

93 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.

94 The Business Times, 'MAS accelerates reviews, investigations of criminal and civil cases', (4 November 2020) at https://www.businesstimes.com.sg/banking-finance/mas-accelerates-reviews-investigations-of-criminal-and-civil-cases.

95 https://www.cpib.gov.sg/press-room/press-releases/corruption-situation-singapore.

[its] collaboration with partners'.[96] In July 2020, it issued a consultation paper proposing the enactment of a new omnibus act for the financial sector that would consolidate its regulatory powers in relation to FIs and digital services. SGX RegCo has also demonstrated a continued commitment to improving regulation by proposing a new enforcement framework for swifter outcomes in enforcement actions.[97] These proposals are clear illustrations of how the authorities intend to continue pressing for increased efficiency and effectiveness in investigations.

96 The Business Times, 'MAS accelerates reviews, investigations of criminal and civil cases', (4 November 2020) at https://www.businesstimes.com.sg/banking-finance/mas-accelerates-reviews-investigations-of-criminal-and-civil-cases.

97 https://www.sgx.com/regulation/public-consultations/20200806-consultation-enhancements-enforcement-and-whistleblowing.

Appendix 1

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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.

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.

Joy is a Fellow of the Chartered Institute of Arbitrators, sits on the Singapore International Arbitration Centre (SIAC) Panel of Arbitrators and is also a panel member of the Law Society disciplinary tribunals appointed by the Honourable Chief Justice under the Legal Profession Act.

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Jenny is experienced in all aspects of employment laws, with particular focus on preventing and resolving disputes between employers and employees. In addition to employment-related disputes, Jenny's dispute resolution experience extends to shareholder disputes, commercial and contractual disputes, and claims relating to directors' duties, auditors' duties and other corporate governance matters, and she has experience in both litigation and arbitration.

On the investigations front, Jenny frequently handles sensitive and complex investigations relating to employee misconduct and workplace safety issues. Jenny has led

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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 regarding such issues.

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