GIR INSIGHT

ASIA-PACIFIC INVESTIGATIONS REVIEW 2020

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Preface

Welcome to the *Asia-Pacific Investigations Review 2020*, 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'); 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 our journalistic output is able.

The *Asia-Pacific Investigations Review 2020*, which you are reading, is part of that series. It contains insight and thought leadership from 37 pre-eminent practitioners from the region. Across 16 chapters, spanning around 200 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic. This edition covers Australia, Cambodia, China, Hong Kong, India, Indonesia, Laos, Myanmar, Singapore, Thailand and Vietnam in jurisdictional overviews. It also looks at the impact of AI, data privacy, forensic accounting and law enforcement in multi-jurisdictional investigations.

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.

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Singapore: Handling Financial Services Investigations

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In just over four decades, Singapore has established itself as the pre-eminent financial centre for the Asia-Pacific region. Home to over 700 financial institutions across the full spectrum of asset classes, Singapore offers a pro-business environment that allows for well-managed risk-taking and innovation while at the same time being underpinned by high standards of financial regulation and strict supervision. Particularly in the wake of the recent scandals affecting the industry that have had far-reaching consequences, Singapore's robust but practical regulatory approach is integral in ensuring that Singapore continues to thrive as a stable, sustainable business and financial hub.

The main regulatory bodies in Singapore empowered to undertake financial services investigations and prosecutions are broadly as follows:

- The Monetary Authority of Singapore (MAS) acts as the central bank of Singapore. It regulates and supervises the financial services sector, including administering the Securities and Futures Act (SFA), the Financial Advisers Act (FAA), and the Singapore Code on Take-overs and Mergers, as well as enforcement of the civil penalty regime for market misconduct. Under Part IX of the SFA, MAS officers have the power to compel disclosure of the names of persons behind any acquisition or disposal of securities, to inspect and order production of company books, and examination of witnesses.
- The Singapore Exchange Ltd (SGX) plays a dual role as both market regulator and commercial entity. It manages the day-to-day regulation of listed companies (which include banks and financial institutions listed on the Singapore Exchange), monitors ongoing compliance with listing requirements and provides support on regulatory issues to listed companies. In terms of enforcement, the SGX also investigates suspected infractions and complaints, and is empowered to take remedial and disciplinary action against defaulting listed companies and their directors and officers. From the third quarter of 2017 onwards, the regulatory functions of the SGX is carried out by an independent regulatory subsidiary of the SGX, the Singapore Exchange Regulation Pte Ltd (SGX RegCo). The SGX RegCo will have a separate

board of directors from the SGX to make more explicit the segregation of the SGX RegCo's regulatory functions from the SGX's commercial and operating activities.[1]

- The police have investigative powers pursuant to Part IV of the Criminal Procedure Code (CPC). By written order, the police may summon any person in Singapore to assist in investigations, failing which the police may apply to court for a warrant to secure his or her attendance.[2] The police have additional powers to issue orders for the production of relevant documents or evidence.[3] In the event of non-compliance, the police may conduct a search or apply for a search warrant to retrieve such documents or evidence.[4] Investigations of financial crimes are generally conducted by the Commercial Affairs Department (CAD), a highly specialised division of the Singapore police force that investigates a wide spectrum of commercial and financial crimes. Where corruption is involved, investigations will be conducted by the Corrupt Practices Investigations Bureau, an independent agency that reports directly to the Prime Minister's office. Prosecutions of financial crime are generally conducted by the Financial Crime and Technology Division of the Attorney-General's Chambers.
- The Competition Commission of Singapore (CCS) promotes competition in the markets by eliminating or controlling practices that potentially hinder competition in Singapore. The CCS enforces the Competition Act (CA) and takes action against anticompetitive agreements, corporate abuse of dominance in the marketplace and mergers that substantially lessen competition. Officers from the CCS have wide powers of investigation that include compelling production of specified documents or information and entering premises to carry out inspections, either with or without a warrant.[5]

In 2015, the MAS and the CAD announced a collaboration to undertake joint investigations into market misconduct offences, such as insider trading and market manipulation, under Part XII of the SFA, an arrangement whereby both agencies will collaborate from the outset, drawing significant synergies from the MAS's role as financial regulator and the CAD's financial crime investigation and intelligence capabilities. Under this arrangement, MAS officers would be gazetted with the same criminal powers of investigation as CAD officers, including powers of search and seizure, and the power to order financial institutions to monitor customer accounts. The SFA also provides for the transfer of information from the MAS to the CAD and vice versa. The decision on whether to pursue civil penalty action or criminal prosecution will be made jointly when investigations are concluded.[6] Since 2015, joint MAS-CAD investigations have been the

1 www.sgx.com/wps/wcm/connect/sgx_en/home/higlights/news_releases/singapore_exchange_regulation_appoints_tan_cheng_han_chairman.

2 Section 21 of the CPC.

3 Section 20 of the CPC.

4 Sections 24 and 25 of the CPC.

5 For more, see the CCCS Guidelines on the Powers of Investigation in Competition Cases 2016; https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-powers-of-investigation-in-competition-cases-2016.pdf

6 MAS: MAS and CAD to jointly investigate market misconduct offences, https://www.mas.gov.sg/news/media-releases/2015/mas-and-cad-to-jointly-investigate-market-misconduct-offences.

norm for complex and high-profile investigations in Singapore, including the largest market manipulation case in Singapore's history, which saw a multibillion-dollar penny stock crash, and the breaches of money laundering regulations arising from the 1 Malaysia Development Berhad-related fund flows through Singapore.

In March 2018, the MAS and the CAD announced that they would be extending the scope of their joint investigations arrangement to cover all offences under the SFA and the FAA. This would allow both authorities to consolidate their investigative resources and further improve the effectiveness of market misconduct investigations. Since then, this joint investigations arrangement has resulted in, among other things, a key conviction of an individual for market misconduct; he was found liable of defrauding two providers of contracts-for-differences (CFDs) on 50 occasions across the CFDs on 17 different securities, resulting in a 16 weeks' imprisonment term and five-year prohibition order being made against him.

In handling financial services investigations, both internal and external, it is critical to understand the interplay between regulatory agencies, to deal with the issue of whether to self-report or cooperate with investigations, and the concerns of legal professional privilege.

Self-reporting

There has been a general shift in Singapore's legislative and regulatory framework from a merits-based approach to a disclosure-based regime.[7] For companies listed on the Singapore Exchange, Rule 703 of the Listing Manual (LM) imposes the obligation to make timely disclosure of any information it has concerning itself or any of 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 with Rule 703 is a criminal offence under the SFA if the company withholds disclosure intentionally or recklessly.[8] Directors can also be prosecuted in their personal capacity for the acts of their company under section 331 of the SFA, provided it can be proved that the non-compliance was committed with their consent or connivance, or attributable to their neglect.

Self-reporting is required under the broader anti-money laundering and counter-financing of terrorism framework by way of the CPC and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA). Materially, section 39 of the CDSA imposes an obligation on individuals to file a suspicious transaction report with the CAD as soon as is reasonably practicable when individuals 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,[9] and the information on which the knowledge (or suspicion) is based came to their attention during the course of their

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

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

9 That is, committing a serious offence, as defined in the Second Schedule to the CDSA, which includes corporate fraud offences such as criminal breach of trust and forgery as well as corruption.

trade, profession, business or employment. Failure to comply would attract criminal penalties. Under the CDSA, individuals who disclose possible offences are given statutory protection, such as immunity against certain civil proceedings and anonymity.[10]

Self-reporting is also required of financial institutions under a variety of applicable mandatory notices issued by MAS.[11] For example, financial institutions are required to report to the MAS misconduct committed by any of 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.[12] Financial institutions are also required to undertake internal investigations into the conduct of their representatives and to submit an annual nil return where there has been no instance of reportable misconduct in the course of the financial year. A failure to comply would also attract criminal penalties.[13] Financial institutions that are licensed financial advisers are also required to report suspicious activities and incidents of fraud that may be material to the soundness, safety or reputation of the licensed financial adviser.[14] In line with the industry's current focus on technology risk management, financial institutions are also required to immediately report serious IT security breaches and system malfunctions, and within 14 days submit a root cause and impact analysis report to the MAS.[15]

In the realm of competition law, section 66 of the CA was amended in 2005 to enable individuals to disclose self-incriminating documents or information when seeking leniency from the CCS.[16] The revised section 66 was intended to facilitate the CCS's investigation work, and clarifies that although self-incriminating information can still be used as evidence against the person disclosing the information in civil and criminal prosecutions for ancillary offences under the CA, it cannot be used as evidence to prove any other criminal offences. To encourage self-reporting, the CCS maintains a leniency programme for companies coming forward with information on cartel activity cases, whereby they could be granted total immunity or a substantial reduction in financial penalties.[17]

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

11 These notices are issued by MAS pursuant to section 101 of the SFA. Contravention is a criminal offence: section 101(3) of the SFA.

12 Notice SFA04-N11, Notice FAA-N14.

13 Notice FAA-N14.

14 Notice FAA-N17.

15 Notice CMG-N02.

16 Second Reading Speech by Lim Hng Kiang on the Competition (Amendment) Bill 2005, http://www.nas.gov.sg/archivesonline/data/pdfdoc/20051121_1001.pdf. The amended section 66 was deemed a more comprehensive formulation based on section 153 of the Securities and Futures Act, and aligned with the common law and other legislation such as the Media Development Authority of Singapore Act and the Gas Act.

17 CCS Guidelines on lenient treatment for undertakings coming forward with information on cartel activity cases 2016, https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-lenient-treatment-for-undertakings-coming-forward-with-information-on-cartel-activity-2016.pdf.

Internal investigations

Financial institutions may be prompted to launch internal investigations when faced with complaints from employees or customers, or concerns raised by independent directors or their audit committee, which is obliged under section 201B(5)(a) of the CA to review the effectiveness of the company's material internal controls, legal and regulatory matters, or pursuant to incidents of employee misconduct, suspicious transactions, fraud or technology breaches, in connection with the self-reporting requirements referenced above. Additionally, in cases involving certain types of misconduct by their representatives, MAS expects financial institutions to conduct an internal investigation and keep proper records of, among other things, interviews with the relevant parties, the documentary evidence of the alleged misconduct, the investigator's assessment and recommendation.[18]

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.

From the financial institution's perspective, it is important to keep in mind its 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).

Depending on the seriousness and nature of the matter, the individuals being interviewed or whose conduct is being investigated may retain their own lawyers. 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 or of personal data under the Personal Data Protection Act 2012 in the course of the investigation. One way to address the issue is to implement appropriate anonymising of any customer or personal information before it is referred to by the financial institution concerned.

A key question arises as to the extent to which legal professional privilege[19] can be maintained during internal investigations in Singapore. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia-Pacific Breweries (Singapore) Pte Ltd (Skandinaviska)*,[20] the company Asia-Pacific Breweries (Singapore) (APBS) was informed by CAD officers that its finance manager had used bank accounts fraudulently opened in the name of APBS to borrow money for his personal use. The board of directors constituted a special committee comprising external auditors and lawyers to investigate and review the company's internal control systems

18 Notice SFA04-N11, Notice FAA-N14.

19 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 lawyer and other third parties that were made for the predominant purpose of litigation).

20 [2007] 2 SLR(R) 367.

and procedures. Although draft reports were prepared by the external auditors, a final report was never issued. The Court of Appeal was then faced with the issue of whether the draft reports submitted by the auditors to APBS were protected by legal professional privilege.

Legal advice privilege

Regarding legal advice privilege, the Court of Appeal accepted that applying the English position at law, 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. The court, however, strongly endorsed the decision of the Australian Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation*,[21] 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. 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. It would appear to follow from this that legal advice privilege applied to any such legal advice embedded in, or that formed an integral part of, the draft reports, even though the draft reports themselves were drafted by the third-party auditors and forwarded directly to APBS by those auditors. The Court of Appeal, however, 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.

In this regard, it should be noted that although the English case, *Re RBS Rights Issue Litigation*,[22] reaffirmed the English position that communications to and from a third party were not protected by legal advice privilege (as opposed to adopting the more flexible approach set out in *Pratt Holdings*), the English Court of Appeal has since indicated in *The Director of Serious Fraud Office v Eurasian National Resources Corporation Ltd* (*SFO v ENRC 2*) that it would have, as a matter of principle, been in favour of departing from such a narrow approach. To elaborate, In *Re RBS Rights Issue Litigation*, the key issue that arose was whether legal advice privilege would cover the notes of interview with current and former employees of a corporation as part of an investigation by both in-house and external lawyers. The English High Court held that although the interview notes recorded direct communications with the corporation's lawyers, they comprised information gathering from current or former employees preparatory to and for the purpose of enabling the corporation, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice. As such, legal advice privilege could not be claimed by employees or ex-employees of the corporation (ie, the client), who had merely been authorised to speak to the client's lawyers to provide information with regard to the

21 [2004] 136 FCR 357.

22 [2016] EWHC 3161 (Ch)

investigation, as opposed to being authorised to seek and receive legal advice. In contrast, the English Court of Appeal in *SFO v ENRC 2* has since held that, had it been open to do so, it would have departed from the position that employees do not fall under the definition of a 'client' and are not protected by legal professional privilege. The Court of Appeal accepted the evolving nature of large corporations; where legal advice is often sought, and corporations may therefore require their employees with relevant first-hand knowledge to obtain such advice from lawyers under the protection of legal advice privilege. That said, the Court of Appeal eventually held that this was a matter for the English Supreme Court to decide, and made no finding of the same.

As neither *Re RBS Rights Issue Litigation* nor *SFO v ENRC 2* have been considered by the Singapore courts, it remains to be seen whether the courts would choose to adopt the more conservative approach in subsequent cases concerning legal advice privilege with third parties. However, given the fact that the Court of Appeal had, in Skandinaviska, strongly endorsed the broader and more flexible approach set out in *Pratt Holdings*, it is possible that the Singapore courts would, in determining whether legal advice privilege exists, choose to focus on the nature of the function the third party performed, rather than the nature of the legal relationship between the parties.

Litigation privilege

Regarding litigation privilege, the Court of Appeal 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 them. This decision was influenced by the fact that APBS had appointed external auditors and a legal adviser to discover and quantify the financial impact of the fraud and to determine APBS's potential liability with regard to the foreign banks. As litigation was imminent[23] and 'foremost in the mind' of APBS, such communications were therefore protected by litigation privilege.

In light of this decision, it appears that financial institutions 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 if the advice is sought for the main purpose of litigation or contemplated litigation. The benefit of this is significant: for instance, 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.[24] The Singapore High Court in *Yap Sing Yee v MCST No. 1267*[25] also held that statutes will not be regarded to have revoked the legal advice privilege unless this is expressly provided for or abrogated by necessary implication.

23 In the recent decision of the Singapore High Court in *Comptroller of Income Tax v ARW and another* [2017] SGHC 16, the court 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.

24 See for instance, section 66(3) of the Competition Act and sections 30(9)(a), 34(5) of the CDSA.

25 [2011] 2 SLR 998.

In 2012, the Evidence (Amendment) Bill was passed, extending legal professional privilege to communications with in-house counsel made for the dominant purpose of seeking legal advice.[26] The Singapore Court of Appeal in *ARX v Comptroller of Income Tax* [2016] 5 SLR 590[27] has also since clarified that such privilege will extend to communications that existed prior to the Evidence (Amendment) Bill. There are, however, exceptions to the claim of privilege over documents and information. Section 128(2) of the Evidence Act (EA) expressly provides that legal advice privilege will not apply to 'any communications made in furtherance of any illegal purpose' and 'any fact observed by any advocate or solicitor in the course of his [or her] employment as such showing that any crime or fraud has been committed since the commencement of his [or her] employment'. In *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd*,[28] it was held that despite the literal wording of section 131 of the EA, which suggests that litigation privilege is an absolute privilege, it is similarly subject to common law 'fraud and crime' exceptions. Where the common law 'fraud and crime' exceptions apply, legal professional privilege can no longer be successfully sustained.

In order that privilege may be maintained and not inadvertently waived, 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 often 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 as privileged. For example, the English of Appeal in *SFO v ENRC 2* recently affirmed the High Court's decision decided that the legal advice privilege did not protect communications from a corporation's employees to its investigating external counsel for the purposes of enabling the corporation to obtain legal advice regarding a potential investigation by the Serious Fraud Office; this decision was made on the basis that the definition of client did not include such employees. As it appears that the English courts have taken a narrower approach in relation to establishing the identity of a client and accordingly, the extent of privilege, corporations should be cognisant of this throughout the investigations and ensure that its actions and directions would fall within the extent of such privilege.

Cooperation and enforcement

Cooperation

Financial institutions and their directors, officers and employees in Singapore are obliged to cooperate with regulatory investigations by the aforementioned authorities. For example, 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

26 Evidence (Amendment) Act 2012, No. 4 of 2012.

27 [2016] 5 SLR 590.

28 [2010] 1 SLR 833.

under Chapters X and XI of the Penal Code. Also, the failure to appear before the MAS and to render all reasonable assistance in connection with investigations and failure to produce accounts for inspection are offences under Part IX of the SFA.

Financial institutions that are being investigated would be entitled to rely on legal professional privilege and the privilege against self-incrimination. However, in many instances, the financial institution 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 or via criminal prosecution. Such a waiver of privilege in relation to the 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.[29] 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.[30] 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.

As mentioned above, in the area of competition law, full cooperation would result in more lenient treatment under the formal leniency regime.

Significantly, the Criminal Justice Reform Act (passed by Parliament in March 2018 but not yet in force) has introduced the option of deferred prosecution agreements (DPAs) to the Singaporean investigations scene. With such an option available, companies are encouraged to cooperate with the public prosecutor and, in exchange of amnesty being granted, agree to fulfil certain requirements and specific conditions. One of the key conditions that may be imposed in a DPA would be to require the company to cooperate in any investigation relating to the alleged offence, resulting in increased cooperation and a decrease in commission of the alleged offences. 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 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 the SFO in relation any prosecution brought by the SFO in respect of the alleged offences). Crucially, the 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 the SFO during its investigations and had effectively opened its doors, providing the SFO with copies of key documents as well as giving it access to

29 See, eg, *Berezovsky v Hine & Ors* [2011] EWCA Civ 1089.

30 See, *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597.

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.

The approach to DPAs, along with its viability and usefulness, has yet to be tested in the Singapore investigations scene. That said, it is clear that the DPA is intended to incentivise and encourage a higher level of cooperation with the authorities, which would hopefully assist in a decrease in commission of future offences.

Enforcement

In terms of enforcement, corporate entities can be subject to criminal and civil liability for their employees' misconduct. A company may be held liable for its employee's conduct if the latter is considered the directing mind and will of the company. Further, depending on the nature of market misconduct,[31] companies can be held liable under the SFA for market misconduct committed by employees if the market misconduct was committed with the companies' consent or connivance,[32] or attributable to the companies' negligence in failing to prevent or detect the employee's market misconduct.[33]

In addition to commencing criminal and civil penalty enforcement actions in instances of misconduct, the MAS has also used its wider enforcement and regulatory powers in more innovative ways. For instance, when the Libor rate-fixing probe arising out of the global financial crisis was initiated worldwide, the MAS was among the first regulators in Asia to request that banks in Singapore conduct an internal review of their rate-setting processes, mainly in relation to the Singapore Interbank Offered Rate (SIBOR) and Singapore Swap Offer Rate (SOR), and to report their findings. The SIBOR and SOR are key benchmark rates, typically linked to mortgage loans in Singapore. Like their London counterpart, the SIBOR is set by banks submitting rates at which they anticipate borrowing from other banks, which are then ranked by the Association of Banks in Singapore. The top and bottom 25 per cent are trimmed off, and the average of the remaining quotes forms the daily SIBOR rate. The SOR is set the same way, except that it represents the average cost of funds used by local banks for commercial lending.

Investigations commenced in July 2012. In September 2012, the MAS extended the scope of the review to non-deliverable forwards, a form of foreign exchange (FX) derivative. Targeted financial institutions were asked to complete their internal investigations and submit their reports to the MAS within a stated time.

In June 2013, the MAS issued a statement setting out the banks' obligations in respect of the reviews of rate-setting processes, ordering banks to ring-fence as much as S$12 billion at zero interest pending steps to improve internal controls – instead of commencing traditional

31 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.

32 Section 236B of the SFA; see also MAS: Explanatory Brief on amendments to the SFA 2008, https://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, https://www.mas.gov.sg/news/speeches/2012/explanatory-brief.

33 Section 236C of the SFA.

enforcement action focused on fines and punishment, as was the approach taken by many other regulatory bodies in response to the Libor scandal. The onus was placed on banks to enhance controls around rate setting, to further review and immediately report any irregularities uncovered and to take appropriate disciplinary action against the staff involved. Certain financial institutions took disciplinary action against defaulting employees, and separate civil actions for wrongful termination were commenced by several employees against the banks concerned.

The MAS's response to the Libor scandal illustrated an innovative robust but pro-business enforcement approach in the area of financial rate manipulation. The MAS has been working with the Singapore Foreign Exchange Markets Committee to revamp the SIBOR-setting process and to more robustly regulate activities related to the setting of SIBOR, SOR and FX rates. This attitude should rightly inform the approach of financial institutions to internal investigations and its communications with the MAS.

The MAS is also seeking to use creative methods to increase its efficiency regarding its enforcement approach. In this regard, the MAS recently announced the adoption of a new intelligent tool, which would assist its enforcement officers in triaging of cases for investigation. This intelligence tool would automate the computation of key metrics used for key analysis and crucially, predict the likelihood that an expert will opine that market manipulation has occurred. This provides analysis and predictions during early stages of investigations, which in turn assists the MAS in reaching its findings expeditiously. The SGX has also, since the start of 2018, issued a series of compliance orders that signal a stricter and more interventionist approach to the enforcement of rules governing Singapore-listed companies, including in relation to companies' individual executives. This included issuing compliance notices requiring the cessation of employment of two top executives of a SGX-listed company, and barring them from holding executive posts for three years for breach of Rule 210(5) of the Listing Rules (which requires directors and executives to have the appropriate experience and expertise to manage a company's business),[34] and requiring a company to convene another extraordinary general meeting for delisting plan approval together with an updated delisting circular.[35]

Since 2019, the SGX has armed itself with greater supervisory powers for the purpose of monitoring risky and troubled listed companies via their audit function. In this regard, the SGX has indicated that it will be taking a proactive stance in helping companies manage the scope of their audit and the key audit matters they need to disclose. Such supervisory powers include requiring a company's special auditor to report directly or even exclusively to the SGX where appropriate, and possibly the power to require the appointment of a second auditor (on top of the company's existing statutory auditor) in exceptional circumstances. In addition, the SGX has also indicated that it will be taking a more active role in protecting investor interests through greater enforcement protection and whistle blower protection.

34 SGX's notice of compliance dated 2 April 2018 to Midas Holdings Limited;' https://www.businesstimes.com.sg/companies-markets/sgx-calls-for-immediate-resignation-of-midas-holdings-executives.

35 Vard Holdings; https://www.businesstimes.com.sg/companies-markets/sgx-orders-vard-to-hold-new-egm

These recent moves signal the SGX's intention to not only strengthen individual accountability of senior managers, but also demonstrates its enhanced interventionist approach to identify earlier warning signs and assist high-risk companies before they are in actual breach of the applicable rules.

International cooperation

Singapore has adopted various international conventions that it has incorporated into its domestic law, for example, the CDSA, the Terrorism (Suppression of Financing) Act, the Extradition Act and the Extradition (Commonwealth Countries) Declaration, the United Nations Act and the Mutual Assistance in Criminal Matters Act, which facilitates the provision and obtaining, by Singapore, of international assistance in criminal matters, including the provision and obtaining of evidence; making arrangements for parties to give evidence or assist in criminal investigations and in the recovery, forfeiture or confiscation of property.

Singapore is also party to the Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries, which provides a process through which countries in the region can request and give assistance to each other in the collection of evidence for criminal investigations and prosecutions.

The regulatory authorities in Singapore also work with other foreign regulatory bodies on initiatives. The MAS is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, in connection with which the MAS is empowered under the SFA to provide assistance to its foreign counterparts in foreign investigative and enforcement actions. For instance, under section 172(1) of the SFA, the 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 the MAS with such information. The 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.[36]

Conclusions and outlook

The financial services industry is experiencing a period of unprecedented regulatory investigation from different agencies worldwide. To maintain its edge as a financial hub, the Singapore regulatory authorities have adopted a flexible, robust approach to financial investigations, balancing international cooperation between states and working more closely with foreign authorities to maintain a practical, solutions-oriented attitude toward enforcement and self-regulation. This balance should also shape the approach of all financial institutions undertaking internal and external regulatory investigations either wholly or partially in Singapore.

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

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Joy Tan is the joint head of the commercial and corporate disputes practice, and the joint head of the corporate governance and compliance and financial services regulatory practices at WongPartnership LLP. Her main areas of practice are banking, corporate and commercial dispute resolution and contentious investigations.

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Ms Tan is one of the 'Local Disputes Stars' in *Benchmark Asia-Pacific 2014*. In *Chambers Asia-Pacific*, she is commended as an 'experienced litigator' in 2016, and is identified as a leading lawyer in the area of banking: regulatory since 2015, with clients noting that 'she is extremely efficient and extremely intelligent, and I feel confident in the advice I get from her.' Apart from being acknowledged as a leading lawyer for international arbitration in *Best Lawyers 2017*, she is also a recommended lawyer by *The Legal 500: Asia Pacific* for the areas of financial services regulatory (2017 and 2018) and employment (2016) in Singapore. Recognised as the best in her field, she was awarded 'Best in Corporate Governance' at the Euromoney Asia Women in Business Law Awards 2014, which celebrate the achievements of the best female lawyers across the region.

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WongPartnership is a market leader in Singapore, known for the provision of high-quality legal services that extend beyond the shores of Singapore with a particular focus on the Asia-Pacific region. We offer clients access to lawyers in our offices in Singapore, Beijing, Shanghai and Yangon, and in Abu Dhabi, Dubai, Jakarta, Kuala Lumpur and Manila through our associate firms.

The firm has a full-service compliance, investigations and enforcement practice across all major regulated industry sectors in Singapore, with a focus on financial services, healthcare and transport, trade regulation, and health, safety and the environment. Our teams provide compliance advice, regulatory due diligence and strategic advice on the impact of governmental regulations on businesses and corporate conduct. We are also actively involved in domestic and cross-border government-led and internal investigations into civil, criminal and regulatory misconduct, and represent corporate and individual defendants in enforcement actions, from fraud to market misconduct and insider trading to corruption and white collar crime.

In the antitrust sector, the team has been involved in all major multi-jurisdictional cartel infringement decisions by the Competition Commission of Singapore. We have also acted in numerous investigations for cartel activity and abuse of dominance, providing customised and effective compliance training programmes.

In the corporate and financial services area, the team is active in the full range of regulatory investigations with regulators such as the Singapore Exchange, the Commercial Affairs Department, the Corrupt Practices Investigations Bureau and the Monetary Authority of Singapore. Recent enforcement matters into market-rigging, insider trading and fraud have also involved regulators from other markets and jurisdictions, including Japan, France, the BVI, the Netherlands, the UK and the US.

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