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Improving regulatory transparency

Singapore's financial watchdogs show their teeth, but appear to lack bite. BY MAK YUEN TEEN

IN my article, *"Regulatory enforcement is key to rebuilding trust in market"* (BT, July 11, 2018), I called for greater clarity and transparency about the responsibilities, resources and activities for different regulatory bodies to enhance their accountability and increase trust in the regulatory regime. In particular, I urged the Singapore Exchange and other regulatory agencies to "each disclose, on an annual basis, the resources available to them, summary statistics on cases under investigation and enforcement actions taken (and the categories of organisations and individuals and types of breaches), and the number of cases referred to other regulatory agencies for possible follow-up." This way, I said, the regulatory regime will become less of a "black box".

I was therefore delighted to see the publication of the first Enforcement Report by the Monetary Authority of Singapore (MAS) which discloses useful statistics and information on enforcement actions and ongoing investigations for the period from July 2017 to December 2018. The report included much of what I had hoped to see.

However, it also confirms what I had largely suspected. First, most of the enforcement actions over the period appear to be taken against financial institutions, and individuals within them, for breaches of MAS-administered Acts, Regulations and Notices applicable to financial institutions, compared to capital market-related breaches of the Securities and Futures Act (SFA). The distribution of the enforcement actions shown in the report may give an indication of the relative priorities of enforcement in the different areas that fall under MAS' purview.

I am not downplaying the importance of effective supervision and enforcement for financial institutions – indeed it is critical – but because of MAS' multi-faceted role, there is always a risk that certain areas may not receive the necessary resources and attention. It is important that there are adequate resources for MAS to effectively discharge all these roles, including as a securities regulator. Ultimately, I believe that a separate securities regulator is still the better model for Singapore given the state of development of our capital market.

Second, when it comes to market abuse offences, all the enforcement actions during the period related to insider trading, false trading and unauthorised trading. Again, while effective enforcement in these areas is important, it is somewhat disappointing (although unsurprising) that there was no enforcement action in the area of continuous disclosure. In my past articles, I have pointed out many instances of what I believe to be apparent or clear cases of false or misleading disclosures or failure to comply with continuous disclosure obligations. These cases are possible breaches of the SFA, but there has been an absence of criminal and civil penalty actions.

Nevertheless, it is comforting that MAS recognises the importance of enforcement for continuous disclosure, since eight (or 22 per cent) of the cases relating to market abuse under review or investigation as at Dec 31, 2018 are about this, and corporate disclosure issues have been identified as one of the key priorities for 2019/2010.

The report also shows the average time taken for MAS' reviews and investigations. Regulatory actions by MAS which did not involve civil penalties or criminal sanctions – such as composition fines, prohibition orders, reprimands and warnings – took an average of six months, while civil penalties took 30 months on average and criminal prosecutions 33 months (although the report shows only one criminal prosecution during the period).

Not surprisingly, the timeliness of enforcement is related to type of enforcement action, and this is likely due to factors such as number of enforcement agencies involved, enforcement protocols, and the burden of proof required. While criminal prosecutions have a stronger deterrent effect and may be necessary in the most serious cases, they are likely to be less timely and require more resources. It is important to have a range of enforcement actions that allow regulators to balance the severity of the breach, timeliness of enforcement action and resources required. In certain cases – such as insider trading by directors in shares of their own company which also involves a breach of fiduciary duty – criminal prosecutions may be warranted even if they may take more time.

PERCEPTIONS AND PROGRESS

The report further shows that concluded or closed cases took an average of eight months, from the time a case was opened for review by MAS. A case is considered "closed" when it is referred to the Attorney-General Chambers (AGC) for criminal prosecution or civil action, approved for regulatory action, or a decision is made to take no further action. It is understandable that regulators have to consider factors such as the evidence and seriousness of the breaches in deciding whether to proceed with further action. However, this is an area which probably contributes to perceptions that enforcement actions lack timeliness or transparency – because nothing further may be heard for some years and a case may be still be under investigation or closed without further action. Now that MAS has disclosed that the average time taken for civil penalties and criminal prosecutions is between 30 and 33 months, it may give a general indication to stakeholders as to whether a case is going to result in enforcement action – at least for cases where MAS is involved.

The report states that MAS takes an average of three months to refer cases to external agencies, which may be local or international. It would be useful to know how many cases it has referred. If other local regulatory agencies also disclose how many cases are under review or are investigated, and the enforcement actions taken, stakeholders will get a more complete picture of the whole enforcement chain.

Overall, I think the inaugural MAS Enforcement Report is a big step forward in terms of transparency in MAS' enforcement actions.

Let's now look at the disclosure of enforcement actions by the Singapore Exchange (SGX). Since FY2015, SGX has published a *"Regulation Statistics Report"*, which shows on a quarterly and annual basis, statistics on IPO and RTO submissions (including outcomes), fund-raising corporate actions, compliance queries, and investigation and disciplinary actions. It has also published a report showing annual statistics from FY2012 to FY2014.

The table (above) summarises the annual compliance queries, investigations and disciplinary actions as disclosed by SGX. From this table, we can see that SGX is active in querying companies.

However, the disclosures of investigations and disciplinary actions by SGX are aggregated and difficult to interpret. While the Hong Kong Exchange (HKEx) and Bursa Malaysia (BM) separately disclose actions relating to listed companies and those against intermediaries and their representatives, SGX discloses these together. From SGX's statistics, one is unable to tell the number of enforcement actions against listed companies, their directors and key officers.

Further, while the other exchanges also clearly distinguish between private enforcement actions versus those that are public in nature, SGX aggregates private warnings and public regulatory actions. HKEx and BM also separately disclose the number of listed companies and directors that have been subject to enforcement actions each year.

Take to task

REGULATORY ACTION BY SGX	2012	2013	2014	2015	2016	2017	2018
Continuous disclosure queries	333	405	388	195	330	382	404
Trading queries	76	74	132	85	136	173	57
Composition fines*	0	1	8	7	2	0	0
Private warnings/public regulatory actions*	28	22	16	29	26	30	7
Referrals to disciplinary committees*	3	0	2	2	1	6	3
Referrals to MAS							
Insider trading	15	10	40	18	12	20	37
Market manipulation	11	4	49	13	20	14	7
Other market misconduct	1	3	2	1	0	0	0

**Listed companies, intermediaries and their representatives*

Source: SGX Regulation Statistics Reports 2012-2018

> In my view, there remains a lack of public enforcement actions against key players in the corporate governance ecosystem, such as directors, auditors and sponsors.

In SGX's case, it is unclear from the report how the numbers under "private warnings/public regulatory actions" are arrived at. For example, if SGX reprimands a listed company and three of its directors, the report does not explain whether it is counted as a single regulatory action, or four regulatory actions. However, I was able to clarify with SGX that this would be counted as one regulatory action.

Private warnings/reprimands have little deterrent effect – in the past, I have compared them to my disciplinary actions against my children when they were young. HKEx disclosed that it has not used private reprimands over the past five years. For BM, while private reprimands are still used against companies, there is a clear shift towards public reprimands when it comes to directors, with only three directors receiving private reprimands (accompanied by fines) in 2016, and zero cases of private reprimands against directors in 2017 and 2018. Over the same period, 85 directors were publicly reprimanded, usually accompanied by fines.

In the past, SGX used to rely almost exclusively on private reprimands. Although SGX now uses public reprimands against companies and directors, one has to search through announcements to determine how many public reprimands are made each year.

COMPARING WITH HK, MALAYSIA

Of the three exchanges, HKEx clearly has the best disclosures while BM arguably has the sharpest teeth.

For ongoing investigations, HKEx discloses the number of cases categorised into the following: companies; current directors; former directors; three listing rule breaches or less; more than three listing rule breaches; and investigations involving and referrals to other regulators. Concluded and ongoing investigations are also disclosed by core themes, such as directors' duties, late financial reporting and heavily qualified audit reports. This is useful because it shows where companies and directors are falling short and enforcement actions being taken.

Sanctions imposed are disclosed according to type. The overall average time taken is also disclosed, therefore showing the timeliness of enforcement actions over time. Finally, the number of executive directors, non-independent non-executive directors and independent non-executive directors that are subject to disciplinary sanctions are disclosed, which shows that enforcement actions are not largely limited to executive directors.

I am also very impressed that the HK Securities and Futures Commission (SFC) publishes reports of its annual review of how the Stock Exchange of Hong Kong (SEHK) has performed in its regulation of listing matters. The SFC's website shows reports for each year from 2005 to 2015, and a 2018 report which covers its review of the SEHK's performance in 2016 and 2017. This reinforces the robustness and transparency of the regulatory regime in Hong Kong.

For BM, its enforcement powers include the imposition of fines on companies and individual directors. However, it targets individual directors rather than companies when imposing fines, presumably on the basis that fines on companies are ultimately borne by shareholders. Over the past five years, it has not imposed any fines on companies, but 130 directors have paid fines totalling RM20.6 million.

In SGX's case, when it comes to referrals to regulatory authorities, it is interesting that it only discloses referrals to MAS. We can see that over the past three years, all the referrals to MAS are for insider trading and market manipulation, with no referrals for other market misconduct. Therefore, it appears that SGX has not referred any cases of possible breaches relating to false or misleading disclosures or continuous disclosures to MAS. Over that period, SGX has referred a number of cases to "other regulatory authorities", which often appears to refer to the Commercial Affairs Department (CAD), but this is not disclosed in its report. What happens after referrals is also largely a black box.

SGX also publishes a "Directors' and Executive Officers' Watchlist" which shows the names of directors and executive officers "who have been reprimanded by SGX, and who in the exchange's opinion did not extend the necessary cooperation to the exchange". However, the year that a particular individual is placed on the Watchlist is not disclosed. The number of directors and key officers reprimanded each year and added to the Watchlist should be disclosed separately in SGX's *Regulation Statistics Report.*

It is also unclear if individuals will remain on the Watchlist indefinitely and the process for exiting it (since I notice that at least one director has been removed from it since it was first published). While I have little sympathy for many of the individuals who have been placed on the Watchlist given what has transpired in their companies, fairness and natural justice also require transparency and consistency in implementing the Watchlist.

Overall, there is still significant room for improvement in enforcement actions and transparency throughout the regulatory enforcement chain here. In my view, there remains a lack of public enforcement actions against key players in the corporate governance ecosystem, such as directors, auditors and sponsors. All regulatory agencies have to step up to help bring back investor confidence to the market.

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