Regulatory enforcement is key to rebuilding trust in market

SGX, other regulators must ensure proper investigations and enforcement. BY MAH YUEN TEE

SEVERAL years ago, a few Malaysian directors were in town for a conference. As I was driving them to dinner, one of the directors said he had been reprimanded by Bursa Malaysia for breaches of listing rules. Rather coincidentally, that director’s phone rang. The call was from his company secretary telling him that the Companies Commission of Malaysia (CCM) required him to go to its office for a meeting about the company for which he had been reprimanded. He complained about being called up by the CCM since he had already been reprimanded by the stock exchange.

I said that just because a director has been sanctioned by the stock exchange does not mean that he will not face further sanctions from statutory regulators. I explained that the stock exchange only sanctions directors for breaches of listing rules, while other statutory regulators may take action for breaches of company law.

I am not sure if what I said affected his appetite.

Corporate governance rules are like an onion, with company law at its core and other laws, regulations, rules and codes being the additional layers. Very importantly, key corporate rules such as those relating to duties of directors and shareholder rights are in company law. While the company regulator in a particular jurisdiction may have limited investigation and enforcement powers, it is nevertheless often the regulator responsible in the first instance for administering company law.

Similarly, when it comes to market misconduct such as insider trading, while the SGX plays the primary role in monitoring and detecting possible breaches, other regulators must play their role to ensure proper investigations and enforcement.

Effective regulatory enforcement requires each regulator to play its role. While SGX is the frontline regulator for listed companies here, we cannot place all regulatory responsibilities on it or take the view that regulatory actions begin and end with it. Although we can consider broadening the types of breaches that SCX could enforce (such as including directors’ duties in listing rules as is done in Hong Kong), and review whether the structure and resources are appropriate for SCX to effectively discharge its regulatory role, other regulators must also play their part.

The importance of effective enforcement to the development of capital markets is supported by academic research and recognised by multilateral organisations such as the Organisation for Economic Co-operation and Development (OECD).

The first of the six OECD Principles of Corporate Governance states: "The corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement."

It further adds: "Public authorities should have effective enforcement and sanctioning powers to deter dishonest behaviour and provide for sound corporate governance practices. In addition, enforcement can also be pursued through private action, and the effective balance between public and private enforcement will vary depending upon the specific features of each jurisdiction."

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In Michelle Quah’s excellent commentary “Sakae case: Who’s blowing the whistle on corporate Singapore?” (BT, July 4), she asked where the corporate and market regulators have been, after the Court of Appeal ruled in Sakae Holdings’ favour in its long-running battle against former director Andy Ong. The legal battle reportedly cost the company $31 million in legal fees— an amount that few companies and shareholders could afford or would be willing to spend. Given the unavailability of contingency-based class actions here, ordinary shareholders stand little chance in enforcing their rights. Cost aside, private actions and regulatory actions have different objectives, and are complements rather than substitutes within the corporate governance eco-system. Given the limitations in private enforcement here, public enforcement becomes particularly important.

The OECD also emphasises that the division of responsibilities among different authorities should be clearly articulated and that effective enforcement also requires that the allocation of responsibilities for supervision, implementation and enforcement among different authorities is clearly defined. Greater clarity and transparency about responsibilities, resources and activities for different regulatory bodies would enhance their accountability and help increase trust in the regulatory regime.

For example, SGX and other regulatory agencies can each declare, 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, the regulatory regime becomes less of a “black box.”

In Hong Kong and Malaysia, both the securities regulator and stock exchange disclose detailed enforcement statistics, including information about the types of breaches for which enforcement action is taken, and in some cases, even statistics on investigations that are being initiated or in progress.

Such transparency builds confidence among investors in the integrity of the market and also sends an important signal to directors, officers and other market players about the lack of tolerance for various types of misconduct. Summary statistics about ongoing investigations are particularly important given the length of time often taken for enforcement actions.

It is also noteworthy that independent directors are often not spared such enforcement actions. For instance, just for this year until July 6, the Hong Kong Exchange has taken action against independent directors (together with other directors) in six companies.

The OECD principles also warn about potentially conflicting objectives faced by regulators, for example, where the same institution is charged with attracting business and sanctioning violations. Such conflicts are best avoided, or should minimally be managed through clear governance provisions.

Potential conflicts in disciplining regulatory responsibilities are now generally well recognised when stock exchanges undertake front-line regulatory roles— even if the solutions often still leave something to be desired. However, it is not only stock exchanges that face potential conflicting objectives in discharging their regulatory responsibilities— statutory regulators do too.

When shareholders and other stakeholders “blow the whistle” on potential misconduct to regulators and provide substantial evidence to support their allegations, regulators must take these complaints seriously. Regulators should investigate when incontrovertible evidence has been provided by whistleblowers, who lack resources and investigatory powers themselves.

We often hear regulators talking about different stakeholders playing their role in improving market integrity. If stakeholders’ efforts in highlighting possible misconduct do not get the necessary support from regulators, they will stop doing it and the market will be the worse for it.

I am concerned about the loss of trust in our market and urge that more be done to improve regulatory enforcement to rebuild that trust.