Deferred Prosecution Agreements to be Introduced in Singapore

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I. Introduction

- On 15 January 2018, Law and Home Affairs Minister K Shanmugam revealed that the Singapore Government is looking to introduce deferred prosecution agreements ("**DPAs**") as part of a slew of proposed changes to the Criminal Procedure Code.

- DPAs recently came to prominence in Singapore when they were featured in media reports of the corruption probe involving Keppel Corporation's offshore and marine unit. Keppel Offshore & Marine ("**KOM**") had entered into a DPA with the United States Department of Justice ("**DOJ**") under which KOM was required to pay a US$422 million fine to authorities in three countries for handing out bribes of more than US$50 million over 13 years to officials in Brazil in exchange for business deals.

- DPAs are essentially agreements between the prosecutor and the accused whereby the prosecutor agrees to suspend prosecution of the accused in exchange for the accused agreeing to fulfil certain conditions. Typically, these conditions would include: (a) financial sanctions; (b) terms concerning enhancing compliance procedures, including possibly the appointment of a monitor; and (c) terms concerning ongoing cooperation, for example in the prosecution of individuals. If any of these conditions are breached, the prosecution may be resumed.

II. DPAs in the United States and United Kingdom

- DPAs originated in the United States ("**US**"). The earliest incarnation of a DPA dates back more than 25 years to a 1992 settlement between Salomon Brothers and the DOJ that included an agreement to forego prosecution of the organisation due to its "unprecedented cooperation" with the DOJ.[1] Subsequently, and over the years, the DOJ formalised the requirements for the use of such agreements in its United States Attorneys' Manual.

- In practice, however, the standards and guidance that prosecutors face in deciding whether to seek a DPA have evolved over the past decade depending on the policy adopted by the incumbent Attorney-General. For example, the Thompson Memorandum in 2003 marked the start of a "DPA era" by encouraging prosecutors to substitute DPAs for plea agreements in those instances where companies voluntarily disclosed and/or cooperated with the investigation of wrongdoing.[2]

- The United Kingdom ("**UK**"), having had the benefit of the US experience, have chosen to adopt a different approach to DPAs when they introduced it in 2014. Unlike in the US, the UK Government has

1 Emma Radmore and Stephen L. Hill, Jr, *Deferred Prosecution Agreements: the US experience and the UK potential*, Lexology, 14 July 2014.

2 Alexander and Cohen et al, *Trends in the Use of Non-Prosecution, Deferred Prosecution, and Plea Agreements in the Settlement of Alleged Corporate Criminal Wrongdoing*, Law & Economics Center – George Mason University School of Law, April 2015.

consistently adopted a strict approach towards DPAs. DPAs will only be offered to companies who have "behaved responsibly", which are likely companies that are frank about what has happened and which cooperate fully with investigations. Since their introduction, there have been only four instances of DPAs to-date.[3]

- The other difference between the UK and US models is that the UK model has a much stronger element of judicial oversight.[4] DPAs in the UK may only be concluded if the Crown Court grants its approval at two stages – first approving the DPA process in principle after negotiations with the accused company has commenced, and a second time to approve the terms of the final DPA.

III. What does the DPA regime mean for Singapore

- The key features of the Singapore DPA regime, as distilled from Minister Shanmugam's speech, are as follows:
    - Agreements are only reserved for corporate offenders.
    - Corporate offenders could end up paying higher fines compared to what the current criminal law provides for.
    - Terms of the agreement have to be approved by the High Court.
- The first feature is significant. This means that the directors, officers and any employees of a company which has entered into a DPA with the Attorney-General's Chambers may still be prosecuted for corporate offences. To use the example of KOM, the fact that KOM has entered into a DPA with the DOJ does not preclude the DOJ from charging the employees and officers of the company. In fact, Jeffrey Chow, a former senior member of KOM's legal department, was charged by the US authorities for his involvement in the corruption probe even though KOM had agreed to pay US$422 million under a DPA with the US authorities.
- In practice, DPAs have been used by the authorities to obtain the cooperation of errant companies to reveal individuals who are truly responsible for the wrongdoings of the company. These individuals are then prosecuted for the corporate offences of the company. This not only allows the Prosecution to save on legal costs which would otherwise be spent on fighting the accused company's legal team, but also allows the authorities to prosecute the individuals who are truly at fault.
- As for the second feature, *viz*, that corporate offenders could end up paying higher fines compared to what the criminal law provides, this could be construed as the "price" which corporate offenders have to pay in lieu of prosecution. From the Government's perspective, it would make economic sense to have DPAs which can not only avert costly investigation and prosecution, but also add to the Government's coffers by way of imposition of substantial fines.
- In relation to the third feature, the fact that the terms of the agreement will have to be approved by the High Court *ostensibly* provides a level of judicial oversight similar to the UK model. This

[3] Ben Morgan, *The future of Deferred Prosecution Agreements after Rolls-Royce*, Serious Fraud Office, 8 March 2017.

[4] Eunice Chua, *Deferred Prosecution Agreements in Singapore?*, 30 January 2018.

may make it even harder for corporate offenders to enter into DPAs with the Prosecution. The devil is, however, in the details. For example, it is not yet clear at which stages of the DPA process will the High Court's approval be required, and how much discretion the High Court will have in rejecting agreements reached by the Prosecution and the errant companies.

IV. Conclusion

- The DPA regime is to be welcome as providing an additional tool in the Prosecution's arsenal in dealing with corporate offenders. While it remains to be seen how DPA regime will work in practice, there is a good chance that Singapore will follow the UK's approach in preferring to prosecute corporate offenders, save in exceptional circumstances. Should this be the policy norm in Singapore, it is likely to cost corporate offenders an arm and a limb to convince the Prosecution to agree to a DPA.

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