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Singapore adopts Deferred Prosecution Agreements

In March 2018, the Singapore Parliament passed the Criminal Justice Reform Act (the "**Act**").[1] Among other things, the Act introduces a legislative framework for the use of deferred prosecution agreements ("**DPAs**"), with the aim of allowing the public prosecutor to resolve alleged instances of economic crime by commercial organisations more quickly and appropriately than under current procedures.

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What is a DPA?

DPAs are a mechanism by which corporate entities may resolve allegations of corporate wrongdoing without having to face a full criminal trial, and the attendant risk of a criminal conviction. DPAs have been a mainstay of criminal procedure in the US for more than 20 years, and have in recent years been adopted by other key jurisdictions including the UK, France, Australia and Canada.

Under a DPA, the public prosecutor would agree to defer criminal prosecution of a corporate entity in respect of offences for a fixed period, conditional upon the company's performance of strict terms set out in the DPA. Those terms typically include payment of a significant fine, and remedial measures. At the end of the fixed period, provided that the terms of the agreement have been adhered to, the corporate entity would no longer face prosecution for the offences covered by the DPA.

DPAs are not intended to replace traditional prosecution, but are used in certain limited circumstances, where the prosecution may wish to lessen the cost of investigating economic crime by securing cooperation from the subject of the investigation. The mechanism also has wider policy aims of encouraging corporate entities to self-report, cooperate with regulators and enhance their compliance culture.

The Singapore DPA regime

Singapore has largely adopted the UK's DPA regime. Key features of the Singapore DPA regime are as follows:

[1] https://www.parliament.gov.sg/docs/default-source/default-document-library/criminal-justice-reform-bill-14-2018.pdf

- DPAs are only available to body corporates, limited liability partnerships, partnerships or unincorporated associations. An individual person may not enter into a DPA.
- DPAs may only be entered into in respect of certain types of stipulated offences principally relating to: bribery; corruption; use of proceeds of crime; money laundering and terrorism financing; falsification of accounts; and market manipulation.
- The DPA must set out a charge or draft charge for the alleged offence(s), as well as a statement of facts, including any admissions.
- The DPA should also set out the requirements imposed on the accused entity, including the amount of any financial penalty, disgorgement of profits, and/or implementation of any compliance program.
- Once a DPA has been agreed between the subject and the public prosecutor, the Attorney-General's Chambers ("**AGC**"), it must be submitted to the High Court for approval. The High Court must be satisfied: (i) that the DPA is in the interests of justice; and (ii) that the terms of the DPA are fair, reasonable and proportionate.
- While the DPA is in force, the subject cannot be prosecuted for the alleged offence in any criminal proceedings. However, in the event of any failure to comply with the terms of the DPA, the AGC may apply to court to terminate the DPA, and commence or resume any prosecution.
- Upon expiry of the DPA, the AGC is required to notify the High Court that it does not intend to prosecute the subject for the alleged offence. The High Court may then grant the subject a discharge amounting to an acquittal, which prevents the subject from being prosecuted for the same offence in the future. However, new criminal proceedings may be instituted if the subject is found to have provided incomplete or misleading information during the course of negotiations of the DPA.

Judicial oversight of the DPA regime

Like the UK DPA regime, Singapore's judiciary will have significant oversight over DPAs – the High Court must approve the DPA and be satisfied that it is in the interests of justice, and that its terms are fair, reasonable and proportionate.

However, unlike the UK DPA regime, the Singapore courts will not be required to approve the commencement of negotiations in respect of a DPA. The Singapore courts will only be involved in the final stage of the process.

Both the UK and Singapore DPA regimes differ substantially from their US counterpart, in which discretion to enter into a DPA (and on what terms) lies within the powers of the federal prosecution, the United States Attorneys.

A certain degree of confidentiality is accorded to the proceedings by which the Court reviews the DPA – these proceedings are conducted *in camera* and are therefore closed to the public. However, once the Court issues a declaration approving the DPA, the prosecution is required to give public notice of the DPA,

the Court's declaration, and any reasons given for the declaration, unless the Court grants an order to restrict or redact any publication.

When will a DPA be appropriate?

The UK prosecuting authorities have published a detailed Code of Practice[2] setting out considerations that the prosecution should take into account when exercising its discretion in respect of a DPA. At a high level, the factors militating in favour of a DPA include:

> a proactive and cooperative approach on the part of the subject's management team, including any self-reporting of the offence;

> a lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the subject, its partners/directors and/or majority shareholders;

> the existence of a proactive corporate compliance programme, even if it failed in this instance;

> that the offending resulted from isolated actions of individuals;

> that the offending is not recent, and the subject is now effectively a different entity; and

> that a conviction is likely to have disproportionate consequences for the subject or collateral effects on the public, the subject's employees and/or shareholders.

In keeping with a longstanding policy practice, the AGC is unlikely to publish any prosecutorial guidelines in respect of DPAs. However, given that the Singapore DPA regime is driven by the same policy objectives, we expect that the AGC would consider similar factors as those set out in the UK's Code of Practice, when exercising its discretion in respect of DPAs.

By way of illustration, the recent global resolution of alleged bribery offences committed by Keppel Offshore & Marine Ltd ("**KOM**") involved a joint investigation by US, Brazil and Singapore authorities. The KOM resolution pre-dated Singapore's adoption of DPAs. As such, KOM's resolution with the Singapore authorities was made by the issuance of a "conditional warning" in lieu of prosecution, on terms similar to a DPA. In a joint press statement,[3] the AGC and Corrupt Practices Investigation Bureau highlighted that in issuing the conditional warning, due consideration had been given to: (i) the substantial cooperation rendered by KOM to the investigations (which included self-reporting of the offences); and (ii) the extensive remedial measures taken by KOM. Such factors will likely also be highly relevant to any decision to enter into a DPA.

[2] https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf
[3] https://www.agc.gov.sg/docs/default-source/newsroom-doucments/media-releases/2017/joint-press-release-by-agc-and-cpib---conditional-warning-issued-to-keppel-offshore-marine-ltd8c1000354dcc63e28975ff00001533c2.pdf?sfvrsn=0

Considerations for corporate entities

It is too early to say how the availability of DPAs will impact the enforcement of financial crime in Singapore. In the four years since DPAs were introduced in the UK, only four have been concluded. However, the introduction of a DPA regime in Singapore is a welcome development. It will allow Singapore's criminal authorities to participate in cross border economic crime investigations in a more coherent manner, with the benefit of judicial safeguards. It also provides an opportunity for corporate entities to mitigate the risk of liability for economic crime in Singapore, as well as the damage to business that can be caused by a lengthy criminal trial.

To maximise the prospect of an opportunity to negotiate a DPA in respect of any offence that might be alleged, companies should ensure that their compliance programme is robust, including whistleblowing and/or swift escalation of identified concerns and (if necessary) prompt reporting to the relevant criminal authorities. At the same time, corporate entities should be sure to seek legal advice before commencing negotiations on or entering into a DPA.

Some pertinent considerations for corporations in considering whether a DPA might be an appropriate option for the resolution of an alleged offence include:

> **High threshold to establish corporate criminal liability:** The standard for proving corporate criminal liability in Singapore is high, requiring proof that the individuals who conducted the crime(s) are the "*embodiment of the company*" or its "*directing mind and will*". This common law standard is qualified under certain statutory regimes (for example, in respect of certain money laundering and drug offences, the acts of an employee or agent acting within his authority may be imputed to the company), but remains applicable in respect of key economic crimes such as bribery offences. The decision to opt for a DPA would always be made by reference, in part, to the prospect of successfully defending against the charge. Before entering into a DPA, companies should carefully consider whether corporate liability is a likely outcome of a full prosecution, as well as the extent of such liability.

> **Disclosure of information:** Material or information disclosed during DPA negotiations is generally admissible as evidence, and can be used against the corporation and its officers in any criminal proceedings, whether or not related to the proceedings in respect of which the DPA negotiations were conducted. If a DPA is ultimately not concluded, the corporate entity would be exposed to prosecution based on evidence which was volunteered during the DPA process.

> **Compliance with DPA terms:** Companies entering into a DPA must be able to comply with all the terms of the DPA. These terms might include substantial compliance enhancement commitments and external independent monitoring of performance. The terms of the DPA could also include undertakings that no further potentially offending acts are being or will be committed, whether in Singapore or overseas – such terms

might render the DPA inappropriate for a corporation that is aware of pending issues that would result in a breach of the DPA terms. If a DPA is terminated for breach of its terms, the corporation would be exposed to prosecution for the relevant offence, notwithstanding that it might have already paid financial penalties or other compensation.

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