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Deferred prosecution agreements in Singapore?

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Deferred Prosecution Agreements in Singapore?

On 15 January 2018, Minister for Law and Home Affairs K Shanmugam said at a dialogue organised by the Law Society that deferred prosecution agreements (DPAs) could be introduced in Singapore as part of proposed changes to the criminal justice system. DPAs are agreements by the prosecutor to suspend prosecution of a corporate entity if it complies with specific conditions. If the corporation fails to comply with the conditions, the prosecution may resume.

The Case for DPAs

Historically, DPAs were created in the United States of America (the US) as alternative solutions to rehabilitate individuals charged with non-violent offences and other low-level crimes, and were frequently used for non-violent drug offenders, juveniles, or defendants who had particularly sympathetic or compelling cases (Paola C Henry, "Individual Accountability for Corporate Crimes after the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform", 6 Am U Bus L Rev 153 (2016) at 157). However, since the financial crisis of 2008, DPAs in the US became more frequently used for corporate crimes, which may include corruption, product safety and securities violations, environmental crimes, money laundering and fraud.

One may argue that DPAs used for corporate crime could, drawing an analogy from the original use of DPAs, be seen as alternative solutions to "rehabilitate" companies from wrong-doing, especially where as abstract entities they have no real criminal intention and a long drawn out prosecution could punish innocent people reliant on the company such as employees, suppliers, manufacturers and customers. This can be seen as going to the root of the problem and also avoiding future problems as companies can be required to revamp their practices to be compliant with existing laws and regulations and also monitored to ensure compliance.

An economic argument could also be made for DPAs. Given the complexity of large-scale corporate crimes, DPAs could avert costly investigation and prosecution and may even result in net gain for the government if a substantial penalty and costs is part of the terms of the DPA. The resources of law enforcement and the prosecution can then be focused on bringing to justice the individuals responsible for the fraud.

In terms of achieving retribution and restitution, DPAs allow for a proportionate response taking into account the particular nature and extent of the corporate crime. Without them, the only options would be to charge or not charge the corporate entity. Even if a charge is proceeded with and the company is found guilty, the consequences are limited to what is prescribed by criminal law. DPAs may be crafted more flexibly, allowing the quantum of the penalty to be customised and also victims who suffered financial loss to be compensated.

Finally, another benefit of DPAs is that they may provide an incentive to corporate entities to confront criminal conduct within their ranks, and encourage the whistle-blowing that may often be necessary to uncover the criminal conduct in the first place.

The Case against DPAs

DPAs, however, do raise important concerns. As a matter of principle, they seem to run contrary to upholding and enforcing the rule of law against all – individuals and large companies alike. The use of DPAs only for large-scale corporate crime may, particularly where individuals in the wrongdoing are not prosecuted and where the consequences of the corporate crime are very severe, create the impression of a two-tier criminal justice system with large companies being "too big to jail" (Matt Trome, "UK Bribery Prosecutions and the Rule of Law" *The Global Anticorruption Blog*, 24 August 2017).

It has also been argued that DPAs undermine the deterrent effect of the law and incentives to self-report by lowering the cost to firms from reputational damage or stigma resulting from a criminal settlement. This is evidenced when companies that have resolved corporate offences through DPAs become repeat offenders. Some examples of companies who have resolved more than one US Foreign Corrupt Practices Act action include oilfield services and products company Halliburton, medical device companies Biomet and Orthofix, and Japanese conglomerate Marubeni (see "Corporate FCPA Repeat Offenders" *FCPA Professor Blog*, 3 August 2017). If this is so, then as one commentator puts it, the use of DPAs will only contribute to a "façade of enforcement" that has insignificant impact on deterring and punishing criminal conduct of corporations (Mike Koehler, "The Façade of FCPA Enforcement" Georgetown Journal of International Law, Vol. 41, No. 4, 2010).

The nature of DPAs further blurs the distinction between the role of the prosecution and the judiciary. One US scholar has claimed that the use of DPAs "erodes the most elementary protections of the criminal law, by turning the prosecutor into judge and jury, thus undermining our principles of separation of powers" (Richard A Epstein, "The Deferred Prosecution Racket" *Wall Street Journal* (28 November 2006)). Another aspect of DPAs is their flexibility and customisability, which may lead to ambiguities about how the law is to be enforced.

Is it Possible to Strike a Balance?

Is it possible for DPAs to be used in a way that allow the concerns associated with them to be minimised? This question can be answered by examining the

DPA schemes in the US and UK and how they have been implemented. Perhaps being the newer scheme that had the benefit of the US experience, the UK DPA scheme appears more attuned to manage the risks discussed earlier.

First, the UK has a published and binding "Code of Practice" (available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/) that promotes transparency and guidance in the exercise of the discretion to enter into DPAs. This Code of Practice contains, amongst others, the test for whether it is possible to enter into a DPA, factors that the prosecution may take into account, terms of the DPA, and the process where a breach of DPA is alleged. The US Justice Department did not have such a document to begin with and, over time, different policy memos were published by different Attorneys General and Deputy Attorneys General to address various issues. Some of the principles in these memos have since 2008 been incorporated into the US Attorney's Manual. Nevertheless, these policies continue to develop and change as policy memos continue to be issued. This makes the US practice less transparent and consistent, and less able to inspire public confidence.

A more significant check is judicial oversight. In the US, there is reference in legislation to the "approval of the court" (18 U.S.C. § 3161(h)(2)) and the courts have discretion to reject proposed DPAs. Nevertheless, this does not seem to be a very strong check as the extent to which judges can oversee the DPAs is not clear. DPAs are a creature of compromise and the court may feel hampered in supervising this exercise of prosecutorial discretion. Additionally, once the DPAs have been approved, the performance of the DPAs is no longer subject to judicial review. The question of whether or not a DPA is breached is a matter of prosecutorial discretion. Further, DPAs are but one string in the prosecution's quiver and in the US, non-prosecution agreements (NPAs) are also available and these are not required by legislation to be subject to judicial scrutiny.

The UK model, on the other hand, has a much stronger element of judicial oversight. DPAs in the UK are concluded under the supervision of a judge, who is involved at various stages of the process. First, after negotiations with the defendant have commenced, the prosecutor must seek a declaration from the Crown Court approving the DPA process in principle. This is done at a private hearing. Second, after a defendant has accepted the terms of a draft DPA, the prosecutor must again apply to the Crown Court for final approval, following another hearing. While that hearing may be private, if the court decides to approve the DPA, that decision and reasons for it must be handed down in open court. At both of these stages the court must be satisfied that a DPA is in the "interests of justice" and its "terms are fair, reasonable and proportionate". Third, should there be an alleged breach of the DPA that is not minor and that cannot be resolved through rectification, the prosecutor then applies to court to seek a finding of breach (this is assessed by the court on a balance of probabilities) and explain the remedy it seeks as a result. This pronounced role for the courts in the UK DPA model allows for substantial oversight over DPAs.

Finally, the publication and easy availability of data on DPAs is another important check as it allows for scrutiny and encourages accountability. In the US, although all DPAs are published, the government does not make available any consolidated database for DPAs that have been entered into. This has not stopped private entities and academics from publishing their own collection of information (see, for example, Gibson Dunn's updates on NPAs and DPAs available at <https://www.gibsondunn.com/2017-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/>) but more can certainly be done to make information more conveniently accessible. In the UK, after a DPA is approved by the court, the prosecutor is obliged to publish the DPA, the initial judicial declaration, the court's reasons for granting it and the court's final decision to approve it. This is presently done through the website of the Serious Fraud Office, which also includes a summary of financial statistical information. DPAs are also available to the Crown Prosecution Service but none have been entered into as at time of writing.

DPAs in the Singapore Context

According to news reports (Tan Tam Mei, "New legal framework proposed for corporate offences" *The Straits Times* (16 January 2018); Justin Ong, "Deferred prosecution agreements proposed for corporate offences: Shanmugam" *Channel News Asia* (16 January 2018); Siau Ming En, "Deferred prosecution agreements to be part of proposed changes to Criminal Procedure Code" *Today* (17 January 2018)), the proposed DPA framework in Singapore would allow charges against companies to be dismissed if they meet the conditions of the DPA, but the companies could pay higher fines compared to what the current criminal law provides for. DPAs would also only be available for corporate offenders represented by counsel and are fully voluntary. The DPAs will contain a statement of facts, expiry date and relevant financial penalty where applicable, among other things. The terms of the DPAs have to be approved by the High Court, which will have to be satisfied that it is in the interests of justice and that the terms are fair, reasonable and proportionate. The DPAs must be published once approved.

This seems to suggest that the proposed Singapore model lies somewhere in between the US and UK model. It is not clear if the prosecution will publish policy guidelines on the use of DPAs and whether the High Court will be involved at other stages of the DPA process apart from the approval of the DPA. These additional safeguards may be important. In relation to the policy guidelines relating to the use of DPAs, these would allow the High Court to assess whether a DPA in a particular case is in the interests of justice and to consider the issues of fairness, reasonableness and proportionality. Otherwise, the High Court may be placed in a difficult situation of having to determine how the prosecution is to exercise its discretion in relation to DPAs. This would go beyond its judicial role. Having clear policy guidelines would also serve to help potential corporate defendants better understand their situation in the event of discovery of wrongdoing within their networks. This would determine whether or not DPAs could still have a deterrent value and provide incentives to self-report. Involving the court at other stages of the DPA beyond mere approval is

also important as the manner of negotiation and enforcement of the DPA will also influence the values of the criminal justice system.

Conclusion

However, even with all these measures, the introduction of DPAs as an alternative tool to resolving criminal conduct cannot avoid the question of whether this measure is consistent with upholding and enforcing the rule of law. In the civil justice system, alternative dispute resolution may be more easily acceptable and may even be seen as appropriate dispute resolution given that what is at stake is usually the interests of private parties. Where criminal conduct is in question, something less than a prosecution and conviction will never seem to carry equal weight even if a DPA could achieve more in terms of higher penalties, changing the conduct of companies and even victim restitution than what we can expect from criminal punishment. This is particularly so for crimes such as corruption, which are antithetical to the "clean" Singapore identity. Nevertheless, with DPAs already a feature in the US and UK, as well as the observable trend to use or consider using DPAs in other jurisdictions such as Australia, Canada and France, DPAs could over time become the "new normal" for corporate crime.

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