

Cos. Take Note: Singapore Plans Deferred Prosecutions

By **Daniel Chia and Kenneth Kong**
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Singapore Minister for Home Affairs and Law K. Shanmugam announced last month that the government is considering the inclusion of deferred prosecution agreements in the latest round of amendments to the Criminal Procedure Code and Evidence Act.

It was reported toward the end of 2017 that Keppel Offshore & Marine Ltd. reached a global resolution with authorities in the United States, Brazil and Singapore, under a deferred prosecution agreement with the U.S. Department of Justice, and settlement agreements with the Attorney General's Chambers in Singapore and the Ministério Público Federal in Brazil.

Under this arrangement, Keppel will pay a total of \$422 million in fines to resolve criminal corruption charges relating to its activities in Brazil, of which Singapore will receive up to \$105.5 million. Keppel is listed on the Singapore Exchange and is Singapore's largest oil rig builder; it has, as its largest shareholder, Temasek Holdings, one of Singapore's sovereign wealth funds.

Just a few months after this groundbreaking enforcement, the Singapore Minister for Home Affairs and Law announced in a dialogue session with lawyers that the Singapore government is now considering implementing the DPA framework in Singapore, noting that the DPA regime is available in the context of the United States' Foreign Corrupt Practices Act and the United Kingdom's Bribery Act.

What Is a Deferred Prosecution Agreement?

A DPA is an agreement entered into between the regulating authority and the accused company to defer (or "settle") criminal charges. The terms of a DPA often involve more than an agreement simply to pay financial penalties; for example, U.S. and U.K. DPAs have required corporations to develop and enhance compliance programs, to engage in remediation and to cooperate with authorities in the prosecution of key individuals.

If a corporation fails to comply with the terms of a DPA, the prosecution may proceed with the charges that were deferred under the agreement or institute new criminal proceedings.



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The DPA Framework Overseas

The DPA framework has been used to incentivize corporations and businesses to proactively enhance their compliance programs, to report misconduct to authorities and to cooperate at the earliest available opportunity. As demonstrated in the United States and United Kingdom, the DPA framework promotes a coordinated approach between corporations and prosecuting authorities to detecting and dealing with instances of corporate crime.

While full prosecution against corporations remains available to prosecuting authorities, the DPA has become an established regulatory tool in the United States, and is now an emerging tool for prosecutors in Europe, through which authorities have sanctioned corporate criminal conduct. Depending on the jurisdiction, entering into a DPA is not an automatic right; in the United Kingdom, for example, a court must agree that the decision to offer a DPA rather than prosecute is “in the interests of justice.”

That said, the DPA framework allows authorities to avoid the difficulties of full prosecution (which in the U.K., for example, has historically been difficult and mostly unsuccessful, given the often-secretive nature of illicit conduct). For corporations, a DPA means that they avoid the potentially catastrophic impact of criminal conviction and demonstrate positively their response to and remediation of misconduct within the organization.

What We Know of the Likely-to-be-Proposed Singapore Framework

Although details of the proposed Singaporean DPA framework have not yet been published (including for which offenses it may apply at this time), the Ministry of Law in Singapore has stated that the proposed framework will only apply to prosecutions against companies and not individuals.

It is also expected that all DPAs will need to be approved by the High Court in Singapore, which must be satisfied that the DPA is in the interests of justice and that the proposed terms are fair, reasonable and proportionate. Consequently, counsel representing clients on DPAs must be closely involved from the outset in identifying and managing the issues, conducting investigations, advising in decisions to report and cooperate with authorities in Singapore and elsewhere and embarking on the DPA process to guide a company in its interaction with the Singapore authorities, the Singapore courts and overseas agencies.

The suggested DPA framework represents a significant shift from the perceived reluctance of the Singapore authorities to prosecute corporate offenders for criminal conduct, choosing instead to focus on the main controlling minds and culpable individuals within the organization. The implementation of the DPA framework highlights the increased sophistication and resources needed to sanction corporations beyond criminal investigation by the police and full prosecution in criminal proceedings.

It also reflects the global development of DPA frameworks beyond the United States and United Kingdom. (Australia has embarked on a consultation to introduce a similar framework; in November 2017, France used its recently implemented criminal settlement procedure for the first time.)

It is a timely and, some would say, overdue formalized development to Singapore’s criminal procedure laws, given the increasing complexity of business, the increased regulatory environment and an interconnected world in which companies and businesses operate today. This is especially true for Singapore companies and corporations that are used often as a gateway or regional headquarters for multinational corporations’ Asian operations.

Important Takeaways

Corporations with operations in Asia should pay particular attention to the development of this corporate criminal enforcement regime in Singapore, the increasing sophistication of the process to deal with corporate misconduct in the region and the prevalence of communication and cooperation between Singaporean, U.S. and other prosecuting authorities globally.

We have already seen multijurisdictional settlements involving European, U.S. and Latin American authorities. We can expect that Singaporean authorities will join this cooperative approach.

The conduct of multijurisdictional investigations, engagement with cross-border prosecuting authorities and navigation of multijurisdictional settlements is complex. An integrated, cross-border team of legal advisers is essential, comprising those with deep experience in handling investigations and dealing with the authorities and courts locally, such as in Singapore, as well as sophisticated knowledge and experience of investigations globally and dealing with U.S., U.K. and other agencies.

Experience in the United States and United Kingdom has indicated that the DPA framework encourages and rewards corporations that proactively establish, maintain and review compliance programs across their business globally to limit, detect and report misconduct. The proposed introduction of DPAs in Singapore serves as a timely reminder to corporations doing business in Asia to develop, update and review internal policies and procedures to preempt illegal activity and, in the event they face corporate charges, to be better placed to take advantage of the proposed DPA framework.

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