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To compound or not to compound, and reason for the decision

To compound or not to compound may very well be the question when it comes to compoundable offences. The decision to compound the four executives in the Serba Dinamik Holdings Bhd case has raised a myriad of questions, thoughts, and opinions.

As a general principle, crime should not pay. And in that vein, regulators often fine triple the amount of illicit gain (or loss avoided) to send home the strong message that they will not allow anyone to profit from their crime. Likewise, as an added deterrent, jail terms are also imposed to drive home this message. The message to be sent is that there should not be any arbitrage between illicit advantages and the cost of the sanction.

In the case of Serba Dinamik, the Securities Commission (SC) has stated that the decision to compound was a result of the decision of the Public Prosecutor to accept the representation made to the Attorney-General's Chambers (AGC) by Serba Dinamik and the individuals involved regarding the charges pending in court.

The Federal Constitution (Article 145 (3)) states that the AG shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence. Thus, the AG has the sole and unfettered discretion to charge or discontinue the charge against the accused person or company. In the interest of transparency, reasons should be given why a decision is made to compound instead of pursuing the charge.

A compound is conclusive in that it absolves those charged of any further action in relation to the charge. The SC takes instruction from the AGC before prosecuting anyone. And to this extent, the SC may be obliged not to continue with a prosecution.

Here, it also needs to be explained why an earlier decision to proceed with the criminal charges was later substituted with a compound. The reason for this should also be made transparent. In the interest of transparency, the AGC could lift the veil of its absolute discretion and explain the reasons.

The criminal charges that the four executives faced were under Section 369(a)(B) of the Capital Market and Services Act (CMSA), read together with Section 368(1)(b)(i) of the same Act. This carries a maximum jail term of 10 years and a maximum fine of RM3 million if one is convicted of the offence.

The SC, the statutory regulator, imposed the maximum compound permitted. The SC has stated that the RM3 million is the maximum amount of compound permissible under Section 369(a)(B) of the CMSA.

In offering a compound, one must be mindful of not creating a dangerous precedent.

It has been observed that some charges of lesser degree in the past were not compounded but went on to trial with resultant jail terms. We must be mindful of the message that we are sending to the capital market and potential wrongdoers. Crime must not pay and must never be seen to be paying. Sanctions must act as a sufficient deterrent to potential wrongdoers. For every wrongdoing, there must be the certainty of the visitation of a sanction.

The AGC will need to sufficiently distinguish the Serba Dinamik case from other cases in future and explains its reasons clearly. And that is why there is a need to know the reason for the decision. The AGC may now be constrained from accepting a representation for a compound in future cases where the charges are of lesser severity due to the precedence set.

The judges do it all the time when they make decisions – they have their *ratio decidendi*.

Ratio decidendi is a Latin phrase meaning "the reason" or "the rationale for the decision". The *ratio decidendi* is "the point in a case that determines the judgement" or "the principle that the case establishes". In short, it is the reason for the decision.

Likewise, every exercise of discretion should be backed by a reason for the decision.

What is needed is perhaps some structural reform. Absolute discretion is fast going out of fashion. It is being replaced by accountable discretion. All discretion should be tempered with accountability – the *ratio decidendi*. Every exercise of discretion should be backed by the rationale for the exercise of a particular discretion.

In the case of Serba Dinamik, many investors have suffered losses – they will not be able to recoup much of their losses, at least in the foreseeable future. It has indeed been a sad misadventure for many minority shareholders.

The exercise of the discretion whether to compound or not to compound a capital market offence has far-reaching implications for the capital market. It may hinder the development of a fair and orderly capital market that prides itself on investor protection.

We are not alone. Our capital markets must be attractive enough for foreign investments too. There must be certainty on how we deal with things. Perceptions are just as important as reality. In the words of Lord Chief Justice Hewart, "justice should not only be done, but should manifestly and undoubtedly be seen to be done".

It is all about transparency – the question to be answered is "why compound?". What is the *ratio decidendi*?

***This** article is contributed by Minority Shareholders Watch Group CEO Devanesan Evanson.*