

MINORITY SHAREHOLDERS WATCH GROUP

BADAN PENGAWAS PEMEGANG SAHAM MINORITI BERHAD
(Incorporated in Malaysia – Registration No.: 200001022382 (524989-M))
The Malaysian Insight – April 17, 2022 **(A) Part 1**

Why fine Serba Dinamik top executives instead of charging them, group asks



Minority Shareholders Watch Group (MSWG) chief executive officer Devanesan Evanson says the decision to compound the four Serba Dinamik executives instead of charging them has raised questions about transparency in the case. – MSWG website pic, April 17, 2022.

IN THE interest of transparency, reasons should be given why a decision was made to compound four top executives of Serba Dinamik Holdings Bhd instead of pursuing charges against them, a commentary said. Commenting on the recent development in Serba Dinamik, Minority Shareholders Watch Group (MSWG) chief executive officer Devanesan Evanson said the decision to compound the four executives 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 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,” he said.

The Securities Commission Malaysia (SC), in a statement on April 13, said Serba Dinamik and its four top executives have been compounded RM3 million each for submitting a false statement involving a revenue of RM6.01 billion for its financial period ended December 31, 2020 (FY20).

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The four individuals were chief executive officer and group managing director Dr Mohd Abdul Karim Abdullah, executive director Syed Nazim Syed Faisal who was chief financial officer (CFO) from June 2016 until mid-2020, its current group CFO Azhan Azmi, and vice-president of accounts and finance Muhammad Hafiz Othman.

Devanesan said in the case of Serba Dinamik, the SC had 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 (AG) Chambers 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.

Devanesan asserted that 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 AG's Chambers before prosecuting anyone.

And to this extent, the SC may be obliged not to continue with a prosecution.

"Here, it 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 AG's Chambers 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," he said.

Devanesan said the AG's Chambers would 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.

He said that the AG's Chambers 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, which means 'the reason' or 'the rationale' in Latin for the decision.

"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.

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In the case of Serba Dinamik, many investors have suffered losses and 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, Devanesan said, adding that 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.” – Bernama, April 17, 2022.