Implementation of Deferred Prosecution Agreements

The Criminal Justice Reform Act ("**CJRA**") was passed by Parliament on 19 March 2018 and encompasses a wide range of revisions to the existing laws under the Criminal Procedure Code ("**CPC**"). These reforms are a result of a thorough review of the criminal justice process and is part of the Government's efforts towards achieving a progressive and updated criminal justice system.

The reforms are in relation to a wide range of issues, such as enhanced protection for sexual and child abuse victims, video recording of police interviews, expanding community sentences to cover a bigger range of offences and toughened bail criteria. In particular, the CJRA introduces the option of Deferred Prosecution Agreements ("**DPA**") to the investigations scene in Singapore.

This Update will focus on the DPA legislation and what it entails for companies who are subject to investigations by regulatory authorities in Singapore.

DPA — what is it?

A DPA is a voluntary alternative in which a prosecutor agrees to grant amnesty in exchange for the defendant agreeing to fulfil certain requirements and specific conditions, such as, for example, to implement compliance programmes, and/or to co-operate in investigations into wrongdoing by individuals.

DPA schemes have already been in use in the United Kingdom and the USA, where prosecutors in these jurisdictions have used DPAs to actively penalise corporations. The new DPA legislation in Singapore may be an indication that the Government has increased its focus on holding corporate entities liable and accountable, as opposed to simply prosecuting individuals for their acts.

Key points of DPA under the CJRA

Who can enter into a DPA?

A body corporate, limited liability partnership, a partnership or an unincorporated association i.e., a corporate entity can enter into a DPA with the Public Prosecutor. However, an individual cannot do so.

What this means is that individual officials are not protected by a DPA and the Public Prosecutor can still choose to level charges against them, notwithstanding the fact that a DPA may have been reached with the corporate entity. This allows the Public Prosecutor to hold both the corporate entity and the offending individuals liable for their offences.

When can a DPA be entered into?

A corporate entity has a choice on whether to enter into a DPA with the Public Prosecutor. It may be entered into before, on or after a date on which the entity is charged with the alleged offence, but cannot be entered into after the commencement of trial for the offence.

Before the DPA comes into force, any party can withdraw from negotiations and/or the DPA itself and it does not have to provide a reason for doing so.

Effect of DPA when in force

When a DPA is entered into between parties, the corporate entity is deemed to have been granted a *discharge not amounting to an acquittal* in relation to the offence. The entity cannot be prosecuted for the alleged offence in any criminal proceedings.

In addition, any limitation period or time limit for the commencement of any of the following matters will be suspended:

a. Prosecution of an alleged offence;

b. Any civil penalty action in respect of the offence;

c. Any proceedings for an order for disgorgement of a benefit derived from the offence;

d. Any proceedings for the confiscation of any property that is used (or intended to be used) for the commission of the offence or constitutes a benefit derived from the offence;

e. Any disciplinary proceedings, or other proceedings relating to the imposition of any regulatory measure, that arise from the facts of the offence.

Possible conditions / requirements of a DPA

The Public Prosecutor is able to impose a wide range of conditions and requirements on the corporate entity that it has to fulfil under the DPA. The aim of these conditions may be to not only penalise the entity, but to also ensure that the entity does not repeat the same alleged offence(s) in the future.

As such, besides requiring the entity to pay the Public Prosecutor a financial penalty and/or to compensate victims of the alleged offence, the Public Prosecutor can also require the entity to implement a compliance programme, or make changes to an existing compliance programme, relating to the entity's policies or to the training of the entity's employees or both.

In this regard, the Public Prosecutor may also appoint a person to assess and monitor the entity's internal controls, to advise both parties of any improvements to the entity's compliance programme that are necessary or that will reduce the risk of a recurrence of any conduct prohibited by the DPA, and to report to the Public Prosecutor any misconduct in the implementation of the entity's compliance programme / internal controls.

One of the key conditions that may be imposed in a DPA would be to require the entity to co-operate in any investigation relating to the alleged offence. From a public perspective, this is one of the key advantages of having a DPA scheme as it may result in increased co-operation and a decrease in commission of the alleged offences.

Finally, a DPA may impose a time limit within which the entity must comply with its conditions and requirements. If the entity fails to do so, the DPA may also prescribe the consequences of such failure.

How does a DPA come into effect?

A DPA comes into effect pursuant to a High Court declaration i.e., the DPA must be approved and sanctioned by the High Court.

The Public Prosecutor will have to apply to obtain such a declaration *via* criminal motion, and such a declaration can only be obtained if the High Court is of the view that the DPA is in the interests of justice, and that the terms of the DPA are fair, reasonable and proportionate.

Generally, all DPAs must be published after receiving High Court approval.

What happens if an entity breaches the DPA?

If the Public Prosecutor believes that the entity has breached the terms of the DPA, he must make an application to the High Court and must prove, *on the balance of probabilities*, that the entity has failed to comply with such terms. If the High Court is satisfied, it must terminate the DPA.

Expiry of DPA

After the DPA has expired, the Public Prosecutor must give written notice to the High Court that it does not intend to prosecute the entity for the offence. This written notice must be published to the public.

Once written notice is provided to the High Court, the entity cannot be prosecuted for the alleged offence, unless the Public Prosecutor finds that, during the course of negotiations for the DPA, the subject provided inaccurate, misleading or incomplete information, or knew or ought to have known that such information was inaccurate, misleading or incomplete, to the Public Prosecutor.

Upon the Public Prosecutor's application, the High Court may then grant the entity *a discharge amounting to an acquittal*.

Case study: *SFO v Rolls Royce PLC*

The DPA terms under the CJRA, which would eventually amend and be incorporated into the CPC, are modelled largely after the UK DPA scheme as set out in Schedule 17 of the UK Crime and Courts Act 2013.

As such, it would be helpful to look towards the investigations that the Serious Fraud Office ("**SFO**") had conducted against Rolls-Royce in the UK for criminal conduct involving bribery and corruption, as an example of how a DPA scheme would work.

The SFO had charged Rolls-Royce with 12 counts of conspiracy to corrupt, false accounting and breaches of section 7 of the Bribery Act 2010, as well as the corporate offence of a failure to prevent bribery from being committed by an associated person to obtain or retain business or a business advantage. The corrupt conduct took place across Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia.

The four year investigation conducted by the SFO eventually culminated in both parties entering into a DPA which was approved by Sir Brian Leveson, President of the Queen's Bench Division on 17 January 2017.

The DPA enabled Rolls-Royce to account to a UK court for criminal conduct which had occurred over three decades, across seven jurisdictions and involving three business sectors. The terms of the DPA involved payments of £497,252,645 (comprising disgorgement of profits of £258,170,000 and a financial penalty of £239,082,645) plus interest. Rolls-Royce was also required to reimburse the SFO's costs in full (approximately £13m) and to disgorge the profits that were gains as a result of the alleged offences.

Besides the financial penalties, the DPA also required Rolls-Royce to co-operate fully and honestly with the SFO in relation to any prosecution brought by the SFO in respect of any conduct under investigation or prosecution by the SFO which relate to the alleged offences. This would require Rolls-Royce to disclose all information and material in its possession, custody or control and use best efforts to make themselves available for interviews, as requested by the SFO.

The DPA also required Rolls-Royce to implement a robust compliance programme within a stipulated time-period and to report its progress to the SFO.

Commentaries have noted that a large part of why the SFO had agreed to offer the DPA to Rolls-Royce was due to the fact that Rolls-Royce had fully-co-operated with the SFO during its investigations and had effectively opened its doors, providing the SFO with copies of key documents (such as interview statements), as well as giving it access to all relevant emails and hard copy materials. Rolls-Royce had also waived legal professional privilege on a limited basis, which was viewed as a key indicator of whether an entity was genuinely co-operating and deserving of a DPA.

However, as the DPA does not provide any protection to any individuals concerned, the SFO's investigation into their conduct continues and may eventually result in criminal prosecutions.

With Singapore now adopting the DPA scheme, the Singapore regulatory authorities may take a leaf out of *SFO v Rolls Royce PLC* and adopt a similar approach for its investigations. It would be certainly useful to keep an eye on the new DPA legislation and observe how it is implemented locally.

How can Singapore companies protect themselves?

With more number of companies being prosecuted for bribery related matters, it is crucial for companies to ensure that they have taken steps to prohibit such conduct, either within the company itself or with regard to the actions of other third party associated persons / companies.

In this regard, companies can, as a good starting point, refer to "PACT: A Practical Anti-Corruption Guide for Businesses in Singapore" ("**PACT**") that was designed by the Corrupt Practices Investigation Bureau and which sets out to guide companies in developing and implementing an effective anti-corruption system.

Some key principles a company should adopt:

a. Have a clear and robust anti-corruption policy which should be formally documented and communicated to all parties within and outside the company to enhance awareness and effective implementation;

b. There should be clear management buy-in on the company's policy. The tone from the top has a large impact and preventing corruption starts at the top;

c. Companies should develop a company code of conduct. This code of conduct should serve as a comprehensive, unambiguous guide for all employees on a uniform standard of conduct and ethics in all areas of business activities where corrupt practices may occur;

d. Companies should also establish a strong compliance programme, with good internal controls, to track and ensure that the anti-corruption policy and code of conduct are being adhered to;

e. It is important to conduct regular training on the anti-corruption policy, code of conduct and compliance programme for all of the company's employees;

f. Companies should continuously track and evaluate the effectiveness of their anti-corruption system and policies to determine whether improvements and/or modification are required. Sources of information that can assist in a company's evaluation include the information from the company's records, results from audit checks and feedback from employees and/or business partners, which can be gathered from surveys and focus groups;

g. It would also be prudent for a company to keep an eye out for anti-corruption benchmarks, established by other companies, in the same / similar industry; and

h. If and when investigations are commenced against a company, it is important to co-operate with the regulatory authority and protect the company's position at the same time.

The guidelines set out above are helpful to assist companies in developing and establishing an anti-corruption framework internally. However, if companies are interested in implementing a more comprehensive anti-bribery management and compliance system, they may consider obtaining the Singapore Standard on Anti-Bribery Management Systems (ISO 37001) certification from the Singapore Accreditation Council.

Our team is well qualified to assist in drafting and training employees in anti-corruption frameworks. We also routinely help companies faced with dawn raids.

Our previous article on Deferred Prosecution Agreements can be accessed at: https://www.wongpartnership.com/index.php/files/download/2750

If you would like information and / or assistance on the above or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or any of the following partners:

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