CORPORATE LIABILITY

THE CONCEPT OF DEFERRED PROSECUTION AGREEMENTS IN THE LANDSCAPE OF CORPORATE LIABILITY FOR CORRUPTION IN MALAYSIA – AN INEVITABLE NECESSITY?

INTRODUCTION On 31st January 2020, Airbus entered into a deferred prosecution agreement ("**DPA**") as it faced five separate charges of failure of a commercial organisation to prevent bribery under Section 7 of the UK Bribery Act by the UK Serious Fraud Office ("**SFO**")[1]. Section 7 of the UK Bribery Act is similar to Malaysia's corporate liability provisions, Section 17A of the Malaysian Anti-Corruption Commission Act 2009 ("**MACC Act**").

Under the terms of the DPA, Airbus agreed to pay a fine and costs amounting to €991 million in the UK, and in total, €3.6 billion as part of one of the world's largest global settlements for bribery, involving authorities in France and the United States. As details became publicly available, Malaysians were shocked to discover that Airbus had agreed to a statement of facts regarding the matter that appeared to implicate executives of a domestic airline in wrongdoing.

DPAs were introduced in the United Kingdom's Crime and Courts Act 2013 which received royal assent in April 2013 and have been used in 8 enforcement actions ever since. DPAs have been regularly used by regulators in the US since 1992. Other countries where the DPA mechanism are available include France, Canada, Singapore and Australia. There are an increasing number of countries considering implementing a DPA regime. Given that global trend, it would be prudent for Malaysia to consider the same.

WHAT IS A "DEFERRED PROSECUTION AGREEMENT"?

A DPA is a voluntary agreement reached between a prosecutor and an organization. The agreement allows prosecution to be suspended or deferred for a defined period of time provided the commercial organization fulfils specified conditions. Conditions of DPAs may include but are not limited to a combination of the following:

1) An admission to facts;

2) Payment of a monetary fine;

3) Implementation of a compliance programme to detect and/or prevent future violations;

4) Disgorgement of monies associated with the offence; and

5) Being monitored by relevant regulatory agencies for a defined period.

DPAs can be used to settle charges for bribery, money laundering, fraud and other white-collar crimes. It should be noted that DPAs do not require the organization to plead guilty to the alleged offence. The DPA will be considered a probation prior to submitting a plea.

In the UK, a DPA can be proposed only at the discretion of the prosecutor. The SFO and Crown Prosecution Service have published a Code of Practice for prosecutors which must be applied when considering whether or not to propose a DPA. The prosecutor is obligated to apply a two-stage test to determine whether a proposal for a DPA is appropriate in any given case.

Firstly, the prosecutor must first determine whether there is sufficient evidence or reasonable suspicion based on evidence, that an offence has been committed. Secondly, whether the public interest is properly served by entering into a DPA as opposed to proceeding with the prosecution. In attempting to determine what constitutes "the public interest", the prosecutor is obliged to consider several factors, including but not limited to the following:

[1] R v Airbus SE [Case No: U20200108]

1) Is the organisation compliant and cooperative with the prosecutor's investigation?

2) Does the company have an effective and satisfactory compliance programme in place?

3) If the organisation has notified the authorities of the wrongdoing, was such notification done within a reasonable time?

4) What is the organisations history of wrongdoing?

5) How has the organisations practices changed since discovering the wrongdoing?

6) What is the impact of prosecution on employees and others innocent of any misconduct?

After the prosecutor believes that it is appropriate to propose a DPA, the prosecutor will subsequently seek a declaration from the court that the utilization of a DPA in that case would be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.

Justice William Davis stated in his judgment for the 2019 DPA between the UK's SFO and Serco Geografix Ltd (SGL), that approval for the DPA would only be given where there is the clearest possible demonstration of integrity on the part of the company concerned once the criminal activity has become apparent. This requires "*early self-reporting to the authorities, full co-operation with the investigation, a willingness to learn lessons and an acceptance of an appropriate penalty*[2]".

Why Are Deferred Prosecution Agreements Used?

DPAs can provide a possibility for a more expedient conclusion to an investigation. Investigating large-scale, cross-jurisdictional and complex cases are time consuming and costly for governments. DPAs may assist in minimising the financial or economic losses caused by pursuing a prosecution.

Cost-efficient methods such as a DPA may be a necessary option especially when countries (and by extension, regulatory agencies and prosecutors) are suffering from difficult economic conditions. DPAs offer an alternative to trials which may be incredibly expensive while being open to scrutiny by the public.

Additionally, a DPA regime may encourage more companies to willingly self-report cases of financial crimes. For example, in the event that new management in an organization discovers wrongdoing by the previous management upon assuming control of the organization, a DPA system may dilute incentives to conceal the wrongdoing of the previous management and encourage self-reporting.

Coupled with the commercial organisations cooperation, a DPA may compel companies to provide regulators and enforcement agencies more access to information that would be otherwise difficult to obtain. This information may ultimately lead to more effective investigations and more successful prosecutions.

A DPA also offers the opportunity to reduce potential damage caused by the investigation to third parties, such as shareholders and employees. Additionally, it may allow victims to be compensated while a penalty is imposed.

DPA Has No Equivalent in Malaysia

In early October 2020, Datuk Seri Azam Baki, chief commissioner of the Malaysian Anti-Corruption Commission (MACC) stated that the MACC has seen an increase in corruption cases related to leakages in government procurement that involved top leadership in government agencies. He raised the concern that 50% of MACC's investigation work is currently taken up by such cases[3].

[2] R v Serco Geografix Limited Case (No: U20190413)

[3] "MACC: Rampant corruption in govt procurement processes" (New Straits Times, 2020)

Corrupt practices within the government can take place both at the political and bureaucratic level. However, these corrupt practices are often inextricably linked to corporate entities that similarly participate in corruption to obtain contracts, licenses or other benefits.

In 2019, the Chief Commissioner of the MACC at the time, Latheefa Koya, when asked whether she would like to see a DPA regime implemented in Malaysia, raised concerns that the absence of DPAs in the MACC's arsenal of tools would mean that "it is going to be a difficult process to prosecute"[4]. She had then confirmed that the MACC were examining how such a settlement system could work in Malaysia and be implemented alongside the newly introduced corporate liability provisions under Section 17A of the MACC Act.

However, there has been close to no public indication ever since that the MACC or the Malaysian government at large have been actively considering adopting the DPA regime as other jurisdictions have.

CONCLUSION Prior to the introduction of DPAs in the UK, the SFO conducted extensive consultations with stakeholders in establishing the Code of Practice on the use of DPAs. The SFO sought serious public engagement regarding the eight points covered in the draft Code of Practice, including the circumstances when a prosecutor should consider a DPA, the criteria to apply when making this decision, and on the disclosure approach envisaged.

Similarly, Malaysia should widely and seriously consult with anti-corruption stakeholders and the public to formulate a comprehensive domestic equivalent. However, it needs to do so with urgency. As COVID-19 creates cracks in the economy, regulators must be agile, cost-efficient and effective in an environment wherein resources to conduct expansive investigations and costly long-drawn trials are limited.

Malaysia may need to learn lessons from other jurisdictions and consider implementing a transparent, accountable and effective DPA regime to provide regulators more options in dealing with corruption in Malaysia. An effective Malaysian DPA regime will ultimately complement the implementation of the newly introduced corporate liability provisions in Section 17A of the MACC Act.

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22 October 2020

[4] Ben Lucas, "Deferred prosecution agreements required in Malaysia before corporate failure-to-prevent-bribery offense is enforced, MACC chief says" (MLex, 2019)