UK DEFERRED PROSECUTION AGREEMENTS - ARE THEY THE BRIDGE BETWEEN PROSECUTION AND CIVIL RECOVERY?

On 17 May 2012 the Ministry of Justice published its long awaited formal consultation on Deferred Prosecution Agreements ("DPAs"). It is hoped by the Government that by providing prosecutors with this additional tool, greater flexibility will be available when dealing with corporations such that companies will find it more attractive to self-report.

The author was involved in the SFO's first prosecution of an English company for overseas corruption which was also the first time the Attorney General's Plea Bargaining Guidelines were used and a formal plea agreement entered into. Having been involved in that case, as well as having handled the prosecutions of Severn Trent Plc and Weir Group Plc, we appreciate the difficulties for companies faced with a decision whether to co-operate with an SFO or other law enforcement investigation.

However, whilst the Consultation Paper discusses the need to encourage self-reporting, this overlooks the need under the Proceeds of Crime Act 2002 to make a money laundering disclosure and seek consent to retain the proceeds of corrupt conduct, or otherwise face the risk of a prosecution both of the company and any individual officers or employees for money laundering offences, even if they were not involved in the corrupt conduct which gave rise to the tainted assets.

Perhaps the greatest concern for companies is uncertainty over any potential fine and confiscation order. Recent comments from the judiciary criticising the SFO for over-stepping the mark in agreeing financial penalties has not assisted matters[1]. If DPAs are to work going forward this is one area of uncertainty which will need to resolved. The Government has also said that it is hoped DPAs will encourage early engagement with UK authorities, assist in achieving finality in shorter timescales and enable closer co-operation between different jurisdictions.

However, the Consultation and proposed structure of DPAs raises a number of issues as discussed below. We will be submitting a response to the Consultation Paper and would welcome comments from clients if they would prefer us to submit them anonymously on their behalf.

[1] Sentencing remarks in R -v- Innospec Limited and R -v- Dougall.

Summary of DPAs

The proposed structure of the DPA process is as follows:

1. The parties will confidentially negotiate the basis for a DPA. This will include:

    - an admission of facts constituting the offence to be charged;

    - the time period for the duration of the DPA, during which time any breach of the DPA could be subject to additional sanction, extension of the DPA or its termination and a subsequent prosecution for the charges initially laid;

    - the financial penalty;

    - any disgorgement of profits;

    - reparation to victims;

    - conditions regarding possible future co-operation with respect to prosecutions of individuals;

    - conditions regarding management change for any implicated management or withdrawal from the relevant markets;

    - conditions regarding putting in place appropriate anti-corruption policies and procedures going forward, including monitoring thereof.

2. There will be a preliminary hearing before a judge, in private, at which the judge will be asked to express a view whether he considers the DPA to be in the interests of justice and the conditions are fair, reasonable and adequate, including the financial terms. Any views expressed at that stage are not intended to bind the judge at the subsequent hearing (see below).

3. The DPA will then be finalised and put before the court. Again the judge will be asked in a private hearing to reach a final view on whether it is in the interests of justice. The financial penalty would be reduced by, it is proposed, a maximum of one third to reflect the co-operation.

4. The judge would then give a judgment in open court on the DPA to ensure there is transparency in the process. The terms of the DPA would be explained. The charges would then be laid and left to lie on file. The details of any rulings given at earlier hearings would also then be made public. If no final DPA is approved, then any admissions made in the negotiations would remain confidential, unless the matter was subsequently prosecuted, in which case in limited circumstances evidence can be led on what was discussed. We comment on these aspects below.

5. There would then be a period of monitoring of compliance with the DPA. If the DPA was not breached, at the end of the relevant period the prosecutor would write to the court, inform it of the successful conclusion, offer no evidence on the charges previously laid and as a result those charges would be dismissed and the proceedings would be concluded.

Issues arising

The above structure and the proposals in the Consultation Paper raise a number of concerns.

1. *The extent of the admissions required*

It should be remembered that the DPA process is a criminal process, albeit with no conviction and therefore none of the consequences in terms of mandatory debarment under the EU procurement rules. However, it will not necessarily be possible, or helpful, for a company to accept that the facts allegedly constituted an offence by the company since in many cases, the directing mind and will of the company will not be implicated and it is only through them a company can be guilty. This may pose real problems which section 7 of the Bribery Act was intended to overcome by making a corporate prosecution easier since section 7 does not require proof of fault of the directing mind and will of the company. DPAs for the substantive bribery offences under the Bribery Act may therefore be just as difficult to agree as a guilty plea.

In our view, whilst companies should be expected to make factual admissions, they should not be forced to accept that the facts alleged would amount to an offence by the company.

2. *Lack of certainty regarding the financial penalty or disgorgement*

The Consultation Paper notes the need for guidance on the financial penalty. It proposes two approaches:

- an over arching narrative guideline on the principles to be followed, including factors of how the penalty should relate to any hypothetical sentence which would have been imposed if the company had been convicted as well as, perhaps, a non-exhaustive list of example penalties which might be appropriate for particular types of behaviour. This is seen to have advantages of flexibility, but in our view is unlikely to have the certainty companies need.

- guidelines structured on an offence by offence basis, setting out ranges, categories and starting points for DPA penalties. There is a concern that this may restrict flexibility, but that may be worth trading for greater certainty, particularly in light of the sentencing remarks by the Judge in Innospec where it was suggested UK fines should increase to a similar size to those in the US, a development not to be encouraged. If that is the feeling of the judiciary, then given their involvement in commenting on DPAs at an early stage including the appropriateness of the financial penalty, the less discretion to significantly increase the penalty, the better.

However, what neither approach deals with is perhaps the greater uncertainty as regards disgorgement. As a result of cases in which we have been involved, we have seen a range of approaches. The starting point has always been the gross revenues derived from the criminal conduct i.e. the whole of a tainted contract secured through corruption. Through negotiation, that figure has been reduced to one reflecting gross or net profits, with the net profit figure itself being calculated on different bases. Given the potential for this figure to be greater than the fine, as it was in the Weir Group case, sometimes by several multiples, we consider that if companies are going to be encouraged to enter into DPAs, greater certainty is also needed around the approach to disgorgement in DPAs.

The other issue raised by the proposed DPA process is that the judge's comments on the appropriateness of the financial reality at the first hearing are not binding on the judge at the final hearing. By then the DPA has been signed. In our view, unless significant new facts emerge between the two hearings, the judge should be bound by his earlier remarks such that there is greater certainty earlier in the process.

3. *Confidentiality of the admissions and DPA process*

One of the criticisms which has been made in the past around Civil Recovery Orders is the lack of transparency since few if any facts are disclosed. Whilst it may be acceptable to bring greater disclosure through DPAs, the Consultation raises a number of concerns:

- The effect on admissions in the event the DPA is terminated by a successful Judicial Review. We discuss this below.

- After any final hearing, details of any rulings given at any earlier hearings would be made public. It is not clear what is meant by "rulings" but if it goes beyond what the judge has said, we consider this could be unhelpful as a host of issues may be discussed at the first hearing since it is a preliminary process. Any "compare and contrast" between the position put forward at the initial hearing and the final hearing could be prejudicial to the company. Since those discussions are akin to "without prejudice" discussions, no formal DPA having been signed, we consider as a matter of public policy they should remain confidential.

- It is proposed that documents created by a commercial organisation during the course of DPA discussions can be used by a Prosecutor in subsequent proceedings:

    1. where a company adduces evidence about what was said during DPA discussions and makes a statement inconsistent with it;

    2. where there is a prosecution for another offence other than the one subject to the DPA discussions. There is no trigger for such use and in our view it is far too broad. It means, for example, any comment made could be used against the company in any subsequent prosecution for another offence, such that the "without prejudice" nature of the discussions is completely eroded. We can see no public policy rationale for

this approach and at the very least, the trigger should be the same as 1 above i.e. a company adduces evidence about what was said during DPA discussions and makes a statement inconsistent with it;

3. to make inquiries and gather evidence which could be used against the company. Again, we consider this is too broad since the DPA discussions may be terminated through no fault of the company but either because of an unreasonable position adopted by the Prosecutor or adverse comments by the judge. In civil proceedings, the "without prejudice" nature of the discussions would not be overridden so lightly, and we do not consider it is helpful for Prosecutors to be given this "leg up". It may disincentivise companies from engaging with the process as candidly as would be helpful to secure a resolution.

4. *Finality*

Companies entering into DPAs will want finality, particularly after the content of the DPA has been made public. One concern which is therefore raised by the Consultation is a proposal that whilst the judge's decision to approve the DPA cannot be subject to judicial review, the Prosecutor's decision not to prosecute will be capable of review. We consider this is particularly unhelpful since it is proposed that in those circumstances the DPA would be terminated with all the consequences that brings, namely that the prosecutor could use the admissions gained. Whilst we doubt that is what is intended and no doubt a distinction could be drawn between DPAs terminated as a result of breach by the company and those terminated as a result of successful judicial review proceedings, we consider the risk and uncertainty not to mention the damaging publicity which could result is very unhelpful and will act as a strong deterrent. Where a DPA has been entered into, arguably the Prosecutor has not made a decision not to prosecute, but has decided that a criminal resolution is appropriate, has laid charges (as would normally be the case) and has simply decided to compromise those proceedings through a court order. Since the judge hands down a judgment in open court reflecting the DPA, in our view it would be more consistent not to allow judicial review of the DPA process.

5. *Effect of breach*

In the event the commercial organisation is in breach of the DPA, the Consultation Paper sets out a number of options. They range from proceedings for breach of the DPA, followed by an assessment by a judge to determine what penalty should be imposed for breach, to revival of the prosecution.

Interestingly it is not proposed that a judge will have to take into account the sums paid by the company under the DPA in the event that a prosecution is sought. We consider this is unreasonable and amounts to, in effect, double punishment.

Secondly, if the company is acquitted of the substantive offence, any sums paid under the DPA are not automatically repaid. Again, we consider that this is unreasonable as it is inconsistent with the current criminal law, which does not entitle the state to keep the benefit of criminal

penalties where, for instance, a person has pleaded guilty, but subsequently launches a successful appeal on the basis that the conviction was unsafe (i.e. following fresh evidence or an erroneous ruling of law).

6. *Individuals*

The Consultation Paper proposes that information provided by the company, but not admissions, could be used against any individual in a subsequent prosecution. We have no objection to that, as that is consistent with the current approach where information provided by companies can be used against their employees. However, the Consultation Paper goes further and suggests that companies may be required to co-operate with any investigation of its employees, including by making available non-privileged information and material, as well as providing access to witnesses.

Difficulties have arisen in other prosecutions by the OFT where defence teams have pushed for disclosure of vast amounts of information as well as interview notes taken by the company as part of its internal investigation. Claims have been made in other trials that such notes are not privileged and in any event, where the company has agreed to co-operate, privilege should be waived. Whilst the proposal as regards co-operation is more specific than that required by the OFT, we are concerned that the OFT's requirements have become more exacting over time. It should therefore be made entirely clear that companies will not be expected to waive privilege to maintain co-operation and that in providing information drawn from those interviews, there is no loss of privilege.

Conclusion

Whilst in our view DPAs may be a helpful additional option, there are still some points of principle to be resolved before they should be welcomed in facilitating the resolution of a possible prosecution of the company. What we would not want to see is DPAs becoming the only real alternative to a criminal prosecution/plea bargain and the use of civil recovery falling away. In practical terms, there is little difference between a DPA and a conviction following a plea bargain, particularly in the case of a prosecution of the new corporate offence under section 7 of the Bribery Act, a conviction for which brings no automatic debarrment. We consider that the focus should also be on ensuring the civil recovery process works for all interested stakeholders such that companies which self-report and properly remediate can, rightfully, avoid criminal prosecution. We fail to see why a company/individual coming forward with a competition infringement can gain complete immunity, but that a company self-disclosing issues around bribery and corruption should not be able to avoid a criminal prosecution.

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If you have any questions regarding this memorandum, please contact Peter Burrell (+44 207 153 1206, pburrell@willkie.com) or the Willkie attorney with whom you regularly work.

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