Client Alert

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The American Way – DPAs arrive in the UK

By Kevin Roberts and Duncan Grieve

February 2014 marks an important landmark in the UK authorities' ongoing efforts to fight corporate crime, international corruption and bribery. On 24 February 2014, a new Part 12 of the Criminal Procedure Rules will come into force, and the Deferred Prosecution Agreement (**DPA**) will become available as an additional tool to assist UK prosecutors in tackling a wide range of corporate criminal offences. The basic features of the new DPA regime are set out in our Outline below. Further details on practical implementation are expected when the Director of Public Prosecutions and the Director of the Serious Fraud Office (**SFO**) publish a Code of Conduct later this year.

The aim of the DPA is to incentivise cooperation from organisations under investigation by offering a negotiated resolution (in the form of a court-sanctioned, written settlement) in order to avoid the potentially catastrophic consequences of a conviction in the criminal courts. In return for compliance, the prosecutor will defer and ultimately discontinue criminal prosecution. The DPA is therefore also intended to allow effective supervision of remedial measures undertaken by the organisation through maintaining the threat of prosecution over a fixed time period.

The DPA is attractive to prosecutors because it offers a quick resolution that avoids the expense and uncertainty of a full criminal trial. The appeal for organisations is clear, as the consequences of a criminal conviction can be fatal to a business. For example, in the European Union, public procurement rules bar an organisation from receiving an EU contract if it has been found guilty of bribery. The debarment regime in the US differs in that it is not designed to punish organisations, but rather to ensure that the US government contracts only with "presently responsible" entities. If offered a DPA, an organisation will be able to make a pragmatic, strategic decision based on the commercial consequences unconstrained by the human stigma of a guilty plea. DPAs will not be available to individuals for reasons of public policy.

The advent of the new DPA regime marks a significant change, in that it introduces a statutory basis and accompanying formal process to govern this type of plea bargaining in England and Wales. The DPA has long been a prominent and extremely effective tool used by the US authorities and is underpinned by a mature process supported by the courts. The results are striking. The US authorities concluded 28 non-prosecution and deferred prosecution agreements in 2013, which resulted in nearly $2.9 billion in monetary penalties.

Prior to this legislative reform, efforts to implement cross-jurisdictional settlement agreements in criminal proceedings against corporates in England and Wales have been met with disapproval by the judiciary. Lord Justice Thomas baulked at such an agreement in the *Innospec* case, which he perceived as a fetter to the judge's specific discretion over sentence and, whilst upholding the settlement on the particular facts of the case, noted, "*However, I have concluded that the Director of the SFO had no power to enter into the arrangements made and*

no such arrangements should be made again".[1] This stinging criticism effectively ended attempts to conclude global settlement agreements in criminal proceedings in the UK. Prosecutors will hope that defined processes in the new regime, in particular the requirement for prior court approval of a draft DPA, will result in judicial support. This is a key issue given the increasing international scope of investigations and the requirement to deal with multi-jurisdictional legal issues in future criminal matters involving organisations. We understand that four High Court judges have been appointed to specifically deal with DPAs.

An important difference between US and English criminal law is the standard of proof required to make a corporate entity liable. In English law, a company will normally only be criminally liable where the commission of the offence can be attributed to someone who, at the material time, was the '*directing mind and will*' of the company or '*an embodiment of the company*'.[2] This requirement has severely inhibited successful prosecutions due to the difficulties in meeting this standard. The much lower standards of proof required in the United States for such offences mean that the threat of corporate prosecution has historically been felt more keenly by corporations who have agreed to large financial settlements with US authorities to avoid prosecution.[3] In the last four years the Foreign Corrupt Practices Act (**FCPA**) Unit of the US Department of Justice has overseen enforcement actions that resulted in about $2 billion in penalties.[4] Prosecutors in England and Wales will continue to face this problem under the new DPA regime but there are signs that changes are occurring. Recent legislative activity in England aimed at tackling corporate crime has addressed the issue, including, most prominently, the strict liability offence for corporates failing to prevent bribery imposed by Section 7 of the Bribery Act 2010.

It is an open question whether the UK authorities can mirror the impressive record of their US counterparts by making use of the new DPA regime. Uncertainties remain given the higher standard of proof required to make corporate entities liable under English law and the historic lack of successful SFO prosecutions. The judiciary will have a very active role in drafting and supporting DPAs and their approach is presently unknown.

What is clear is that the SFO aims to bring high-profile corporate prosecutions in 2014. The historic disparity between well-funded US authorities and their UK counterparts may also be changing. The SFO has been granted special funding from the Treasury for a bribery investigation of the jet engine-maker Rolls-Royce in China and Indonesia.[5] This move is consistent with recent tough public statements made by the joint head of Bribery and Corruption at the SFO, Ben Morgan, making clear that the SFO intends to focus on the "top slice" of economic crime.[6] On 24 October 2013, the Director of the SFO, David Green, stated that the SFO has two cases involving

[1] http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf
[2] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.
[3] The current US federal common law standard is: a corporate is criminally liable for the acts of its agents and employees whenever such agents or employees act within the scope of their employment and those acts are intended, at least in part, to benefit the corporate (*New York Central R. Co. v. United States* (1909) 212 US 481). The US courts have interpreted 'scope of employment' broadly, such that it rarely serves to limit a company's exposure.
[4] http://www.fcpablog.com/blog/2014/1/27/dojs-duross-joining-mofo.html
[5] http://www.ft.com/intl/cms/s/0/e8d7939e-811a-11e3-b3d5-00144feab7de.html#axzz2riDbhMmE.
[6] http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2013/striking-tigers-as-well-as-flies--non-selective-anti-corruption-law-enforcement.aspx.

corporate defendants in the court system awaiting trial.[7] Further developments are expected to be announced soon after 24 February 2014.

OUTLINE OF THE DPA REGIME

Section 45 of the Crime and Courts Act 2013 enacts Schedule 17, which contains the provisions governing DPAs. A DPA can be applied to a wide range of offences, including fraud, bribery and money laundering.[8] Past misconduct is also covered.

A DPA must contain a statement of facts relating to the alleged offence and requirements on the organisation. The DPA must contain an expiry date. On expiry, the prosecutor will give notice that it does not want the proceedings to continue.

After expiry, the organisation cannot be subject to fresh proceedings for the same offence unless:

- the DPA has been terminated for breach; or
- the organisation provided inaccurate, misleading or incomplete information to the prosecutor and ought to have known that the information was inaccurate, misleading or incomplete.

Requirements (which may be subject to a time limit) can include:

- paying the prosecutor a financial penalty;
- paying compensation to victims of the alleged offence;
- donating to a charity or other third party;
- disgorging profits made from the alleged offence;
- implementing a compliance programme or changing an existing programme;
- cooperating in any investigation related to the alleged offence; and
- paying any reasonable costs of the prosecutor in relation to the investigation of the alleged offence or the DPA.

The decision to act under a DPA will be made before any proceedings have commenced. The prosecutor will be required to obtain the preliminary approval of a judge before drafting the final agreement and its proposed terms. A preliminary hearing before a judge will be held in private and will determine whether to issue a declaration that entering into a draft DPA with the organisation is likely to be in the interests of justice and that the terms are fair, reasonable and proportionate. The court must give reasons for its decision on whether to make a declaration, however these reasons will be private until the final DPA is approved.

Following preliminary approval, the terms of the DPA will be finalised and agreed upon. The agreed upon DPA will then be brought into force after a final hearing. At the final hearing, the court will determine whether the final DPA

[7] http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx.

[8] The government intends to review the list of offences and consider whether further offences should be included within the DPA regime.

is in the interests of justice and whether the terms are fair, reasonable and proportionate. If the court approves the DPA, it must give its reasons in open court.

Following approval at the final hearing, the prosecutor must publish the DPA, the declaration of the court approving the final DPA and the reasons for its decision, and the previous declarations (positive or negative) at prior preliminary hearings.

The prosecutor will monitor compliance with the conditions of the DPA and can make a further application to the court if there is a failure to comply. The court will determine the question of breach based on the balance of probabilities. If the organisation is found to be in breach, the court can invite the parties to agree to a remedy for the failure or it can terminate the DPA. The result of the application must be published by the prosecutor, even if no breach is found.

If the DPA is not approved by the court, the prosecutor cannot rely on the fact that it conducted DPA negotiations or any draft DPA created during the process, unless:

- the future criminal proceedings against the organisation are for an offence consisting of the provision of inaccurate, misleading or incomplete information; or
- in proceedings for another offence, the organisation makes a statement in evidence that is inconsistent with a statement made in the course of the DPA process.

In spite of these restrictions, admissible evidence includes:

- other evidence obtained from investigations pursued as a result of anything said in any unsigned statements of facts or a draft DPA;
- pre-existing material provided by the organisation during the DPA process; and
- information obtained by the prosecutor from other sources.

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