The Bribery Act and DPAs: Transparency is the Key

By: Thomas Fox

The debate now ongoing in the UK about whether Deferred Prosecution Agreements (DPA) should be a tool available to prosecutors in the Serious Fraud Office (SFO) and Crown Prosecutors is an important issue that should be well reasoned and thoroughly vetted. However, from where I sit in the US, I believe that the ability to enter into a DPA is a powerful tool that advances the interests of prosecutors, the judiciary and the public. Based on the reasons I will set out below, I believe that the UK should incorporate such a tool into those mechanisms available to the SFO and Crown Prosecutors to resolve cases brought under the Bribery Act.

The key issues that law makers in the UK must resolve is how to incorporate the concept of a DPA into a system which only allows prosecutors the option of bringing criminal charges or declining to do so coupled with a judiciary system that has unfettered discretion to accept or reject any settlement agreement brought before it. In an article entitled "*The US Model for Deferred and Non-Prosecution Agreements*" Mike Volkov phrases the question as "For UK policy makers, the balance between judicial review and prosecutorial discretion is one which has to be resolved before any new policy can be enacted."

The primary reason for both the prosecution and a company which violates the Bribery Act entering into a DPA is certainty. The one thing I learned in almost 20 years of trying cases in the US (civil side only) is that nothing is certain when you leave the final decision to an ultimate trier of fact who is not yourself, whether that trier of fact be a jury, judge or arbitrator. The most important thing for a company is certainty and that is even more paramount when a potential criminal conviction looms over its corporate head. Certainty is equally critical for the prosecution. No matter how 'slam dunk' the facts are, or appear to be, once a prosecutor turns over the final decision in a case to another trier of fact; the prosecution has also lost certainty in the final decision. Every corporate defendant which goes to trial can and should raise all procedural and factual defenses available to it. No prosecutor can ever be 100% certain that it will win every court ruling or that a guilty conviction will be upheld on appeal.

However, a DPA can bring certainty. For a company certainty in its rights and obligations, for the prosecution the same is true. The key then is how to achieve this certainty through the judicial process where the judicial system has other interests to protect. These interests include the right of judicial review and protection of the public interest. The key is how to reconcile these competing interests.

One of the suggestions in the Bribery Act debate on this issue is to allow a judicial representative to be a part of the negotiations between companies and prosecutors before a final DPA is agreed to by the parties. The judicial representative could provide guidance on what might be acceptable under a final judicial review when the DPA is submitted to a court for acceptance and Entry of

Judge. To forestall any claim of conflict of interest, the reviewing court would be a different judge than the judge who provided the guidance in the pre-court review stage.

However, I would not advocate such an approach for several reasons. I believe that the judiciary has a different role which is to ensure that laws are followed and administered justly and to safeguard that the public interest is represented in any settlement which results in a DPA. For one judicial representative to assist in the crafting of the DPA and another judicial representative to rule upon the DPA demeans from this role. While not enshrined in a written constitution as in the US, there is a distinction between the prosecution, which is a function of the executive branch and the judiciary, which is a function of the judicial branch. While the UK has a different form of democracy than the US, parliamentary vs. representative democracy, the executive and judicial functions remain separate and distinct. Next, no matter how independent the final reviewing judge is, the fact that another judge assisted in fashioning a DPA would factor into any judicial analysis and usually a reviewing judge respects the rulings and decisions of another judge, at least at the trial court level. This respect would most probably continue in the court review of DPAs negotiated with the help of another member of the bench.

Nevertheless, I still argue that DPAs still should play an important role in the resolution of Bribery Act cases. However, I would not urge early judicial involvement but that the key to certainty is transparency. The transparency comes into play in the crafting of the DPA, which should include a full analysis of the penalty to which the parties agreed to in the DPA. Here guidance might be taken from the US Department of Justice's (DOJ) approach to list out the factors and the attendant scoring in each DPA. This scoring can go up or down depending on many factors which are now discussed in each DPA. Further the underlying factors and scoring are based upon the US Prosecutors Guidelines which are also publicly available.

It is through this transparency that a court can determine if the law, here the Bribery Act, has been fairly or justly administered. A court can then also use this transparency to ensure that the interests of the British public are also properly taken into account. The fact that the Bribery Act is a new law should not prevent a thorough analysis of such factors. The prosecution can simply do what lawyers are trained to do; review the prior law to provide guidance or look at other similar laws for guidance.

I understand the response that a DPA brought before a court under such a scenario that I have listed above is still open to judicial rejection. However, I believe that most courts will follow precedent, if such precedent is used in a well-reasoned manner and presented logically to a court. As for the argument that such an approach may well lead to higher fines or greatly penalties being levied, I would respond that such higher fines or greatly penalties should have then been agreed to in the first place.

A DPA can be, and is, a powerful tool in the arsenal to fight bribery and corruption. The US DOJ has used it successfully, I would argue, for many years, to the benefit of the US public. I would

also urge that such a tool become available to the SFO and Crown Prosecutors in their fight against bribery and corruption. However, the maintenance of judicial independence is a key component of any democracy. This judicial independence can continue in a manner consistent with the certainty brought by DPAs and court oversight and approval through transparency.