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UK Government unveils plans for Deferred Prosecution Agreements

The UK Government has today announced details of its proposals to enable companies to avoid prosecution in some cases. Deferred prosecution agreements ("DPAs"), whereby companies agree to pay penalties and take remedial action as an alternative to contested criminal proceedings, have been used extensively in the United States to conclude fraud and corruption investigations. The consultation paper released earlier today brings their use in the UK a step closer. Although DPAs are proposed to be made available to a number of agencies responsible for prosecuting serious economic crime, they are expected to be used principally by the Serious Fraud Office ("SFO").

Why is the government proposing DPAs?

In recent years, the SFO has made clear its wish not only to tackle and deter corruption through punitive criminal prosecutions, but also to encourage a climate of corporate engagement by entering into negotiated settlements with co-operating defendants.

However, settlements entered into to date have come about largely despite rather than as the result of the current UK legal framework. Lord Justice Thomas made clear when sentencing Innospec Limited ("**Innospec**") in March 2010 after considering plea agreements entered into by the company with the SFO and US Department of Justice that "*agreements and submissions of the type put forward in this case can have no effect*" and that "*the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again*". He recognised, however, that in circumstances of that case, where the agreements had been entered into in the UK and the US and widely publicised, he was left with no practical alternative but to impose, in broad terms, the sentence provided for in those agreements.

His statement came shortly after the SFO had entered into a separate settlement agreement with BAE Systems plc in February 2010 under which, in return for a guilty plea to technical accounting offences and payment of £30 million, the SFO agreed, amongst other commitments given, that "*there shall be no further investigation or prosecutions ... for any conduct preceding 5 February 2010*". Mr Justice Bean, passing sentence in that case in December 2010 following an unsuccessful judicial review challenge to the validity of the settlement agreement, expressed surprise that the SFO had granted "*a blanket indemnity*" for past offences, but conceded that he had no power to set aside or vary the settlement agreement.

The use by the SFO of agreements such as these has placed it in direct conflict not only with critics who perceive that large organisations have been able to avoid the full force of the criminal law for historic corruption, but also with judges exasperated at their limited role in deciding or scrutinising their contents until they are presented as *faits accomplis*.

Richard Alderman's recently concluded tenure as director of the SFO was also marked by an increase in the frequency in the use of the only alternative which the SFO currently has to immediate prosecution; civil recovery proceedings under Part V of the Proceeds of Crime Act 2002 ("**POCA**"). These have most recently been used, in a case proudly acknowledged by Mr Alderman as an example of the SFO "*pushing the law to its limits*", to secure the recovery of dividends received by a corporate shareholder from Mabey & Johnson Limited, which the shareholder accepted were connected with corruption.

However, in most instances, they have been used as an alternative to criminal proceedings where, following self-reporting to the SFO, the SFO has decided not to prosecute the organisations concerned. Action in three separate cases in 2011 resulted in civil recovery orders to pay restitution of over £23 million as an alternative to criminal prosecution.

Judges and other critics have expressed particular concern at indications given by the SFO that it will seek to deal with cases where organisations self-report historic corruption by way of civil proceedings rather than criminal prosecutions. In particular, Lord Justice Thomas, again when sentencing Innospec, stated that "*It would be inconsistent with the basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction*."

The government's proposals for the introduction of DPAs recognise the tension between the legitimate objectives of prosecutors wishing to tackle historic bribery and corruption pragmatically and efficiently and judges anxious to ensure that investigations are concluded in a way which serves the wider public interest. The proposals are aimed at alleviating this tension by modernising the UK criminal law to give judges an active role in scrutinising and approving the contents of proposed agreements much earlier and much more meaningfully than has been the case under arrangements entered into to date.

How will DPAs work?

The consultation paper released earlier today confirms the proposals widely mooted by the UK Solicitor General, Edward Garnier QC, during an extensive programme of discussions with industry representatives and the legal profession over recent months. In broad terms, a five stage model is envisaged, consisting of : -

1. A decision by prosecutors following investigation as to whether to offer and enter into a DPA;
2. Commencement of DPA proceedings before a judge;
3. Judicial approval of the content of the DPA;
4. Monitoring and action if necessary for non-compliance or breach (which may include prosecution); and
5. Withdrawal of prosecution in the case of full compliance.

Much of the detail of how and when DPAs will be used remains to be decided. The paper acknowledges that further detailed procedural rules and operational guidance in relation to the mechanics of the process are necessary, and will be issued, before DPAs can be used. Amongst the specific eventualities for which these will need to cater are the potential for breakdown of negotiations between prosecutors and commercial organisations and for the emergence of new evidence during investigations and/or negotiations. There is likely to be lively debate as prosecutors, representatives of the business community and judges addressing these and many other practical, commercial, and sometimes constitutional issues, all seek to advance and protect their often competing priorities.

The key battleground between judges and prosecutors is likely to be the stage at which judges are to be involved in the process, and the extent of the information required to be presented to the Court. The consultation paper acknowledges that commercial organisations approaching prosecutors will wish to be provided with clear details of the proposed settlement in advance of judicial involvement in order to enable them to make informed decisions. However, judges have made clear their expectation of early and active involvement in future agreements.

The priorities of business, prosecutors and judges are also likely to collide in relation to the handling of the reputational impact of DPAs. Organisations and their representatives are likely to wish to maximise the input which they may have into the contents of publicity issued following the making of a DPA. However, the categorical statement made by Lord Justice Thomas when sentencing Innospec that "*It would be inconceivable for a prosecutor to approve a press statement to be made by a person convicted of burglary or rape; companies who are guilty of corruption should be treated no differently to others who commit serious crimes*" perhaps indicates that this may be another area where debate is likely to be particularly intense as rules and guidance are drawn up.

Senior executives will also be concerned to ensure that their interests are adequately protected. DPAs are not expected to be made available to individuals. The collective potential liability of "*senior management*" for anti-bribery and corruption compliance issues has already been greatly increased by the enactment of the Bribery Act 2010 ("**BA 2010**"). Individuals (who will typically be less well resourced than organisations and/or dependent on them for funding of legal advice and representation) will be concerned to ensure that their potential personal criminal liability is not similarly increased by organisations sensing an opportunity to seek to negotiate a deferred rather than immediate prosecution by emphasising senior executives' role in historic corruption. The likelihood of such a scenario will be greater where (as has been the case in several recent cases where individuals and organisations have been prosecuted) the new management of an organisation is considering whether to approach the SFO in respect of historic corruption occurring under the previous management.

Will DPAs work?

DPAs and other alternatives to criminal prosecutions have long been used extensively in the US (see Clifford Chance briefing). Although this illustrates the potential utility of these tools for tackling historic corporate misconduct, it does not provide a template for their application in the UK. As illustrated by the much more hands-on role envisaged for the UK judiciary than in the US, the proposals are squarely aimed at removing particular stumbling blocks in the UK criminal law as it currently stands rather than replicating the US model.

However, whilst successful implementation of arrangements for the use of DPAs in the UK will depend upon the resolution of strictly domestic legal issues, their successful application will depend much more heavily upon multilateral international collaboration and dialogue between self-reporting organisations and UK and overseas prosecutors, particularly the US Department of Justice. If the proposals progress into law, there are likely to be significant advantages to organisations in negotiating simultaneously with UK and US prosecutors and seeking to broker one global settlement to draw a line under historic overseas corruption. This has been achieved in some UK cases to date without DPAs. However, although the involvement of judges means that no guarantees are possible, the enactment of a dedicated framework for negotiated settlements in the UK is likely to provide organisations considering engaging with prosecutors with additional comfort that indications given by the SFO that action will stop short of immediate criminal prosecution are likely to materialise.

Recent press reports since David Green QC, the new director of the SFO, took office on 23 April, suggest that, whilst remaining broadly supportive of the use of DPAs, his strategy may involve the SFO returning its focus to conspicuously prosecuting organisations and individuals involved in historic bribery and corruption. Such a shift of emphasis may reassure the UK judiciary, currently wary of any measures which may sideline them, that they will continue to play an important role in the prosecution and punishment of serious crime.

The potential benefits of DPAs, both for enforcement authorities keen to target their prosecution resources towards the most egregious cases, and for organisations anxious to avoid the potentially ruinous consequences of criminal convictions, are clear. The proposals, if passed into law, would enable the SFO (and other prosecution authorities) greater flexibility to work collaboratively with co-operative organisations, demonstrate the benefits of positive engagement by companies, and ensure the implementation of effective remedial steps without surrendering the ultimate sanction of criminal prosecution.

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