

DEFERRED PROSECUTION AGREEMENTS

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I. INTRODUCTION

Deferred Prosecution Agreements (DPAs) were introduced into the English and Welsh legal system as the second of two important and inter-connected reforms made at the start of this decade. The first was the introduction into English and Welsh law of a new and simpler basis for corporate criminal liability in bribery cases with the passing of the Bribery Act 2010.

By way of background, the law in England and Wales of corporate criminal liability is based on the idea that a company can only be convicted in respect of the criminality of those who speak and act for the company. Those people, in turn, are made up of the company's leadership – conventionally understood to mean its directors as opposed to its rank and file employees, although who precisely fits into this leadership category is a question to be determined in accordance both with the precise structure of the company and the purpose of the statute said to have been breached. We call this rule the identification principle.

The Bribery Act 2010 left the identification principle undisturbed. It follows that, if the evidence implicates a sufficiently senior person within the company, that company can be held criminally liable for offences of bribery or bribery of foreign public officials. Significantly, however, the Act created a whole new form of criminal liability with the offence of a failure by a commercial organization to prevent bribery. This offence is made out simply if a person associated with a commercial organization bribes another person intending to obtain or retain business or a business advantage for that organization. The company concerned is afforded a defence if it is able to show that it had adequate procedures to prevent bribery. However, even with that defence, it is easy to see that prosecutors have a simpler route through to liability because they do not need to show fault on the part of a senior person in the company.

Having made this reform, the Government then addressed the question of how to deal with companies which now faced a greater risk of prosecution. In reviewing their position, it looked to the example of the United States where the basis for corporate criminal liability was clear and where a system of deferred prosecution agreements had been in place for many years. It saw much that was good in the US example and adapted it to suit the requirements and traditions of the English and Welsh legal system. So it was that Deferred Prosecution Agreements (DPAs) were introduced into English and Welsh law on 24 February 2014 by the Crime and Courts Act 2013.

II. DEFERRED PROSECUTION AGREEMENTS

A DPA is an agreement between a designated prosecutor and an organization facing prosecution for certain financial offences. The agreement provides that the prosecutor will institute proceedings which will immediately be deferred for a fixed period of time pending the organization's compliance with conditions imposed in the agreement. Typical conditions include the payment of a financial penalty, compensation, disgorgement of profit, payment of costs, implementation of a reform programme and undertaking a continuing duty of cooperation. If the company complies with the agreement at the end of the fixed period of time the prosecution is discontinued. However, if the company fails to comply with the agreement, the deferment is lifted and the company is prosecuted. Crucially, a DPA only takes effect after a judge has reviewed the case and declared that the agreement is in the interests of justice and that its terms are fair, reasonable and proportionate.

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An important element of the statutory scheme for DPAs is that it included a number of provisions aimed at ensuring that public confidence could be secured for any agreements that were entered into. These were as follows.

- i. The requirement for a judge to review the case and make the necessary declarations.
- ii. The power to enter into a DPA is limited to so-called designated prosecutors, currently only the Director of the Serious Fraud Office and the Director of Public Prosecutions. In this way, the law limits the exercise of the power to enter into a DPA to the most senior public prosecutors in the country with a view to ensuring as far as possible quality and consistency of decision-making.
- iii. Before the DPA scheme became effective, the designated prosecutors had first to prepare and publish a Code of Practice setting out the general principles to be applied in deciding whether a DPA was likely to be appropriate in any given case. In this way, the parameters by which the prosecutor would decide whether to offer a company the opportunity to enter into a DPA are clear both to the companies concerned and to the wider public.
- iv. A DPA is intended only for companies who are facing a prosecution. As such, the Code of Practice for DPAs provides that a prosecutor may only invite a company to enter into DPA negotiations if satisfied either that there is sufficient evidence against the company to provide a realistic prospect of conviction against it or that there is at least a reasonable suspicion based upon some admissible evidence that the company has committed the offence and there are reasonable grounds for believing that a continued investigation would provide admissible evidence within a reasonable period of time so that there would then be a realistic prospect of conviction against it. This alternative test is intended to allow the prosecution to enter into DPA negotiations without incurring the cost of completing the investigation into the allegation, but only where it has reasonable grounds to believe that it would get the admissible evidence it needs.
- v. Any financial penalty must be broadly comparable to a fine that the court would have imposed on a guilty plea. In this way, the law protects a company from a prosecutor who might seek to secure a greater penalty than a court would impose if the company were to be prosecuted.
- vi. Proceedings for a DPA are, as far as possible, to be made public. That is not to say that the whole process is transparent, however. DPA negotiations are intended to be confidential, with both parties giving confidentiality undertakings to the other. If an agreement is reached at the end of the negotiations, there is a private court hearing at which the judge will consider whether he or she is in principle prepared to declare the agreement in the interests of justice and its terms fair, reasonable and proportionate. If such an indication is made, there is a delay of a few days before a final, public hearing takes place. In that time, the parties will confirm that they do, in fact, want to enter into the agreement and the court will ensure that the forthcoming hearing is publicised so that interested members of the public can attend. The SFO has also agreed proactively to notify civil society organizations of hearings. At the public hearing, the prosecutor explains the conduct the company has agreed to account for, the reasons for its decision to offer a DPA and why it considers the terms of the agreement to be fair, reasonable and proportionate. The company may make representations so that its position is clear, and the judge then explains his or her reasons for approving the DPA. The law then requires the prosecutor to publish those reasons on its website together with the DPA. The court has the power to delay the publication only if it would risk rendering unfair any subsequent trial of individuals. The key point here is that this power is one only of delay: there will inevitably come a point where the information must, by law, be published.

III. CONSIDERATIONS FOR SECURING APPROVAL OF DEFERRED PROSECUTION AGREEMENTS

The Code of Practice concerning Deferred Prosecution Agreements is lengthy, and it sets out a number of detailed criteria which prosecutors will take into account when considering whether to offer a Deferred Prosecution Agreement to a company. In practice, however, the criteria boil down to three key elements:

the seriousness of the offending; the degree of cooperation showed by the corporate; and the extent to which the company concerned has reformed itself.

A. Seriousness

It is a key principle of English and Welsh criminal procedure that a prosecution can only take effect once a prosecutor has applied to the case the criteria contained in a publicly available document entitled “The Code for Crown Prosecutors”. At the heart of the Code for Crown Prosecutors is a two-stage test for a prosecution. First, the prosecutor must be satisfied that there is a realistic prospect of conviction. In practice, this means that the prosecutor must be satisfied that in applying the law a court would be more likely than not to convict the defendant. If that test is met, and only if that test is met, the prosecutor must then consider whether a prosecution is in the public interest. The Code for Crown Prosecutors sets out the criteria by which this assessment is made, one of the most important of which is the seriousness of the offence. The rule is that the more serious the offence the more likely it is that a prosecution is required in the public interest.

A DPA represents a diversion away from a prosecution. It follows that the prosecutor must consider the seriousness of the offence when deciding whether or not to offer a deferred prosecution agreement. The decided cases, however, show that even the most serious of corporate offences may remain eligible for a disposal by way of DPA provided the other criteria for a DPA are met. In other words, seriousness alone is not a reason to prevent a company from being offered a DPA.

B. Cooperation

A DPA is a pragmatic compromise between a prosecutor and a company. On the one hand, the company is offered an opportunity to escape a conviction where there is sufficient evidence to prosecute it. It is worth recalling that such a conviction can be very damaging to the company’s reputation and so its ability to conduct business, particularly its ability to secure future government contracts. In exchange for assistance in avoiding a conviction, the prosecutor will require the company’s active assistance in pursuing its investigation. Cooperation is a key element of the DPA Code of Practice which was issued when the scheme became law and, more recently, the Director of the Serious Fraud Office has issued specific guidance on cooperation. Cooperation involves the following.

- i) Making a self-report. The DPA Code of Practice identifies cooperation as a significant factor against prosecution. It provides, “considerable weight may be given to a genuinely proactive approach adopted by (the company’s) management team when the offending is brought to their attention, involving within a reasonable period of time of the offending coming to light reporting (the company’s) offending otherwise unknown to the prosecutor...”.
- ii) Supplying Documents. If the prosecutor is informed of suspicions of serious criminality that meets its acceptance criteria, it will want to investigate those suspicions in order properly to understand what happened. If at the end of that investigation those suspicions have been converted into admissible evidence of crime it will want to prosecute, subject always to being satisfied that the public interest warrants a prosecution. While it may be that the company concerned is eligible for a DPA, the individuals responsible for the criminal conduct will not be.

In considering a prosecution, the prosecutor will want to avoid simply presenting a case given to them by the company, which of course will have its own interests to serve. For that reason, it needs to conduct its own investigation. As part of that investigation it will require the company to provide it with documents. It is rare in serious fraud cases to deal with large amounts of paper. Rather, the business records associated with these cases are held on computers. A consequence of this is that the amount of data prosecutors need to analyse has increased enormously over the last few years. The recently issued guidance by the Director of the Serious Fraud Office shows the impact this has had. The SFO wants the company to preserve materials and deliver them to it on a rolling basis and in a format that it can easily process. It does not want the company simply to dump on it all the data it has gathered. Rather, it wants relevant data to be identified and sorted for it. It also wants audit chains and to be provided with context about the company’s operations and structures.

- iii) The supply of witness accounts. If, in looking into what happened within it, the company's representatives speak to witnesses, then the prosecutor will want to know what the witnesses said and will also want a copy of any records made of the interview. They want this for two reasons: first, it helps give them a better understanding of what happened and so assists them with their investigation; second, it helps them assess the credibility of potential witnesses when considering the possibility of a trial.

The request for witness accounts is the most controversial aspect of the cooperation guidance. Companies and their lawyers object to it as they point out that such material is almost invariably caught by legal professional privilege, a key part of the English and Welsh legal system, which affords absolute privacy to communications between lawyers and their clients and, where the dominant purpose of those communications is to prepare for actual or intended adversarial litigation, communications between lawyers and third parties. The SFO's guidance on cooperation makes clear that it expects a cooperative company to waive privilege over any such interviews.

- iv) The nature and tone of the engagement. The SFO's guidance on cooperation makes clear that it will judge the company by the manner it engages with the SFO, either directly or indirectly through its lawyers. More generally it is clear that the SFO requires a cooperative company to prioritize assisting the SFO with its investigation ahead of other concerns the company might have, such as dealing with civil litigation or employment law issues. The SFO is well-used to company representatives assuring it of a desire to cooperate, and it will always judge the company in this regard by its actions and not by its words.

C. Corporate Reform

It is clear that the SFO will not be interested in offering a DPA to a company it considers is likely to reoffend. It is also highly unlikely that, even if such a company were to be offered a DPA, a judge would consider any such agreement to be in the interests of justice. Reform, including the removal of senior managers who are either implicated in or who should have been aware of the criminality the court is considering, has been a key element in all of the judgments made by the court in DPA cases. DPAs are pragmatic devices aimed at incentivizing openness leading to the uncovering of financial crimes, and secondly at allowing companies to account to a court for those crimes in a way that does not punish its innocent employees, suppliers and the local community in which it operates. The SFO has previously made clear that this second rationale only comes into play if the company can show the prosecuting authorities and the court that it will not create new victims of crime.

IV. DEFERRED PROSECUTION AGREEMENT - PRACTICE TO DATE

DPAs entered into the law in England and Wales in February 2014. Since then five DPAs have been entered into. What lessons have been learned?

- i) DPAs are not automatic. If a company is not cooperative, the SFO will not offer it the opportunity to enter into one. So, three weeks after the first DPA case the SFO secured the conviction of a company called Cyril Sweett PLC for an offence of failing to prevent bribery. As the SFO made clear, that company had not cooperated with it and so it had nothing to be rewarded for.
- ii) The courts have actively supported the policy inherent in the statutory scheme of incentivizing companies to cooperation, including to self-report, and to reform themselves. In *SFO v Sarclad*, the judge looked beyond the specific criteria in the Code for Deferred Prosecution Agreements in assessing the interests of justice test. In that case the judge was confronted by a company which did not have the means to pay the level of financial penalties one would have expected as being broadly comparable to a fine on a guilty plea. In essence, therefore, the judge had to decide whether to approve the DPA on the terms ultimately agreed between the parties or to see the company put out of business as a consequence of a prosecution. In deciding to approve the DPA, the judge said this of the scheme "...it is important to send a clear message, reflecting a policy choice in bringing DPAs into the Law of England and Wales, that a company's shareholders, customers and employees (as well as those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness

must be rewarded and be seen to be worthwhile.”

- iii) As part of that process of incentivizing openness and reform, the court has been willing to approve DPAs where the financial penalty agreed by the parties contains a discount of 50% to reflect the company’s cooperation. In English and Welsh law, the usual maximum discount where a defendant enters an early guilty plea is one of 33%.
- iv) The purpose of the cooperation the DPA seeks to incentivize is to render easier the task of investigating serious economic crime in which the company has been involved. Such crime is committed by human beings working with or for the company, and prosecutors consider it important that they are dealt with by the justice system. There have been prosecutions of individuals in England in three of the five cases which have resulted in a DPA. No convictions resulted from those trials. For that reason, there will be anxious scrutiny of the most recent DPA, which the SFO secured against a company called Serco Geografix Limited. In approving the DPA the judge indicated that the SFO had until 18 December 2019 to decide whether to prosecute the individuals concerned. Assuming the SFO does bring such prosecutions, they will be closely watched by the legal and wider community. DPAs will only truly secure public confidence when individuals are convicted.