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Taking a Leap of Faith: Deferred Prosecution Agreements and Corporate Sentencing Guidelines Come to the UK

On 24 February 2014, UK prosecutors gained the ability to use deferred prosecution agreements (DPAs) in corporate crime cases. This followed the publication on 31 January 2014 of a Definitive Guideline for the sentencing of corporate offenders for fraud, bribery, and money laundering offences by the Sentencing Council (the Definitive Guideline). The DPA process and Definitive Guideline share a number of elements in common with their US counterparts, which have been used to achieve record enforcement of US transnational bribery laws. Despite the fact that the Code of Practice issued by the SFO and CPS in early 2014 for the use of DPAs and Guideline statements are intended to bring greater transparency to the resolution of misconduct by corporates, and ideally to encourage cooperation and voluntary disclosures, they fail to bring sufficient reliability and predictability to the process. Ultimately, they likely ask companies to put too much faith in the discretion of the prosecutors and the courts to be effective. Until UK practice is established, this uncertainty may put many corporates off.

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Deferred Prosecution Agreements and the Code of Practice

DPAs were introduced in the UK pursuant to the Crimes and Court Act of 2013, subsequent to Thomas LJ's finding in *R v. Innospec Ltd.* in 2010 that the SFO lacked the authority to negotiate a financial penalty with a corporate in a criminal case. The development of DPAs and the Definitive Guideline also followed the sharp criticism of UK settlement actions by the Organisation for Economic Cooperation and Development (OECD) in 2012, which raised significant concerns about the lack of transparency and consistency in UK criminal and civil settlements in transnational bribery cases.

The form of both DPAs and the Definitive Guideline hew closely to the US DPA and the US Sentencing Guidelines, both of which have been in use for decades, and which were commended by the OECD as contributing to record US enforcement. Notably, the Code of Practice also includes provisions for the appointment of monitors, which was disfavoured by Thomas LJ in *Innospec Ltd.* Monitors – independent third parties that ensure that the defendant company has proactive and effective corporate compliance systems – have also been a prominent feature of US DPAs for years, and the monitor selection process described in the Code of Practice is nearly identical to the process used by the US Department of Justice.

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Unlike in the US, however, where the court is involved only in final approval of the agreement, the English courts will exercise strict scrutiny over the DPA process, both at its inception and its conclusion. The courts have sole discretion to approve or disapprove the contents of the DPA, as well as to make the determination that a corporate should not receive a DPA. Moreover, the Code of Practice makes it clear that full cooperation and complete disclosure – including the provision of a written report and all witness statements – will effectively be a prerequisite before prosecutors will even consider offering corporates the opportunity to negotiate a DPA. SFO Director David Green QC said the cooperation would have to be "unequivocal" and the Code of Practice implies that voluntary disclosure in advance of any investigation may also be required.

Corporate Sentencing Guidelines

The Definitive Guideline published by the Sentencing Council, which comes into effect on 1 October 2014, also bears similarities to its US counterpart, although it is far less strict in its application.

The court will first consider compensation, then confiscation, before entering into a factor-based culpability analysis for the determination of a fine, which can be ordered in addition to compensation and confiscation. Factors will include role in the offence, whether the company involved others, and whether vulnerable victims were targeted, to create a "culpability multiplier" to apply to the amount of the harm suffered or benefit received as a result of the misconduct. That total will then be adjusted based on aggravating or mitigating factors, such as cooperation with the investigation, then further adjusted so as to ensure no benefit is retained and to take into account other financial considerations such as the ability to pay. A final reduction of 1/3 may be applied if there is a guilty plea (or a DPA).

Unlike the US corporate sentencing guidelines, there is no specific weight assigned to each of the various factors to guide how much of an impact they have on the overall fine. This is left in the hands of the judge, in the case of a guilty plea, or the prosecutor, in the case of a DPA. Whilst, ideally, corporates that eventually secure a DPA could expect hefty reductions for cooperation under the Definitive Guideline in addition to the 1/3 reduction for the DPA, in practice there is likely to be uncertainty as to what level of fine they will face. Further, even if prosecutors negotiate a significant reduction in the fine during DPA discussions, the judge may choose not to accept it.

DPAs and the Bribery Act

The SFO has been particularly candid—and eager—in its desire to use DPAs in respect of offences under the Bribery Act. Cases prosecuted under the Bribery Act, and its predecessor, have been scarce, and the absence of appropriate prosecutorial tools to deal with consequences for corporates of criminal convictions, such as mandatory debarment under the Procurement Directive, has contributed to the lack of enforcement. As Green has stated, the SFO is hopeful that DPAs will help resolve this issue and incentivise cooperation and voluntary disclosure by companies as they try to meet what he described as the "very high bar" to qualify for a DPA. Because the Code of Practice requires that the financial penalties set under a DPA are to be "broadly comparable" to a fine that the court would have imposed following a guilty plea, the theory is that this would bring the transparency and predictability the OECD said the SFO needed in its settlement process, and would increase the number of corporate resolutions. However, Green has also asserted that the SFO's "preferred option" continues to be prosecution, increasing the risks associated with pursuing a DPA. The uncertainty inherent in the DPA process may understandably deter corporates from going down this road. Corporates should also be aware that if they enter into negotiations for a DPA, but a DPA is ultimately not granted, there will be no limitations on the use by the prosecutor of the reports, witness statements, documents, and evidence provided by the corporate in order meet the strict cooperation requirement and induce the prosecutor to enter into negotiations.

Pursuant to paragraph 2.8.2.i of the Code of Practice, cooperation – the most important factor in getting the SFO to negotiate a DPA, according to Green – requires identifying relevant witnesses, disclosing their accounts and the documents shown to them, making them available for interview, and "providing a report in respect of any internal investigation including source documents." Pursuant to paragraphs 4.5 and 4.6, all of that material can then be used against the corporate if negotiations break down or the court disapproves the settlement. (Such information is protected from disclosure or use in the United States pursuant to the Federal Rules of Criminal Procedure). Thus, the risk of admitting misconduct when there is substantial uncertainty about whether a DPA will be accepted is significant: a company could potentially hand the prosecutors everything they need for a criminal charge.

Even if the DPA is accepted, corporates can expect significant fines, particularly in Bribery Act cases. While the Definitive Guideline does provide some transparency as to the factors that will be taken into consideration in determining the fine, it ultimately does not provide much comfort. Thomas LJ expressed his concern in

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R. v. Innospec Ltd. that bribery cases are serious and deserving of serious financial penalties, indicating that fines at least in the "tens of millions" were appropriate in such cases. Under the Definitive Guideline, bribery cases will likely qualify in nearly every instance for the highest culpability level, resulting in a fine of 250-400% of the gross profit received on contracts or benefits secured through bribery. With no consistent track record of prior sentencing in corporate bribery matters, it is extremely difficult to predict where in that range a fine will fall prior to reductions for cooperation and entering into a DPA, and the benefits of cooperation or voluntary disclosure appear insufficiently clear or predictable to truly induce corporates to provide the kind of cooperation the SFO seeks.

Conclusion

Without a track record of when DPA negotiations will be offered, and when courts will accept them, even combined with the Definitive Guidance, corporate criminal resolutions still lack clarity, predictability, and reliability. This ongoing uncertainty as to how DPAs will operate in practice, coupled with the apparent lack of protections for information disclosed in the process of seeking a DPA, means that the SFO and CPS are, in effect, asking corporates to tell them all, and then trust that it will all work out. Requiring such faith in the process may simply be too much to ask.

Prior results do not guarantee a similar outcome.

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