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Deferred Prosecution Agreements: Would you really want one?

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Like the morning after the night before, now we have finally seen the UK's first deferred prosecution agreement (DPA), we are all left with one question: Would you really want one?

On 30 November 2015, Sir Brian Leveson approved a DPA between the Serious Fraud Office (SFO) and ICBC Standard Bank (Standard Bank). It is the first DPA in the United Kingdom and in some quarters it is believed likely to be the first of many. Indeed, the SFO tell us that there are several other potential DPAs in the pipeline.

The Stars in Alignment

Much has already been written about the technical aspects of this first DPA. Certainly it appears that the stars were in alignment for this one. This was a case of an isolated bribe, in Tanzania, that was quickly identified and immediately reported both to the National Crime Agency and to the SFO. The self-report was made in 2013, and Standard Bank was later acquired by new owners. Although not a requirement for the DPA, the fact that the organisation in its current form is effectively a different entity that committed the offence appears to have weighed in favour of the DPA. This negated many of the usual questions about the culture at the top of an organisation. Moreover, the SFO had made many clear and public statements that they intended to secure a DPA before the end of 2015. This created a one-off opportunity for a potential DPA candidate to negotiate favourable settlement terms. It is also one of those matters where the outcome does not immediately appear to have significant consequences for potential civil claims. But perhaps the biggest carrot of all was the confirmation from the US Department of Justice (DoJ) that, if Standard Bank was to enter into a DPA with the SFO, then the DoJ itself would no longer need to investigate the matter.

What are the implications for other cases? Are we likely to see many instances where there is one isolated instance of wrongdoing? Where the matter is reported so quickly? Where ownership of the business has recently changed? And will the DoJ always be so accommodating in confirming that it does not intend to take action itself?

These are all important questions and, in our view, the answer to all of them is "no". Consequentially, it is likely that there will be some, but not many, DPAs over the coming years.

A Tortuous Process

The real problem lies in both the nature of a DPA itself and in the convoluted and tortuous process for getting there. It is true that the SFO now has a new tool in its toolbox, but it is a clunky tool that is hard to use. Questions around secrecy in the process, the need for anonymity of individuals who might be implicated, and public disclosure obligations of listed companies are just a few of those difficulties. The current thinking of the SFO – as expressly reflected in the DPA Code of Practice – is that a DPA will not even be offered unless the company has agreed to waive privilege as part of its co-operation. The SFO has also made clear, in a number of public statements, that it does not really like the idea of companies undertaking their own investigations and it is fearful of companies' external lawyers "trampling the flowers" by interviewing witnesses. Even if the

company and the SFO can reach agreement, the role of the judiciary in the process should not be under-estimated – they are not just there to rubber stamp a deal. At the end of this whole process the resulting discount of 30% on the fine is no different to that which could be achieved through early co-operation and a guilty plea.

A Better Alternative?

So a DPA may not represent the best solution, but what other realistic alternatives are there? Under the current regime, the SFO has ceased to use the old civil settlement remedy at all. Officially, the SFO says that civil settlements are still possible, but it is difficult to escape the feeling that this flexible and easy-to-use tool has been unwisely discarded.

One of the reasons civil settlements are not currently in favour is that this remedy is perceived in some quarters as equating to wealthy parties being able to buy justice. This is not a rational approach to the subject. Philosophically, companies do not commit criminal offences – people do. And the criticism of settlements that we have seen in the past (from international organisations such as Transparency International) relate to the transparency of those settlements and not to the fact that matters were resolved in a civil process.

A company that uncovers a problem, deals appropriately with the individuals involved (and with any customers who have suffered as a result), and upgrades its compliance programme accordingly, ought to be able to avail itself of a civil resolution. This might well still involve a significant financial penalty, but without the numerous hurdles involved in the DPA process.

Another great advantage of a civil settlement being available is that companies are more likely to come forward and self-report where this is a realistic option. This in turn would mean that the SFO would be able to focus its limited resources and funding on those companies who do not take such an enlightened path and on the individuals involved in criminal conduct.

So, whilst DPAs are currently the talk of the town, spare a thought for the forgotten civil settlements. Quick, flexible and easy to use, a civil settlement can be achieved relatively easily without anyone having to navigate the minefield of problems that arise during the course of negotiating a deferred prosecution agreement. Not only would they be better for the SFO, for the reasons set out above, but clearly better - and completely appropriate - for reformed and ethically compliant companies too. Set against that possibility, who would want a DPA?

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For further detail on the UK legislative regime, please see: “Bribery & Corruption”, 3rd Ed, Contributing Editors: Jonathan Pickworth and Jo Dimmock; *Global Legal Group*, November 2015. Read the full UK Chapter here.

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