

Deferred Prosecution Agreements 5 Years On – the Americanisation of UK Corporate Crime Enforcement

May 2019

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Introduction

Five years ago, in the spring of 2014, Deferred Prosecution Agreements ('DPAs') were first introduced in the UK through the Crime and Courts Act 2013 ('CCA').¹ Since then, the Serious Fraud Office ('SFO') has concluded four DPAs. Commentary is divided as to the relative success of the DPA process and whether it provides an effective tool for compelling businesses to behave ethically and within the law.

This discussion seeks to examine whether under the current legislation, DPAs offer transparent justice to shareholders and exposed individuals or whether they represent the beginning of the recent Americanisation of British justice. Rhetoric emanating from the SFO suggests that any 'improvement' in the DPA process is likely to seek to utilise methods currently employed in US criminal matters including the controversial use of immunity witnesses or 'supergrass' evidence.

Previous 'Successes'

The SFO has concluded four DPAs with: (i) Standard Bank, (ii) XYZ Limited, (iii) Tesco Plc and, (iv) Rolls Royce. Whether these DPAs can be viewed as successes is more likely measured in financial terms rather than as successful conclusions to a criminal investigation, particularly in terms of the prosecution of the conduct of individuals.

In summary, the case history of the concluded DPAs and the financial penalties imposed are as follows:

- **Standard Bank:** The fine imposed upon ICBC was 25 million USD. No individuals were prosecuted.
- **XYZ Limited:** The fine imposed on XYZ Limited was 6.5 million GBP. The trial of individuals following the XYZ DPA is due to commence in May 2019.
- **Tesco Plc:** The fine imposed on Tesco Plc was 129 million GBP. The three individuals prosecuted following the Tesco Plc DPA stood trial in September 2017. The trial was abandoned in February 2018, owing to the ill health of one of the defendants. The retrial of the two remaining defendants began in October 2018, but collapsed a month later, after Mr. Justice Royce ruled that there was no case to answer. In January 2019, the SFO offered no evidence against the remaining defendant (whose trial had been abandoned due to ill health), and he was formally acquitted.
- **Rolls Royce:** In January 2017, Rolls Royce was fined 497 million GBP under a DPA. This followed a four-year investigation. In February 2019, the SFO dropped its investigation against unnamed individuals based on "*a detailed review of the available evidence and an assessment of the public interest*".

¹ DPAs were introduced on 24 February 2014

Intellectual Inconsistencies

The outcome of the Tesco and Rolls Royce cases against individuals has led to scrutiny over the SFO's investigatory powers and decision-making processes. These cases highlight the arguable inequity between the corporate and SFO on one hand, in the successful negotiation of the DPAs, and, on the other hand, shareholders and individuals left without a voice.

Tesco

The SFO framed its case against Tesco on charges of accounting fraud. This created intellectual and evidential problems for the SFO. Accounting fraud is an offence which requires the conviction of a senior executive, or 'directing mind and will', to bind the guilt of the corporate. In simple terms, the corporate cannot be guilty without the guilt of the senior executive.

In order to establish its case, the SFO was required to demonstrate that the individual who committed the relevant illegal conduct acted dishonestly. Ultimately, the SFO was unable to produce evidence proving that the individuals prosecuted had dishonestly produced false accounts.

Shareholders may be forgiven for questioning whether the Tesco DPA was even appropriate and what the 129 million GBP was for in circumstances where there was no culpable directing mind and Tesco could not therefore be guilty of false accounting.

The SFO withheld publication of the DPA until after the court's finding of no case to answer against the three individuals. The defendants had in effect been anonymous until this point. However, following their acquittal, the SFO chose to publish the DPA. In the accompanying Statement of Facts, Tesco admitted to a 'dishonest falsification' of its accounts between February and September 2014 and named the three individuals as the executives in the senior management team who 'dishonestly perpetuated' the profit misstatement. The startling decision to publish the names of the acquitted individuals highlights the inequity of the DPA system. There appears to be no mechanism within the current DPA framework to alter or redress a change of facts or to correct a misstatement, which later becomes known once the DPA is signed.

Rolls Royce

In relation to the Rolls Royce case, the SFO framed its case largely in terms of conspiracy to corrupt (six counts of conspiracy to corrupt, contrary to section 1 of the Criminal Law Act 1977 ('CLA'), five counts of failing to prevent bribery under s.7 of the Bribery Act 2010 (the 'UKBA 2010') and one count of false accounting). Again, there seems to be some intellectual inconsistency between the guilt of Rolls Royce and the lack of any charges against individuals. Section 1 of the CLA requires the involvement of more than one human mind. Sir Brian Leveson's description of Rolls Royce's behaviour as "*egregious criminality over decades*" makes the contrast between the liability of the corporate and the lack of individual accountability even more extraordinary.

The Future

The SFO's failure to establish the involvement of individuals in the conduct expressly identified as criminal in the DPAs, has led to scrutiny and raised questions as to what the significant fines under the DPAs represent. In the absence of a rigorous review of the available evidence, questions have been asked about whether DPAs are, in fact, a 'soft option' for corporates to absolve themselves of responsibility and to avoid the risks of potential prosecution.

In order for the DPA system to be effective, it must be robust, transparent, credible and just. The SFO's record of proving individual culpability following the signing of a DPA must be improved. Following the closure of the Rolls Royce case, the Executive Director of Transparency International UK described as "absurd" the fact that a company can enter into a DPA without any individuals being held responsible and warned of the danger of DPAs being seen as a soft option for companies, that

“at the right price, can buy their way out of punishment giving impunity to those who flagrantly broke the law“²

² <https://www.transparency.org.uk/press-releases/lack-of-individual-prosecutions-rolls-royce-bribery-case/>

Changes to address these concerns have already been proposed by the new Director of the SFO, Lisa Osofsky ('the Director'), who has publicly committed herself to following a trajectory of Americanisation of British justice in this context.

Economic Crime Offence

Currently, offences involving the failure to prevent criminal conduct extends only to failure to prevent bribery under the UKBA 2010, and failure to prevent the facilitation of tax evasion under s.45 and 46 of the Criminal Finances Act 2017. There have been calls to expand 'failure to prevent' offences to other economic crimes such as fraud. The Director of the SFO advocated for this before the House of Lords Committee on the Bribery Act 2010. Sir Brian Leveson, the President of the Queen's Bench Division and Head of Criminal Justice, did not express a personal view but did state that it was in the public interest for consideration to be given to whether such offences should be extended to other cases of fraud.³ The government has also indicated its support (although any further substantive progress may be delayed in light of the prioritisation of Brexit-related issues).⁴

Any such reform would make the prosecution of corporates for offences such as fraud easier, and may prevent potential embarrassment should individuals accused of wrongdoing ultimately be acquitted. An economic crime offence would not go as far as the American approach to corporate liability in which a corporate is vicariously liable, for the criminal acts of any of its employees, even where an employee acts contrary to company policy. However, any introduction of a more wide-ranging 'failure to prevent' offence could nevertheless be seen as a move towards a position closer to the wider breadth of US corporate liability.

Immunity: Following the delay or failure of a number of high-profile cases, the Director has also indicated that she intends to make greater use of the US-style tactic of persuading insiders to co-operate with investigators to speed up criminal probes.⁵ She made a similar point in a speech in the US at her Keynote address at the FCPA conference in Washington in December 2018 stating that while "cooperators" had been "more widely used in narcotics or gang cases" in Britain, "we are intently exploring this area in the white-collar world".⁶

In, perhaps her frankest interview yet, she was also quoted in the Evening Standard on 26 April 2019 as saying "she plans to work with HM Revenue & Customs to uncover breaches, then tell offenders

'You can spend 20 years in jail for what you did or wear a wire and work with us'.⁷

Ms Osofsky informed the press that she had seen these methods work in the US.⁸

Widespread use of such witnesses may raise eyebrows amongst the UK criminal defence community and perhaps reveals an unfamiliarity with the tightly regulated area of covert surveillance in the UK.

UK enforcement authorities have long utilised co-operating witnesses as a tool in their armoury. 'Supergrass' evidence was widely used in the 1980s to address the troubles in Northern Ireland and more latterly as a response to organised and violent crime in the 2000s. Initially the system was governed by common law and subsequently under the Serious Organised Crime and Police Act 2005 ("SOCPA"). Under section 71 of SOCPA, an offender may be offered immunity from prosecution. Section 73 provides that a defendant who has pleaded guilty to an offence and assists the investigator or prosecutor in relation to that or any other offence may have that assistance taken into account in the determination of his sentence. This statutory framework sought to clarify and strengthen the pre-existing common law framework, which continues to work in parallel. The only substantive difference from the point of view of an offender is that, unlike under section 74

³ Bribery Act 2010 Committee, Corrected Oral Evidence: Bribery Act 2010, 13 November 2018

⁴ Treasury Committee, Oral Evidence: Economic Crime, 30 October 2018 and Bribery Act 2010 Committee, Corrected Oral Evidence: Bribery Act 2010, 4 December 2018

⁵ Justice Committee, Oral Evidence: Serious Fraud Office, 18 December 2018

⁶ <https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/>

⁷ "Wear wire or face jail, white-collar criminals are warned by top British law enforcement official", Evening Standard, 26 April 2019; We do not seek to address here, the SFO's comment that tax offending is likely to merit a 20 year sentence other than to say this would be outside current sentencing guidance

⁸ "Wear wire or face jail, white-collar criminals are warned by top British law enforcement official", Evening Standard, 26 April 2019

of SOCPA, which allows, the court in certain circumstances, to vary a sentence (up or down), after it has been imposed, there is no mechanism for this in the case of a common law agreement. However, the SFO entered into just one agreement under s.71 SOCPA between January 2006 and April 2014, while the number of s.73 agreements entered into by the SFO during the same period was just 11.⁹

The Director is right to point out that ‘co-operation’ has more commonly been used in the UK as a response to general or organised crime and less frequently in the relation to financial crime.

However, significantly co-operation in the UK has only ever been used sparingly. CPS guidance is that “*where sufficient evidence exists to provide a realistic prospect of conviction, the public interest will normally require that an accomplice should be prosecuted whether or not he or she is to be called as a witness*” and “*only in the most exceptional cases will it be appropriate to offer full immunity*.”¹⁰ The Government White Paper that preceded SOCPA noted, “*The assumption will always be...that the majority of co-operating defendants would be offered sentence reduction rather than full immunity*”.¹¹

To introduce the systemic use of ‘immunised witnesses’ is something which may not sit comfortably with the psyche of the notional British juror and one such a juror might find difficult to reconcile. Their children will likely have been taught in school not to ‘snitch’ on their friends. The notional juror will also be familiar with the pejorative terms used to describe someone who ‘tells tales’ such as ‘snitch’ or ‘grass’, and not the more neutral language of ‘immunised witness’ as employed in the US.

Such is the complicated and anxious relationship between UK enforcement and ‘supergrass’ evidence, that in 2012 the Criminal Cases Review Commission (‘CCRC’) examined a series of ‘supergrass’ convictions amid concerns about the use of criminal witnesses and the public cost of cultivating them. The CCRC had such concerns about the safety of these convictions, that it fast-tracked its investigation. At least one such case, involving former police officers jailed for drug offences, was referred (ultimately unsuccessfully) to the Court of Appeal based on doubts over the credibility and reliability of a former colleague who acted as a witness.¹² The review came after Jon Murphy, then head of crime for the Association of Chief Police Officers, likened the use of ‘supergrass’ evidence to “*dancing with the devil*” following the high profile collapse of three ‘supergrass’ cases in 2011.¹³

A strategic decision to use ‘supergrass’ evidence by the SFO also raises the inevitable question as to what the SFO, can in fact, offer an individual by way of ‘inducement’. Under the common law, when a defendant came to be sentenced, a judge was passed a brown envelope, known as a ‘text’. The ‘text’ would set out the assistance given and its value. The judge would then consider whether to reflect that in the sentence imposed. The ‘text’ was handled with great discretion and was not openly referred to by the judge in his sentencing remarks. Under section 73 of SOCPA, the court is provided with relevant materials, including case law, the signed SOCPA Agreement and a confidential report setting out details of the value of the assistance given. Where a lesser sentence is imposed on the basis of that assistance, the judge must state what the sentence would have been but for such assistance (unless it is not in the public interest to do so). The sentence which would otherwise have been imposed is relevant in any subsequent referral back to court under s.74, should the offender be found to have knowingly failed to assist. However, the UK system necessitates that a ‘supergrass’ must ‘leap into the unknown’. They must provide full and transparent co-operation without any assurance by the SFO that their sentence will be reduced, and to what extent. The sentence finally passed is ultimately at the discretion of the Judge.

DPAs for Individuals: DPAs were conceived in the US and were originally directed at individuals accused of general low-level criminal conduct. They were later applied to corporates, and have been used in that context for more than 20 years.

⁹ <https://www.sfo.gov.uk/download/foi2014-063-serious-organised-crime-police-act-2005/>

¹⁰ Queen’s Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005, available at <https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime>

¹¹ One Step Ahead – A 21st Century Strategy to Defeat Organised Crime, page 49, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251075/6167.pdf

¹² <https://www.theguardian.com/law/2014/jul/09/three-former-met-officers-lose-appeal-drug-conspiracy>

¹³ The author of this article worked on one of such ‘supergrass’ cases which was considered and upheld by the CCRC review

Although not yet available to the SFO, it seems logical that DPAs for individuals might be used as a tool in future UK SFO investigations. This is likely to improve the SFO's success rates against individuals and encourage a greater number of individuals to enter 'an early plea'. In a recent interview, the Director expressed a desire to have some of the powers available to prosecutors in the US, including the ability to enter into DPAs with individuals.¹⁴

Conclusion

Since taking up the role in August Ms Osofsky has brought in members of the FBI and the US DOJ to advise SFO staff. She has also appointed a white-collar crime lawyer and former US prosecutor, on secondment as an investigations adviser and has made it clear that the secondments will continue.

The current Director, has a clear attraction to bringing the UK more in line with the US system and towards closer co-operation between the SFO and DOJ. Such changes may result in greater success for the SFO in relation to its pursuit of DPAs and individual prosecutions. The SFO may well strengthen its cases by obtaining the witness evidence it currently lacks by adopting a more strategic approach to the offering of immunity. We may also see fewer cases reach the trial stage as greater use is made of the power to offer immunity from prosecution. If and when introduced, the corporate economic crime offence is likely to protect the DPA process from further criticism regarding inconsistencies between a corporate plea and an individual's acquittal.

However, the SFO will have to countenance challenges to its novel approach to evidence gathering and use of cooperating witnesses as it continues to seek to Americanise British justice to improve its results.

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¹⁴ <https://www.ft.com/content/b5eb36b6-680f-11e9-9adc-98bf1d35a056>