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International Information for International Business

Volume 18, Number 8 August 2012

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UK Government Considers Deferred Prosecution Agreements: Cause For Celebration Or Cause For Concern?

By Michael Roberts and Alex Hohl, of Hogan Lovells, London.

On May 17, 2012, the UK Ministry of Justice (MoJ) published a consultation paper[1] on deferred prosecution agreements (DPAs) (*see WSLR, June 2012, page 9*). DPAs will be voluntary agreements between prosecuting authorities and companies accused of committing an economic crime such as fraud or bribery. They will allow companies to avoid prosecution, provided that the conditions set out in the DPA are fulfilled.

This article examines the options currently available to prosecutors, and considers the potential benefits and downsides of DPAs. If DPAs are introduced in the United Kingdom, care will need to be exercised to ensure that securing a swift outcome does not come at the expense of securing a just outcome.

The Current Position

As matters stand, the options of the English authorities in dealing with economic crimes by companies are limited. Prosecutions of companies have traditionally been difficult, not least due to the need to satisfy the so-called identification doctrine. According to that doctrine, a company will (except where a statute provides for a different basis of liability) be liable for a criminal offence only if the company's "directing mind and will"[2] had the necessary mental element (*i.e.*, *mens rea*). In practice, this often requires the prosecution to show personal involvement by a company director in the alleged crime. Section 7 of the Bribery Act 2010, which renders companies liable for bribery by employees and others acting on their behalf, even in the absence of knowledge or fault on the part of management, is a rare and (as yet) untested exception.

Civil Recovery Orders (CROs) have become an increasingly popular tool for prosecutors in recent years. CROs provide a means by which property which is found by a court to have been obtained by or through crime, or to be traceable to crime, can be recovered. Since 2008, the Serious Fraud Office (SFO) has obtained CROs against seven companies totalling around £32 million (U.S.$49.6 million). Their popularity is not least explicable by the fact that the court needs to be satisfied only on a balance of probabilities that the

property represents the proceeds of crime. In other words, the use of a CRO avoids many of the costs and risks associated with a full-blown trial.

However, CROs have their limitations. Under guidance[3] issued in November 2009 by the Attorney General, CROs are not deemed appropriate in cases where it seems feasible to secure a conviction. In his Lordship's sentencing remarks[4] in the *Innospec* case, Thomas LJ expressed the need for what Transparency International UK has termed "good labelling"[5] :

> It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.

Guidance from the Crown Prosecution Service in April 2010 on corporate prosecutions[6] also emphasises that, where there is a "realistic prospect of conviction" and a prosecution would be in the public interest, prosecutions should be brought due to their strong deterrent value.

English prosecutors can also accept guilty pleas, which not infrequently relate to lesser offences. Under Section 144 of the Criminal Justice Act 2003, courts are required to take into account guilty pleas in sentencing. The Sentencing Guideline on guilty pleas[7] provides that a guilty plea made at the first reasonable opportunity will generally lead to a reduction in sentence of one-third. In addition, under the principles set out by the Court of Appeal in *R v Goodyear*[8] , a defendant may seek an indication from the judge as to the maximum sentence which would be imposed if the defendant pled guilty at that stage.

However, criminal plea agreements in England are not true U.S.-style "plea bargains". As Thomas LJ said in the *Innospec*[9] case:

> [T]he [Serious Fraud Office] cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged [. . .]. Principles of transparent and open justice require a court sitting in public itself first to determine in open court the extent of criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence.

The same point was re-emphasised by the Court of Appeal in *R v Dougall*[10] , in which it was said that "[r]esponsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court [. . .]".

The Proposed New Option

As set out in the MoJ's consultation paper, DPAs will offer a means by which prosecutors and companies can agree a statement describing the alleged wrongdoing and proposing the terms of a settlement. The DPA will set out a number of conditions that the company must comply with, which will vary from case to case, but will generally include a combination of a financial penalty, reparation to victims, and obligations on the organisation to create and implement proper monitoring or reporting procedures and training for employees. This will then be subject to judicial approval. Failure by the company to comply with the DPA's conditions could lead to a prosecution being commenced, although the consultation paper leaves open whether it will be for prosecutors or judges to determine whether the company has complied.

The MoJ argues that a key benefit of DPAs is that they will incentivise companies to self-report, as they will be able to predict with far greater certainty than at present what the eventual result will be. DPAs should also lead to an outcome within a shorter time frame. This will lessen investor disquiet and reduce the impact on a company's share price. Further, the MoJ anticipates that the use of DPAs will reduce the number of expensive investigations and lengthy court proceedings in which prosecutions are contested.

Another advantage of DPAs foreseen by the MoJ is in the field of international co-operation. As was well publicised in the context of the BAE Systems investigation, the UK authorities concluded that they could not prosecute with respect to matters which were the subject of a DPA in the United States, as this would amount to "double jeopardy" (the prohibition on prosecuting someone who has already been convicted or acquitted of the same offence). The MoJ suggests that if UK prosecutors are also able to enter into DPAs, this will make negotiations between UK and U.S. prosecutors easier, and a "global settlement" easier to broker.

Possible Risks

The current Code for Crown Prosecutors[11] provides: "In the vast majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed".

As noted above, the MoJ's consultation paper envisages that the use of DPAs will lead to shorter and less resource-intensive investigations. This opens the possibility that the practice set out in the Code for Crown Prosecutors may be departed from, with prosecutors deciding to offer DPAs based only on a superficial investigation. There is an obvious threat to the justice system if inadequate investigations result in DPAs that only inaccurately or partially capture companies' misconduct.

There is already a so-called "asset recovery incentive scheme" in place, under which a share of sums recovered under CROs form part of the income of the responsible investigating and prosecuting agencies. Whether or not a similar scheme is put in place in relation to fines imposed pursuant to DPAs, there is a risk that DPAs may come to be seen as a means of raising revenue. In view of recent cuts to the budgets of enforcement agencies such as the SFO, the temptation will be there.

DPAs also present potential dangers for companies. In the United States, DPAs do not mean that no investiga-

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tion takes place. Instead, investigations are effectively outsourced by prosecuting authorities to the company's external professional advisers, who naturally work at the company's expense. As was widely reported, Siemens' internal investigation into alleged bribery cost close to U.S.$1 billion[12] .

The U.S. experience also suggests other potential risks. Professor Mike Koehler[13] has noted that companies generally feel they have no choice but to agree to the proposal of the U.S. Department of Justice (DOJ). Failure to agree might be seen as non-cooperation, which is a factor that the DOJ will take into account in deciding whether to prosecute. There is potential for companies in England to feel under similar pressure, not least in view of the SFO's position on self-reporting: "[W]e [. . .] regard failure to self report as a negative factor. The prospects of a criminal investigation followed by prosecution and a confiscation order are much greater [. . .]"[14] .

Professor Koehler also argues that the consequence of the wide use of DPAs has been to allow U.S. enforcement agencies to promote interpretations of the U.S. Foreign Corrupt Practices Act (FCPA) that are never judicially tested and which stretch the wording of the FCPA's provisions to breaking point. In England, it is notable that the SFO has indicated in public statements[15] that it takes a more broad brush approach to issues such as the jurisdictional reach of the Bribery Act than the MoJ did in its guidance[16] on "adequate procedures".

Unresolved Tensions

The consultation paper clearly reflects an awareness of the downsides to the approach to DPAs in the United States, where judges have little scope to review the terms of DPAs. The MoJ suggests in the consultation paper that judges in the United Kingdom will have a more central role, with involvement both at a preliminary stage and in considering the final terms of the settlement. This will, according to the MoJ, ensure both transparency and preserve the judiciary's constitutional primacy in sentencing.

However, there is an inevitable tension between retaining judicial discretion and the goal of providing companies with certainty as to the likely outcome. Will companies really be incentivised to self-report if there is a risk that a judge may throw out the proposed terms of the DPA and indicate that a prosecution would be more appropriate?

There is also an oddity to the logic that the introduction of DPAs in the United Kingdom would resolve the problem that a prosecution in the United Kingdom, if it follows on the heels of a DPA in the United States, would amount to double jeopardy. As mentioned above, in relation to BAE Systems, the SFO apparently concluded, on the advice of counsel, that following the announcement that a DPA had been reached in the United States, a prosecution in the United Kingdom was no longer possible. The same reasoning was applied by the SFO when it decided to seek a CRO against DePuy International in *lieu* of prosecuting. The SFO's press release[17] announcing the CRO stated:

> The DOJ Deferred Prosecution Agreement has the legal character of a formally concluded prosecution and punishes the same conduct in Greece that had formed the basis of the Serious Fraud Office investigation.

The SFO clearly equates a U.S. DPA with a prosecution. If that is right, would a DPA in the United Kingdom not also be double jeopardy if there were already a DPA in the United States? The legislation which introduces DPAs in the United Kingdom may provide a solution, but it is not clear from the MoJ's consultation paper what form that solution will take.

Conclusion

DPAs clearly have advantages over prosecutions for companies. The announcement of a prosecution alone can have a serious adverse impact on its share price and significantly damage a company's reputation. The exodus of clients that followed Arthur Andersen's indictment for obstruction of justice is a case in point.

However, DPAs are not unproblematic. It is in no one's interests if expedience comes at the price of the proper administration of justice. If DPAs are introduced in the United Kingdom, prosecutors will have to use them judiciously and only in instances where they present a proportionate and acceptable alternative to prosecution.

NOTES

[1] The consultation paper is available at https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf.

[2] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

[3] http://www.attorneygeneral.gov.uk/publications/pages/attorneygeneralissuedguidancetoprosectuingbodiesontheirassetrecoverypowersunder.aspx

[4] http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf

[5] http://www.transparency.org.uk/publications/264-deterring-and-punishing-corporate-bribery-an-evaluation-of-uk-corporate-plea-agreements-and-civil-recovery-in-overseas-bribery-cases/download

[6] http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/

[7] http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf

[8] [2005] 1 W.L.R. 2532

[9] *Op cit.*

[10] http://www.bailii.org/ew/cases/EWCA/Crim/2010/1048.html

[11] http://www.cps.gov.uk/publications/docs/code2010english.pdf

[12] http://www.washingtonpost.com/business/economy/justice-department-sec-investigations-often-rely-on-companies-internal-probes/2011/04/26/AFO2HP9G_story.html

[13] http://gjil.org/wp-content/uploads/archives/41.4/TheFacadeOfFCPAEnforcement.PDF

[14] http://www.sfo.gov.uk/media/171439/Approach-of-the-Serious-Fraud-Office-to-dealing-with-overseas-corruption.doc

[15] *E.g.*, the view expressed by the Director of the SFO on June 9, 2011, that "if a foreign group has a subsidiary in the UK and in another country and that bribery occurs in that other country then that bribery is within the remit of the SFO" http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/russia-legal-seminar-2011,-london.aspx

[16] http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

[17] https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx

Michael Roberts is a Partner and Alex Hohl is an Associate at Hogan Lovells, London. They may be contacted at michael.roberts@hoganlovells.com and alex.hohl@hoganlovells.com.

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