QEB HOLLIS WHITEMAN

QEB HOLLIS WHITEMAN BUSINESS CRIME: BRIEFING NOTE

Deferred Prosecution Agreements: Draft Legislation

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On 23 October 2012, the Government published its response to the Deferred Prosecution Agreements Consultation. The same day, the Government tabled amendments to the Crime and Courts Bill to bring DPAs into effect in England and Wales. The amendments simply and economically set out the scheme in a single schedule to the bill. In summary, a DPA will be a voluntary agreement between a prosecutor and an organisation that, in return for compliance with certain requirements, the prosecutor will defer and ultimately discontinue criminal prosecution of the organisation. DPA's are not available to individuals.

The decision to act under a DPA will be taken before any proceedings have been commenced. Under the DPA regime, the proceedings themselves will begin by the prosecutor preferring a bill of indictment (a method of initiating a prosecution that is unprecedented), with the preliminary approval of a Judge for the making of an agreement and the proposed terms. The prosecution must be for a scheduled offence, the list of which includes a wide range of financial crime, money laundering and corruption offences. Thereafter, the terms of the DPA will be settled. Once the DPA is finally approved by the Court, the prosecution will be automatically suspended. If the terms of the DPA are satisfied by the organisation, eventually the DPA will expire and the prosecution will be discontinued. During the currency of the DPA, the organisation is protected from any other prosecution in respect of the same offending.

Some Key Questions

Who Can Get a DPA?

A DPA is an agreement between a designated prosecutor (initially the Director of the Serious Fraud Office and the Director of Public Prosecutions) and either a body corporate, a partnership or an unincorporated partnership (referred to in the draft legislation and here as "P"). Individuals

cannot benefit from the scheme (*cl.* 4); the Government has asserted that DPAs will not be used as a means for individuals to avoid being prosecuted for their crimes.

What Will the DPA Itself Contain?

Clause 5 of the draft legislation requires the DPA to "contain a statement of facts relating to the alleged offence, which may include admissions made by P." The DPA will also include the requirements upon P and must include an expiry date (see below).

What Will The DPA Require of the Organisation? (Cl. 5)

"The requirements that a DPA may impose include, but are not limited to the following requirements:

(a) to pay to the prosecutor a financial penalty;
(b) to compensate victims of the alleged offence;
(c) to donate money to a charity or other third party;
(d) to disgorge any profits made by P from the alleged offence;
(e) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;
(f) to co-operate in any investigation related to the alleged offence;
(g) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA."

The DPA may impose time limits within which P must comply with the requirements imposed on P."

How Will Prosecutors Operate the Scheme?

A Code of Conduct will be published by the Director of Public Prosecutions and the Director of the Serious Fraud Office. Crucially, not only must the Code include guidance on the general principles to apply in determining whether a DPA is likely to be appropriate in a given case (cl. 6(1)(a)), it must also give guidance on the unique disclosure position that would arise during negotiations (cl. 6(1)(b)) and on the use of information obtained by a prosecutor in the course of negotiations (cl. 6(2)).

The Code will require particular scrutiny, not least because an organisation will want to consider carefully the extent to which a prosecutor may use admissions or the provision of pre-existing

documents as a spring-board for their own investigative enquiries, even where they are prohibited from using the admissions or documents directly against the Organisation. Companies and those advising them will need to ensure that the DPA process is not used as an investigative, rather than remedial, tool.

How Will The Court Process Start? (cl.7)

After the commencement of negotiations between a prosecutor and P in respect of a DPA, but before the terms of the DPA are agreed, "the prosecutor must apply to the Crown Court for a declaration that:

> (a) entering into a DPA with P is likely to be in the interests of justice, and
> (b) the proposed terms of the DPA are fair, reasonable and proportionate."

The preliminary hearing and the resulting declaration will be private (cl. 7(4)). Thereafter, there will be a process of negotiation to finalise the terms of the DPA. There will then follow a "Final Hearing".

What happens at a 'Final Hearing'? (Cl.8)

"When a prosecutor and P have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that—

> (a) the DPA is in the interests of justice, and
> (b) the terms of the DPA are fair, reasonable and proportionate"

The DPA comes into force only when it is approved by the Crown Court, by the making of the above declaration. The hearing at which an application for the declaration is determined may be held in private, but if the court decides to approve the DPA and make the required declaration, it must do so, and give its reasons, in open court.

What Happens After the DPA is Approved?

Upon approval of the DPA by the court, the prosecutor *must* publish—

(a) the DPA,

(b) the declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,

(c) in a case where the court initially declined to make a declaration under paragraph 7, the court's reason for that decision, and

(d) the court's declaration under this paragraph and the reasons for its decision to make the declaration (cl. 8(7)).

What Happens if there is a Failure to Comply? (Cl.9)

If the prosecutor considers that P has failed to comply with the terms of the DPA and wishes to terminate or amend the DPA, the Court must determine the question of breach on the balance of probabilities (cl. 9(2)). If P is found to be in breach the Court may either-

(a) invite the prosecutor and P to agree proposals to remedy P's failure to comply, or

(b) terminate the DPA.

The result of such an application must be published, even if no breach is found. Even more curiously, if the prosecutor believes that P has failed to comply with the terms of the DPA but decides *not* to make an application to the Crown Court under this paragraph, the prosecutor must still publish details relating to that decision, including -

(a) the reasons for the prosecutor's belief that P has failed to comply, and

(b) the reasons for the prosecutor's decision not to make an application to the court.

A DPA may only be varied by the Court. Even an "agreed" variation is not effective until it is declared by the Court to be "in the interests of justice" and "fair, reasonable and proportionate" (cl. 10(2)). Again, reasons must be published.

How Will It End?

The DPA must contain an expiry date. Unless terminated for breach, at expiry the prosecutor will give notice that it does not want the proceedings to continue. Thereafter, no fresh proceedings may be instituted against the company for the offence, unless it is discovered that:

(a) P provided inaccurate, misleading or incomplete information to the prosecutor, and
(b) P knew or ought to have known that the information was inaccurate, misleading or incomplete.

Who Will Get The Money?

Not the SFO or the CPS, it seems. The draft provides that "Any money received by a prosecutor under a term of a DPA that provides for P to pay a financial penalty to the prosecutor or to disgorge profits made from the alleged offence is to be paid into the Consolidated Fund." (The Consolidated Fund is the government central bank account which currently receives criminal fines.) The requirements of the DPA may include ordering P to pay money to "a third party" (thus excluding the prosecutor). It would seem that a DPA could not require payment to the prosecutor other than of its costs.

Publicity

One of the most striking features of the draft is the extent and specificity of the provisions concerning publicity. Perhaps in response to anxiety that DPAs could appear to be shady deals between prosecutors and delinquent corporates, publication of the DPA itself and any amendment, as well as publication of any breach proceedings whether successful or not, is mandatory. That is over and above the requirement to hold certain proceedings in open court.

Which Offences Are Covered?

The specified offences are set out in Part 2 of the Schedule, and include common law offences of conspiracy to defraud and cheating the public revenue, as well as various Fraud, Bribery, Money Laundering, VAT, FSMA, Theft Act, Customs and Excise Management Act, Companies Act, and Forgery and Counterfeiting offences. The Government intends to review the list and consider whether there is a case to broaden the range of economic crimes for which DPAs should be available (§45 of the Response). A notable and puzzling exception is the Export Control Act,

which creates offences for the unlicensed supply of controlled goods and to which DPAs would appear to be well-suited. The list does not extend to health and safety, environmental or other non-economic regulatory crimes.

When Will The Scheme Come Into Force?

In early 2014. Royal Assent is expected in spring 2013, with implementation to follow at the start of the following year, according to the Impact Assessment.

Will DPAs Be Available for Past Misconduct?

Yes. The Schedule does not create an offence or sentencing power, but merely provides a scheme for avoiding prosecution where that would otherwise be required. It will therefore be available in respect of any misconduct in respect of which proceedings have not yet commenced (see Government Response at §188).

The US Experience

The US Department of Justice (DoJ) has used DPAs and Non-Prosecution Agreements (NPAs) as a tool to tackle economic crime for a number of years. In the period 2009-2011, the DoJ agreed 46 DPAs (see Impact Assessment). The average financial penalty imposed was $95m. However, as the Government has recognised, it is not realistic to expect penalty levels in England and Wales to approach US penalty levels following the introduction of DPAs. Some of the reasons identified in the Impact Assessment are:

i. the US has different laws on corporate criminal liability which are easier to satisfy;
ii. the US DoJ has a stronger track record of prosecution than the SFO: "a more credible threat of prosecution could allow the US authorities to agree higher financial penalties during the DPA process";
iii. current levels of fines upon conviction of commercial organisations are generally much higher in the US than in England and Wales;
iv. for multi-jurisdictional cases, the government may only obtain a share of the overall penalty.

Comment

DPAs have the potential to become a much more effective way of dealing with corporate criminal conduct than at present, but that can only happen when there is sufficient incentive to enter into such agreements. It is the real threat of a prosecution and conviction, with all the associated costs, that will be the true 'stick' to the DPA 'carrot'. However, a fundamental issue remains: in English law, corporate criminal liability for 'guilty mind' offences still rests on proof of the guilt of a controlling mind of the corporation (see most recently *St Regis Paper Company Ltd*. [2011] EWCA Crim 2527). In the past, that approach has made prosecution of large companies for such offences all but impossible. It follows that, in many cases, the real carrot will not be protecting the corporate from an unlikely prosecution, but (a) reducing the uncertainty of a criminal investigation at an early stage and (b) protecting individuals associated with the organisation who are at risk.

One example is in relation to confiscation. If applied as harshly to a corporate as they are routinely applied to drug traffickers, burglars and mortgage fraudsters, the confiscation provisions of POCA should terrify any Board facing a prosecution. For example, in a contractual bribery case the benefit under POCA would be held to be the gross value of the contract obtained. A confiscation order in such a sum would likely be far in excess of any fine and might in some cases threaten the viability of the company. In contrast, the DPA Scheme provides a route by which an appropriate "disgorgement of profits" may be made, without subjecting the company to the perils and uncertainty of a POCA hearing. The DPA itself might include either an agreed figure or at least the basis of calculation. Note that the draft legislation uses the term "profits made" and not "benefit", no doubt a deliberate signal that, unlike in relation to fines, a different and more "reasonable" approach may be taken under the DPA than that required under POCA, or indeed under a Civil Recovery Order.

The instinct of many corporates faced with an apparently well-founded criminal investigation is to co-operate, whilst wishing to protect staff (particularly those staff who happen also to be corporate decision-makers) and to understand and quickly limit the financial downside. Sympathetically operated, DPAs promise at least the latter and, by some means, may well achieve the former, at least in certain cases.

If you would like to follow up any of the matters covered in this Note, please contact QEB Hollis Whiteman on 020-7933 8855, or email:

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