Cooperation – key for DPAs

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Willingness to come forward and admit the full extent of wrongdoing coupled with ready assistance to the prosecutor: it appears that criminal defence has been turned on its head but that may be the adjustment needed to achieve an optimal deferred prosecution agreement, writes ***Paul Raudnitz*** *of QEB Hollis Whiteman.*

I suggest you look in this one.

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Cooperation is a prerequisite for a deferred prosecution agreement (DPA). This means prompt self-reporting and ongoing assistance to the Serious Fraud Office's criminal investigation. As David Green QC, Director of the SFO, stated at the Cambridge Symposium on Economic Crime on 5 September, even the most cooperative company may wish to take time to agree concurrent settlements in other jurisdictions and will want to test the SFO's position in negotiations, but "the traditional tactics of the litigator have no place in DPA negotiations... it is about reaching a transparent agreement that a court will accept, reflecting the interests of justice".

He reviewed the two DPAs thus far concluded, Standard Bank and XYZ. The facts were different – but the common refrain is that cooperation is key to the conclusion of a DPA.

Standard Bank and XYZ

Standard Bank was a well-resourced financial institution with equity of US$1.25 billion and total income of US$133.1 million. By contrast, XYZ was a UK SME whose agreed unencumbered balance of available cash was £352,000, and which was supported in part through the DPA by its parent company, ABC.

The bribery in Standard Bank was relatively limited and discrete: its wrongdoing was restricted to the maintenance of inadequate compliance systems to prevent associated persons from committing an offence of bribery on a single occasion in a single transaction. The sum paid as a bribe was valued at $6m. By contrast, the bribery in XYZ was extensive and repeated.

During a period of eight years from 2004 to 2012, XYZ, through a small but important group of its employees and agents, was involved in the systematic offer and/or payment of bribes to secure 28 contracts in foreign jurisdictions. Intermediary agents in a particular jurisdiction would offer or place bribes with those thought to exert influence or control over the awarding of contracts. A total of £17.24m was paid to XYZ on the 28 contracts on which bribes were offered. This sum represented 15.81% of the total turnover of XYZ in the relevant period. The total gross profit from the contracts amounted to £6.5m out of a total gross profit of £31.4m (ie, 20.82%).

These differences notwithstanding, the Court was at pains to emphasise that it could approve DPAs because of the extent of cooperation in each case. In both cases, the Court underlined the following factors as militating in favour of the DPA: the promptness of the self-report; the genuinely proactive approach to the wrongdoing that the companies uncovered; the fact that, but for the self-report, the offending might otherwise have remained unknown to the prosecutor; the fact that much of the information relied upon by the SFO was evidence voluntarily disclosed by the companies; the fact that both companies also identified relevant witnesses, disclosing their accounts and the documents shown to them.

So, whilst neither the DPA Code nor either of the judgments thus far go as far as to make cooperation an essential pre-condition of a DPA, the lesson of Standard Bank and XYZ is that in practice it is very hard to envisage any case where a prosecutor – let alone a judge – is likely to be persuaded that a DPA is in the interests of justice in circumstances where a company has not cooperated; that is to say, where a company does not bring relevant conduct to the prosecutor's attention; does not share with it the fruits of its own enquiries and does not identify or make available relevant witnesses.

On the other hand, where such features are present, a DPA may still be countenanced, notwithstanding (as was present in XYZ) very extensive misconduct. As the Court said in XYZ: "it is important to send a clear message , reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile."

Critics of the DPA legislation and Code complained that it failed to offer sufficient incentive to self-report on the basis that any financial penalty, so it was understood, had to be broadly comparable to the penalty that would have been given had the company been prosecuted and pleaded guilty. The lesson from Standard Bank and XYZ is that, in the appropriate case, the court will apply the guidance on credit and "stepping back" flexibly so as to provide sufficient incentive to self-report.

Disgorgement and penalty calculation

In Standard Bank, the DPA allowed for the disgorgement of profits in the form of the fee which Standard Bank and its sister company received as joint lead managers for the transaction (1.4% of the US$600 million capital raised, or US$8.4m). In addition, a financial penalty was agreed in the sum of US$16.8m. In calculating this sum, regard had to be paid to the Sentencing Council Guideline on bribery. The figure was calculated by taking a "harm" figure equal to the gross profit from the contract obtained – in this case the US$8.4m. The court considered that it was then appropriate to take a multiplier of 300% (which is the upper end of medium culpability and the starting point of higher culpability in the Guideline). That led to a figure of US$25.3m. The court was then obliged, following Step 5 of the Guideline, to "step back" and consider the overall effect of its orders such that the combination achieves "removal of all gain, appropriate additional punishment and deterrence". The court considered that the "stepping back" process in Standard Bank underlined that the approach of 300% of the value of the transaction represented a reasonable penalty. It then moved to Step 7 of the Guideline and approved the reduction of the penalty by one third to US$16.8m to reflect the self-report and admissions.

In XYZ the circumstances were different. XYZ made a total gross profit as a result of the 28 implicated contracts of some £6,553,085. However, XYZ had limited means and ability to pay, such that the maximum amount it would be able to provide towards paying any financial obligation imposed without becoming insolvent was estimated to be £352,000. On the other hand, its parent company, ABC, had received £6m in dividends from XYZ since acquiring it in February 2000. The court was keen to emphasise that not only was ABC entirely ignorant of the activities of its subsidiary but that its conduct once it became aware of the facts was beyond reproach. ABC accepted nonetheless, that an appropriate proportion should properly be reflected in the terms of any DPA, notwithstanding that it was under no legal obligation to support its subsidiary in this way. ABC was prepared to offer a long-term loan to XYZ so that the latter was able to pay some £6,201,085 of the £6.5m towards disgorgement of profits.

Turning to the financial penalty, the court considered that, even taking a multiplier of 250%, the starting point was just under £16.4m. However, it recognised that this was academic because, given the amount disgorged, whatever multiplier was chosen and however substantial the discounts, the result would be a figure which XYZ simply could not pay, resulting in its insolvency. Rather than "stepping back" (Step 5) and then discounting to reflect the full admissions (Step 7), the court interpreted the provisions flexibly, indicating that it was in the interests of justice to apply the relevant discounts (Step 7) before "stepping back" (Step 5). The court then took the novel step of applying a 50% discount (to reach £8.2m) to reflect the fact that the admissions were far in advance of the first reasonable opportunity and "to encourage others how to conduct themselves when confronting criminality as XYZ has". It then "stepped back" and took into account all the financial circumstances, including the fact that only £352,000 was available to XYZ to provide towards any financial obligation.

Taking into account the sum to be disgorged of £6,201,085 it approved a financial penalty of £352,000 (notwithstanding that its starting point had been £8.2m) as leading to a total which equated to the gross profit on the implicated contracts.

The message is that in the appropriate case the parties to a DPA can expect the Guidelines to be applied with some degree of flexibility.

The additional lesson from XYZ is that, whilst ABC's conduct was exemplary, the circumstances would be very different were a parent company also to be guilty of misconduct. The judgment concludes with a warning: "any evidence that a parent company has set up a subsidiary as a vehicle through which corrupt payment may be made so that the company can be abandoned in the event that the payment comes to light is likely to lead to prosecution of the parent company under section 7(1) of the Bribery Act 2010 .... A pre-existing plan to behave corruptly through the subsidiary would obviously be treated as a seriously aggravating factor."

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Sep 20 2016

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