UK: deferred prosecution agreements

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On 25 April 2013 the Crime and Courts Act 2013 was enacted and nearly a year later on 24 February 2014,[1] section 43 and schedule 17 of that Act came in to force, introducing Deferred Prosecution Agreements (DPA) into UK law.

Almost two years post enactment the first DPA was agreed on 4 November 2015 at Southwark Crown Court before the Rt Hon Sir Brian Leveson against Standard Bank (now known as ICBC Standard Bank plc).

A DPA is a voluntary agreement between a designated prosecutor and a commercial organisation whereby, in return for complying with a range of stringent conditions, the prosecutor will defer an intended criminal prosecution for a particular offence that it had been investigating. It is not regarded as an alternative to prosecution but it is a conditional deferred prosecution. The deferral period will ordinarily run between one and three years but the legislation provides no guidance on the maximum term available, leaving it at the discretion of the prosecution and judge.

It should be highlighted that DPAs are not available to individuals, but are only ever available between a body corporate, partnership or an unincorporated association and a designated prosecutor. They can only be made for specified offences identified in schedule 17 to the Act such as financial crime, money laundering and corruption offences.

The designated prosecutor will be bound by the Code of Practice for DPAs that provides guidance in determining whether the evidential and public interest test is made out before a DPA can be considered. Interestingly the evidential test will be made out if there is at least a reasonable suspicion, based on admissible evidence, that the organisation has committed an offence and that further evidence could be obtained within a reasonable period of time to fully satisfy the test that there is sufficient evidence to prosecute the case. As opposed to meeting the full test that applies to all criminal prosecutions. The full test requires the prosecutor to be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the defendant as opposed to merely holding a suspicion.

Proceedings for a DPA are initiated by the prosecutor preferring a bill of indictment charging the organisation with the alleged offence and as soon as the proceedings are instituted they are automatically suspended.

Unlike in the US where DPAs are much more frequently used by the Department of Justice, DPAs are not approved by the prosecutor but by a judge in the UK. After negotiations have begun and before the terms of DPA are agreed the prosecutor must seek a declaration from the judge at a private hearing that he/she can enter into a DPA on the proposed terms.

Provided that the judge provides the necessary declaration the terms of the DPA can be finalised between the parties before the final hearing that is usually held in public, where the judge will determine whether he/she should grant the DPA. Once the DPA has been granted it must then be published alongside the declarations.

Content of a DPA

Any agreement made with the prosecutor must contain a statement of facts relating to the alleged offence which may include admissions made by the organisation and must specify an expiry date of its terms for compliance (ordinarily to be between one and three years). It should be noted that if a DPA is not pursued then the statement of facts will be used in the criminal proceedings by the prosecutor as proven facts.[2]

With the judge being the final arbitrator, the DPA must be held to be in the interests of justice, fair, reasonable and proportionate.

Conditions of a DPA

The DPA will seek to impose mandatory conditions against the organisation that may include any of the following:

(i) a fine;
(ii) payment of the prosecutor costs;
(iii) compensation to victims;
(iv) donation to charity;
(v) disgorging any profits made; and
(vi) the implementation of compliance and to co-operate in any investigation.

Any money received under (i) and (v) above would be payable to the government's central bank account, the consolidated fund. Interestingly, part of that fund is used for, amongst other things, making funding available for certain pensions and salaries for the judicial services, MEP's pensions and public and political service pensions.

If any of the conditions are not met during the deferral time period of the DPA then that may be determined as a breach of the DPA and the prosecutor may return to court to institute criminal proceedings relying on the suspended bill of indictment.

What are the advantages of entering into a DPA?

The merits of a DPA for an enforcement agency or a defendant may include:

- avoiding the increased costs of a litigated prosecution;
- providing an alternative to no criminal action at all;
- avoiding the stigma of a criminal conviction and the very real damage that can be caused by a conviction;
- encouraging a culture of cooperation between the regulators and companies. The Ministry of Justice has hoped that DPAs will have a wider benefit in that more effective processing of cases could lead to a cultural change and an increase in companies self-reporting; and
- the judiciary can ensure that the tests of fairness and interests of justice are applied to the DPA – this provides an element of scrutiny in the process. If a judge requires an amendment to the draft of the DPA then the prosecutor will have to follow this.

Disadvantages of a DPA

The drawbacks of a DPA include:

- A lack of incentive and certainty for companies to self-report in order to enter into a DPA. There is no guarantee that after a company self reports it will not be prosecuted. The Serious Fraud Office (SFO) will consider various factors before a DPA can begin including the extent of the co-operation with the SFO and the stage at which a company reports itself. It will also consider whether a DPA would be in the public interest;
- Even if the SFO agreed to a DPA, a judge has to ultimately approve it. There is concern amongst the legal community that a judge may seek to go behind what has been agreed between the prosecutor and the company and disrupt the negotiations;
- Documents disclosed by the company could give rise to other offences not covered by the DPA.

The lack of certainty surrounding DPAs may result in its limited use. There is no true incentive for a company to self-report, unless like in the Standard Bank case the finger of wrongdoing can clearly be pointed to a 'subsidiary' who has acted on a frolic of his own, providing no real comfort to senior executives who, themselves, may be identified as the 'inadequacy'.

Recent news on DPAs

The first DPA in England was made before the President of the Queen's Bench Division, the Rt Hon Sir Brian Leveson, against Standard Bank, the UK subsidiary of South Africa's largest banking group, Standard Bank Group ('the Bank').

Ben Morgan, speaking on behalf of the SFO, hailed the Bank to be 'courageous' in its early cooperation and engagement with the enforcement authorities in securing a DPA.

The draft bill of indictment that was deferred against the Bank was for a section 7 Bribery Act 2010 offence that related to work that one of its subsidiaries carried out in Tanzania three years earlier. The SFO alleged that the subsidiary had paid a $6m bribe to politically exposed persons to secure a business contract from the Tanzanian government.

In considering the 'interests of justice' Leveson made the following remarks: 'An anti-corruption culture was not effectively demonstrated within Standard Bank as regards to the transaction in issue.'[3]

The Bank was found to have had inadequate measures to protect against bribery.

Notably, however, neither the Bank nor its employees were implicated in knowingly participating in an actual bribery offence. It was perhaps this feature of the case that made an offer of a DPA attractive to the bank because it could easily point the finger at the 'outsider' (the subsidiary) and by doing so it could aim to protect its shareholder interests.

Perhaps the decision of the Bank to enter into a DPA can be more aptly described as an astute one rather than 'courageous'.

Having said that it would not pay more than $40m at the outset of the negotiations, the Bank was able to keep the DPA within its financial expectations. It was ordered to pay the following:

- compensation of $6m plus interest of USD 1,153,125 to the Government of Tanzania;
- a disgorgement of profit on the transaction of $8.4m;
- a financial penalty of $16.8m;
- SFO costs of £330,000, and finally;
- it was required to agree to an independent compliance review to be carried out by PriceWaterhouseCoopers, an independent monitor against the Bank.[4]

In the case of Standard Bank the judge placed much emphasis on the fact that the Bank immediately reported itself to the authorities and that it adopted a 'genuinely proactive approach to the matter'.[5]

By the time of the DPA the Bank was in fact a different entity from that which committed the offence in 2012, having been taken over by the Industrial and Commercial Bank of China (ICBC) in February 2015.

Despite this 'badge of recognition' for good behaviour and the change in its composition, the Bank was still subjected to a deferred term of three years.

Prior to the Standard Bank agreement there had been some reference in the media that Sarclad – a small company that provides technology products to the metals industry with operations in China – and the SFO were in talks in relation to two DPAs that were hoped to be signed by the end of 2015. We have yet to hear any more about this.

In 2015 there had also been much speculation about Barclays having been invited to discuss an agreement to settle its probe into its dealings with Qatari investors as part of its £5.8bn cash call during the financial crisis, however Barclays then issued a statement saying: 'We are not in a position to comment on an ongoing legal matter, save to clarify that there has been no offer made of a DPA.'

Unfortunately, as a result of the Standard Bank agreement the SFO may well seek to rely on the facts surrounding this agreement as an example of how a section 7 can successfully be made out.

Ben Morgan, the joint head of bribery and corruption at the SFO, made the following remarks:

> 'Each case will be specific of course, but we now know that this kind of arrangement is at least conceptually one that the court will consider capable of being dealt with by a DPA. There are lots of other features that were relevant to this particular case, as I will come on to, but I think it is helpful that we have this example. The model of a company appointing local agents is a common one and while there can be good honest reasons for doing so I am certain we will see many more examples where the model has, at the very least, raised a strong inference of corruption that is capable of creating potential liability for corporates connected to this jurisdiction, and that potential liability is at least capable of being resolved by a DPA.'

The section 7 defence

Section 7(2) of the Bribery Act 2010 permits a defendant company a defence to a section 7 charge on the basis that they had 'adequate procedures' in place and therefore they should not be liable for the acts of their subsidiaries.

Despite the fact that the prosecution now have one successful case under their belt, with Sweett Group pleading guilty to a section 7 Bribery Act offence for its activities in the Middle East, the defence under this section remains 'opaque' and with no case law on the use of the defence in the UK the defendants are wading through murky waters with no practical insight into how exactly the defence can be successfully deployed. The significance of the recent DPA is that the SFO will no doubt seek to rely upon the judgment to help rebut any future section 7(2) defence by showing that in the case of Standard Bank and now in Sweett Group it was found that the organisations did not have adequate measures in place.

Conclusion

Surely it is hoped that the comments of the SFO are waning towards encouraging future DPAs as opposed to prosecuting section 7 offences. If not, then that would be counter-productive to inviting companies to self-regulate, investigate and genuinely cooperate.

It will be many years before we can properly assess the significance of the introduction of DPAs in UK law.

Notes

1 (Commencement No 8) Order 2014 (SI 2014/258)
2 Section 13 CCA 2013.
3 Para 21 of the judgment.
4 At para 37.
5 At para 27.