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white collar lawflash

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Deferred Prosecution Agreements to Be Introduced in the UK

Beginning in February 2014, the agreements may be used as a sentencing tool for corporate bribery, fraud, and other economic crimes.

Under the UK Crime and Courts Act 2013, which received royal assent in April, deferred prosecution agreements (DPAs) will be made available from February 2014 to the Director of the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) for use in cases that involve bribery, fraud, or any other economic crime by companies or partnerships (but not individuals). DPAs have been used in the United States since the early 1990s with varying degrees of success.

DPAs are generally regarded as a welcome addition to a system that is suffering from a backlog of prosecutions, including some for offences predating the Bribery Act. The following is a summary of the key points relating to DPAs under English law.

- When a corporation is charged with a criminal offence, it may be able to enter into a DPA with the prosecutor. The corporation must then abide by the conditions detailed in the DPA or face prosecution. DPAs can only be entered into with companies, partnerships, and unincorporated entities and cannot be entered into with individuals.
- The prosecutor may include, among other things, any of the following conditions in a DPA:
    - Payment of compensation to the victims of the alleged offence
    - Payment of a financial penalty to the prosecutor
    - Full cooperation in any pending investigations related to the offence
    - An account of any profits made from the alleged offence
- Once the prosecutor and corporation have agreed to a DPA, court approval will be required for the DPA to come into effect. The court must decide if using a DPA is in the interest of justice. The Solicitor General has stated[1] that there will be effective judicial scrutiny over the use of DPAs as a result of concerns raised in the United States that the courts merely undertook a rubber-stamping exercise. The Sentencing Council of England and Wales will publish guidelines in early 2014 to assist judges in treating DPAs consistently.
- Whilst a DPA is being negotiated, no proceedings can be commenced against the relevant corporation unless it is shown that, before or during the negotiations, the corporation provided inaccurate or misleading information.
- On 27 June 2013, the SFO and DPP published a draft Code of Practice (the Code)[2] outlining how DPAs will be used in England and Wales. The Code outlines factors that will aid the prosecutor in deciding whether the use of a DPA is in the public interest. The Code states the following:
    - Generally, the more serious the offence, the less appropriate the use of a DPA will be.

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1. Oliver Heald QC MP, Solicitor General, The Mechanics of Deferred Prosecution Agreements in the UK, Speech to the 7th Advanced Forum on Anti Corruption on the Role of Prosecutors and the Court (26 June 2013), *available at* https://www.gov.uk/government/speeches/the-mechanics-of-deferred-prosecution-agreements-in-the-uk.

2. View the Code at http://www.sfo.gov.uk/media/256647/dpa%20code%20consultation%20final%20approved.docx.

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– Where there is history of similar behaviour by the corporation involving "criminal, civil and regulatory enforcement actions against the company", this will be a factor mitigating in favour of prosecution.

– A DPA, as opposed to a prosecution, is likely to be appropriate in situations where a corporation self-reports.

– Whether the offence is recent and whether the corporation "in its current form is effectively a different body to that which committed the offences" will also be relevant.

• When a company enters into DPA negotiations (and therefore makes admissions and disclosures), if the negotiations are ultimately unsuccessful, there are no current restrictions on the prosecutor using the information gained during the negotiation process in furtherance of a prosecution against the company.

It is evident that DPAs, if utilised properly, will have a significant effect on the enforcement of bribery and fraud offences. They will also be a major factor to take into account when considering whether to self-report criminal activity to the SFO. The final version of the Code is expected to be published in early 2014; we will continue to monitor developments in relation to DPAs and issue guidance accordingly.

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