Deferred prosecution agreements: 
a leap of faith?

Simon Osborn-King, a senior associate in the firm’s Global Investigations Group (GIG), considers the benefits of, and key concerns about, co-operating with the Serious Fraud Office (SFO) during the deferred prosecution agreement (DPA) process.

On 24 February this year, under the Crime and Courts Act 2013 (CCA 2013), DPAs became part of the SFO’s toolkit to tackle fraud and economic crime. While the SFO currently reports 25 cases under investigation (up from eight last September), David Green, the SFO’s Director, has been reluctant to predict when the SFO will enter into its first DPA. DPAs are discretionary tools that enable corporates, if invited to do so by the SFO or Crown Prosecution Service (CPS), to settle — without prosecution — allegations of, primarily economic, criminal conduct. In simple terms, a DPA allows the SFO and CPS, the current designated prosecutors, to agree to suspend a prosecution for bribery (and certain other offences) in return for the corporate accepting financial penalties and agreeing to implement remedial measures and/or to the appointment of monitors.

The DPA Code of Practice, issued jointly by the SFO and the CPS under the CCA 2013, sets out a two-stage test that must be satisfied:

- **the evidential stage**: essentially, is there sufficient evidence to provide a realistic prospect of conviction, or, if not, are there reasonable grounds for believing that continued investigation would provide such evidence within a reasonable time frame, ie evidence that would confirm the prosecutor’s reasonable suspicion, based on existing admissible evidence, that an offence has been committed; and

- **the public interest stage**: ie would it be in the public interest to enter into a DPA rather than prosecuting.

When considering the appropriate financial penalty, the SFO and CPS will have reference to the Sentencing Council’s Definitive Guideline for Fraud, Bribery and Money Laundering Offences (insofar as it relates to corporates). The Guideline applies to all corporates sentenced on or after 1 October 2014, but was published by the Sentencing Council earlier this year so that it could inform the negotiation of financial penalties in any DPAs. The important point to remember about DPAs is that they are exactly what their name suggests: an agreement to defer prosecution. Therefore, if the corporate breaches the terms of the DPA — or if new information comes to light — the prosecution may, if the court approves, resume. Further, the SFO has made it clear that “prosecution remains the preferred option for corporate criminality” and that the use of DPAs as an alternative will only be deemed appropriate in a minority of cases.

**A COLLABORATIVE (NOT RISK-FREE) PROCESS**

"Maximum co-operation on the part of the corporate and its lawyers is an intrinsic part of the DPA process," said Green in March this year. The principal advantage for the corporate of co-operating with the DPA process...
is that it provides the corporate with an opportunity to negotiate the outcome of the SFO investigation in terms of any statement of facts (which does not require an admission of guilt), the level of financial penalties and the nature of any other sanctions, and to do so in a shorter time than a full investigation and prosecution would take.

The necessarily collaborative nature of the DPA process also has other benefits. For example, it may enable the corporate to manage media coverage and limit reputational damage, especially where details of the DPA (including any statement of facts) are published on the prosecutor's website. This is particularly the case where the corporate self-reports. In addition, self-reporting may allow the corporate to influence the timing and direction of an investigation, thereby reducing costs and the burden on management time.

The DPA process presents very real challenges for corporates, especially pending any UK precedent. A couple of these include:

• disclosure: under the DPA Code of Practice, provision by the corporate of inaccurate, misleading or incomplete information (where the corporate knew or ought to have known that the information was inaccurate, misleading or incomplete) may lead to prosecution; further, it is only a limited category of documents that cannot be used by the prosecutor against the corporate in subsequent proceedings if the DPA negotiations break down, eg documents (including drafts) created for the purpose of the DPA and the accompanying statement of facts. When engaging with the DPA process, the corporate will therefore need to weigh up carefully its disclosure obligations against the risk of material disclosed being used against it in subsequent proceedings.

• privilege: the SFO is already expecting corporates to consider voluntary waiver of privilege and has made it clear that it considers a claim of privilege over witness accounts unhelpful and incompatible with a corporate's assertion that it is willing to cooperate. In addition, the SFO recently confirmed that it is "quite prepared to challenge any claim to privilege of any kind on such accounts, particularly if it seems [to the SFO] that a lazy, blanket approach is being taken". We can therefore expect careful scrutiny by the SFO of all claims of privilege.

CONCLUSION

Whether or not to enter into a DPA will be a difficult and sensitive judgment call for any corporate. However, the court’s key role in the process — it scrutinises and has to approve the terms of a DPA — may provide some comfort. Given the publicity surrounding the introduction of DPAs and the likelihood that the SFO’s caseload will only continue to increase, we expect the SFO to be keen to conclude one or more DPAs soon — despite its preferred option being prosecution. When that moment comes, it will be, as Green says, "a leap of faith, and… a question of maintaining public confidence".

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